BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the matter of the Appeal of:	)	Hearing Examiner File:
	)	**No.: LS-21-002**
BAJA CONCRETE USA CORP., ROBERTO CONTRERAS, NEWWAY FORMING, INC., and ANTONIO MACHADO	)	**LS-21-003**
	)	**LS-21-004**
	)	
	)	RESPONDENT CITY OF SEATTLE'S
from a Final Order of the Decision issued by the Director, Seattle Office of Labor Standards	)	REPLY TO NEWWAY FORMING, INC.'S RESPONSE TO CITY'S MOTION FOR SUMMARY JUDGMENT
	)	

I. INTRODUCTION

The material facts establishing Appellant Newway Forming, Inc. ("Newway") as an employer are undisputed in this case. Newway exercised significant control over the workers paid by Baja ("Workers") and their work, creating a relationship that placed Newway in the role of joint employer. The City of Seattle ("City") relied on testimony of Newway's witnesses and employees to support the City's Motion for Summary Judgment ("City's Motion"). In its response, Newway offers no opposition to the fact that the many wage theft, minimum wage, and Paid Sick and Safe Time ("PSST") violations occurred. However, Newway's response is flawed in three main areas: first, Newway misrepresents the undisputed facts offered by the City; second, Newway ignores and misrepresents facts presented by Newway's own witnesses; and third, Newway fails to present case law which supports its position that it is not a joint employer. According to the factors outlined in

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Becerra,[1] the undisputed facts indicate Newway is a joint employer. The Hearing Examiner should not allow Newway to avoid the consequences of failing to comply with Seattle's labor laws. The City's Motion should be granted as the City established that it is entitled to summary judgment as a matter of law.

II. NEWWAY MISREPRESENTS THE UNDISPUTED MATERIAL FACTS OFFERED BY THE CITY.

Newway's initial claim that the City did not cite direct excerpts from deposition testimony is patently untrue and an easily disputable attempt to pretend that Newway's own employees do not provide the convincing evidence of Newway's joint employment.[2] The City's Motion cites to the testimony of Newway employees Antonio Machado and Kwynne Forler-Grant over 100 times. In fact, a quick review of the City's Motion reveals that Newway employees are cited more than anyone else.[3]

Newway asserts that the conclusion Newway and Baja agreed on the hourly rate is somehow incorrect and claims "what Newway paid Baja has nothing to do with what Baja paid its workers."[4] To assert that the rate Newway paid Baja "has nothing to do with" what Baja paid the Workers is disingenuous. When asked specifically about whether Newway ever disputed Baja's hourly rate, Newway's 30(b)(6) witness testified that the rate was "already in stone."[5] In other words, Newway and Baja had a deal on the hourly rate and it would not be changed. If the rate Newway paid Baja was set in stone, then that was the ceiling for what Baja could not pay Workers.

Further, Newway signed off on Baja's invoices, approving the number of hours Baja billed

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[1] *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 195, 332 P.3d 415 (2014) (using FLSA's "suffer or permit" standard in considering joint employment under Washington's Minimum Wage Act).
[2] *See* Newway's Response to the City's Motion for Summary Judgment, page 2.
[3] *Cf.* Antonio Machado and Kwynne Forler-Grant cited over 100 times and Jonathan Parra Ponce cited approximately 15 times.
[4] Newway's Response brief, page 3.
[5] Declaration of Cindi Williams, Exhibit A, 30(b)(6) Deposition of Kwynne Forler-Grant, page 64, lines 15-17 (Previously filed in support of City's Motion for Summary Judgment).

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Newway.[6] If the rate was set in stone, and Newway needed to approve the number of hours for which they would be billed, clearly Newway yielded significant economic control over what Workers were paid. This weighs heavily in favor of joint employment.

Newway oversimplifies the City's position by framing it as "because Newway controlled the schedule and implemented a timeclock, Newway controlled the Workers."[7] This is a gross misstatement of the undisputed facts that support OLS' finding that Newway is a joint employer. The facts are as follows:

- Baja provided Workers to Newway for cement finishing, and Workers were responsible for tasks such as patching and sanding the concrete and building forms for pouring the concrete.[8]
- These finishing tasks were needed for Newway to complete its contractual obligations to build all the vertical concrete forms needed for the project.[9]
- Newway directed Workers' work and supervised the Workers on the worksites.[10]
- Machado, the Newway superintendent, supervised the Newway foremen who also directed the Workers.[11]
- Newway foremen assigned tasks to Workers throughout the workday.[12]
- Newway controlled Workers' daily schedules.[13] Workers could not work on whatever they wanted.
- Newway told Baja how many workers were needed on the site.[14]
- Newway controlled the meal and rest breaks on the site.[15]
- Newway did not differentiate between its own employees and the Workers in the direction it gave on the job site.[16]
- Newway and Baja agreed on the hourly rate that Newway was to pay Baja for Workers' labor.[17]

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[6] *Id.* at page 18, line 16 to page 19, line 4, page 35, line 19 to page 36, line 5 (referencing Deposition Exhibit 7 which was previously filed in support of City's Motion for Summary Judgment), page 61, lines 1-7.
[7] Newway's Response Brief, page 5.
[8] 30(b)(6) Deposition of Forler-Grant, page 92, lines 2-18.
[9] *Id.* at page 90, line 19 to page 91, line 11.
[10] *Id.* at page 79, lines 2-5.
[11] *Id.* at page 80, lines 2-6.
[12] Declaration of Cindi Williams, Exhibit B, Deposition of Antonio Machado, page 42, lines 4-14, page 49, line 55 to page 53, line 5 (Previously filed in support of City's Motion for Summary Judgment).
[13] *Id.* at page 46, lines13-19, page 54, lines 13-21.
[14] 30(b)(6) Deposition of Forler-Grant at page 24, lines 4-16, page 53, lines 4-12.
[15] Declaration of Daron Williams, Exhibit A, Interview Statement of Antonio Machado, page 3 (Bates stamp 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) (Previously filed in support of City's Motion for Summary Judgment).
[16] 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.
[17] *Id.* at page 64, lines 15-17.

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- The Workers provided their services for Newway's benefit and played a role in Newway's ability to perform its contractual duties to Onni.[18]
- Workers used some of their own tools, but Newway provided the equipment they needed for work.[19]
- Newway required Workers to attend regular meetings regarding safety protocols.[20]
- Machado walked around all day to ensure everyone was working safely.[21]
- Machado spent 90 to 95 percent of his time at the construction site.[22]
- Baja could not pay Workers if Newway did not pay Baja.[23]

All of these facts, not just the schedule and the timeclock, weigh in favor of finding that Newway was a joint employer. Newway complains that the City *only* points to mandatory safety meetings, Machado's presence at the construction site, and the fact that Machado addressed problems with various foremen for support in finding Newway is a joint employer.[24] Again, Newway ignores that in addition to all of those factors, the City relies on the totality of the circumstances which include detailed testimony from Machado about his daily activities. As noted above, these facts, along with the other undisputed facts, support the conclusion that Newway is a joint employer.

Newway disputes that it collected and maintained records establishing the number of hours Workers worked.[25] One can safely conclude "Newway collected and maintained records establishing the number of hours Workers worked" from the fact that Newway required Workers to sign in and out using a timeclock located in Newway's office. Newway's 30(b)(6) witness explained the purpose of the timeclock records as follows:

Q: Okay. And was there an approval process for these, all these timecards?

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[18] 30(b)(6) Deposition of Forler-Grant, page 92, lines 5-25, page 93, lines 3-25, page 117, lines 12-15 (page 117 was previously filed in City's Response to Newway's Motion for Summary Judgment, Declaration of Lorna S. Sylvester. Exhibit B).
[19] *Id.* at page 95, lines 17-20.
[20] 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.
[21] Deposition of Antonio Machado, page 23, lines 2-20.
[22] *Id.* at page 24, lines 18-25.
[23] Declaration of Lorna S. Sylvester, Exhibit C, 30(b)(6) Deposition of Mercedes De Armas, page 166, lines 4-10 (Previously filed in support of City's Response to Newway's Motion for Summary Judgment).
[24] *See* Newway's Response Brief, page 9.
[25] *Id.* at page 12.

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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.[26]

And, Newway's 30(b)(6) witness testified to the following:

Q: So if Roberto had a problem he wasn't sure exactly how many hours were used, were worked by his workers, could he look to Newway's time clock or timecard references to check?

A: Yes.[27]

Newway's 30(b)(6) witness clearly explained the extensive level of Newway's involvement in the payroll process. Newway's timeclock records were more than just a way to track who was on site. Newway used the timeclock records to help Baja prepare payroll invoices which include the total number of hours worked: in other words, these records were used to *track hours*.

Lastly, in its response, Newway claims Baja did not hire Workers at Newway's direction and the City provides "absolutely no evidence" to support the argument.[28] Newway's 30(b)(6) witness

[26] 30(b)(6) Deposition of Forler-Grant, page 18, line 5 to page 19, line 8.
[27] *Id.* at page 60, lines 1-5.
[28] Newway's Response Brief, page 3, 14.

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testified that Newway told Baja how many workers were needed on the site.[29] Newway utterly ignores the testimony from Newway's witness which was cited by the City:

> **Q**: So how did Baja Concrete know how many workers or laborers to send to the site on a daily basis?
>
> **A**: They would discuss that with Roberto. It would probably be Tom Grant.
>
> **Q**: Tom Grant would decide how many laborers, how many cement finishers were needed today for this work, something like that?
>
> **A**: Yes. He was most familiar with the schedule.
>
> **Q**: And then he would inform – just trying to be consistent – Mr. Roberto Soto, correct?
>
> **A**: ***Yes.***[30]

Repeatedly, throughout its Response, Newway misstates, misrepresents, or omits crucial portions of the City's argument in an effort to minimize its role in the joint employment of the Workers. However, the undisputed material facts, which overwhelmingly come from Newway's own employees, demonstrate that Newway is a joint employer. Newway's assertion that the only evidence of joint employment is the Parra Ponce Declaration is simply false.[31] The City's Motion should be granted.

III. NEWWAY RAISES ISSUES THAT DO NOT CHANGE THE UNDISPUTED MATERIAL FACTS WHICH WEIGH IN FAVOR OF FINDING NEWWAY IS A JOINT EMPLOYER.

Newway claims that OLS did not visit worksites and they should not have relied on testimony from Workers.[32] Newway fails to provide any evidence or case law to show that a site visit would lead to a different conclusion, especially given that OLS' findings were supported by other evidence, including admissions of Newway employees. For example, Jonathan Parra Ponce indicates Antonio

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[29] 30(b)(6) Deposition of Forler-Grant, page 24, lines 4-16, page 53, lines 4-12.
[30] *Id.* at page 24, lines 4-16 (emphasis added); *see* City's Motion for Summary Judgment, page 31, footnote 210.
[31] Newway's Response Brief, page 18.
[32] *Id.* at page 3.

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Machado was the boss at the worksite and was always present.[33] Machado testified that in the mornings, he told his foremen what work had to be done and the foremen passed that information to the Workers, or, in other words, he was in charge.[34] Machado said he would walk around the site and if he saw someone doing something wrong, he would stop them and call a foreman to address it.[35] And, Machado was in charge of the length of the workday.[36]

Whether OLS visited the construction site is irrelevant to the determination that Newway is a joint employer when the statements from Workers, the paystubs, the timesheets, other records, and statements from Antonio Machado were consistent. Newway controlled the work site, Newway controlled the equipment, Newway controlled the hours, Newway closely supervised and monitored the Workers, and Newway controlled the payments.

Newway continues to deny that it controlled the length of the workday, despite the actual site superintendent's testimony indicating repeatedly that *he* controlled the length of the workday.[37] In fact, Machado was so knowledgeable about what happened on the worksite, he knew Workers sometimes worked more than 40 hours in a week.[38] When asked whether foremen coordinated with Soto Contreras about how many hours the Workers would work in a day, Machado said no.[39] Even Newway's 30(b)(6) witness could not deny the fact that Newway decided when to offer additional hours to Workers.[40]

Without any testimonial support, Newway insists the relationship between Newway and Baja

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[33] Declaration of Laura Hurley, Exhibit A, Declaration of Johnathan Parra Ponce-English, ¶ 14 (Previously provided in support of City's Motion for Summary Judgment).
[34] Deposition of Antonio Machado, page 42, lines 4-24; page
[35] *Id.* at page 43, lines 2-17.
[36] *Id.* at page 45, line 18 to page 46, line 4; page 46, lines 13-20.
[37] *See* Newway's Response Brief, pages 5-6; Deposition of Antonio Machado, page 45, line 20 to page 47, line 18, page 54, lines 14-21.
[38] Declaration of Lorna S. Sylvester, Exhibit A, Deposition of Antonio Machado, page 95, lines 17-23.
[39] Machado Interview Statement at page 7 (SEATTLE-OLS-1066), lines 10-13.
[40] 30(b)(6) Deposition of Forler-Grant at page 68, line 16 to page 69, line 12.

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was one that is "normal at construction sites."[41] Since this claim is unsupported, it cannot be considered an undisputed material fact for the Hearing Examiner to consider and should be disregarded entirely.

Newway's timeclock records were used to assist Soto Contreras with preparing the payroll summaries and invoices.[42] Those summaries and invoices were needed for Baja to be paid by Newway. If Newway failed to pay Baja, Workers did not get paid.[43] Further, Baja relied on Newway since Baja provided its services *only* to Newway and no one else.[44] To assert that the use of the timeclock had nothing to do with payment of Baja workers is disingenuous and misleading.[45]

Newway makes several additional arguments in its Response about the timeclock records that are contradicted by the evidence. Newway's initial intent in implementing the timeclock system for Baja may have been to track whether Workers were on site, however, the timeclock records showed the in- and out-times for Workers, essentially tracking Workers' hours. In fact, Newway did not deny that the timeclock records contained information about Workers' hours. Newway was asked whether the timeclock records would show how many hours each worker worked:

Q: Oh, okay. So from the timecards did that show how much a given worker was working?

A: ***Yes.*** They would punch in and punch out.[46]

No testimony or other evidence supports Newway's claim that they were just trying not to overcharge Onni by tracking Workers' hours. Since this claim is unsupported, it cannot be considered an undisputed material fact for the Hearing Examiner to consider and should be disregarded entirely.

Newway's claims that it did not supervise the Workers' performance, and that it had no

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[41] Newway's Response Brief, page 7.
[42] 30(b)(6) Deposition of Forler-Grant, page 18, line 5 to page 19, line 8, page 60, lines 1-5.
[43] 30(b)(6) Deposition of Mercedes De Armas, page 166, lines 4-10.
[44] *Id.* at p. 89, lines 9-18.
[45] Newway's Response Brief, page 7.
[46] 30(b)(6) Deposition of Forler-Grant at page 57, lines 18-20 (emphasis added).

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authority over the manner in which the Workers performed their duties are simply not true.[47] Newway directed Workers' work and supervised the Workers on the worksites.[48] Machado supervised the Newway foremen who also directed the Workers.[49] Newway foremen assigned tasks to Workers throughout the workday.[50] And, Newway controlled Workers' daily schedules.[51] Machado walked around all day to ensure everyone was working safely.[52] Machado spent 90 to 95 percent of his time at the construction site.[53]

With regard to Newway's involvement with hiring and firing, Baja's primary role in hiring is not inconsistent with Newway's involvement. The City does not dispute that Baja hired Workers, but Newway does not disprove that it was involved in hiring or firing on any level. In fact, Machado indicates that although he did not tell Baja directly when to fire someone, if Machado's labor foreman had an issue with a Worker, the foreman would deal with it and tell Soto Contreras "I don't like this guy."[54] Surely that had an impact on whether a Worker was fired.

The work performed by the Workers was an integral part of Newway's business. Newway and Baja workers were doing work that was indistinguishable, given the same directions and same expectations. Even if Newway has or could have used labor from other subcontractors, it had an agreement with Baja for Baja to provide the labor essential to its task of constructing vertical concrete structures for Onni. Fortunately, the question *is not* whether now, after having been found to be a joint employer, Newway believes Baja's labor to be an integral part of its business. The question is whether, *during the relevant time period*, the services Workers rendered were an integral part of

[47] Newway's Response Brief, page 8, 10.
[48] 30(b)(6) Deposition of Forler-Grant, at page 79, lines 2-5.
[49] *Id.* at page 80, lines 2-6.
[50] Deposition of Antonio Machado, page 42, lines 4-14, page 49, line 55 to page 53, line 5.
[51] *Id.* at page 46, lines13-19, page 54, lines 13-21.
[52] Deposition of Antonio Machado, page 23, lines 2-20.
[53] *Id.* at page 24, lines 18-25.
[54] Machado Interview Statement, page 3 (SEATTLE-OLS-1062), lines 9-12.

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Newway's business.[55] If Newway was hired to handle the concrete components of several construction projects, and Baja provided the concrete finishing for those very same concrete components, then of course Baja's work was an integral part of Newway's business.[56] Baja's tasks constituted an important step in the sequence of steps in Newway's broader effort to perform concrete work for high-rise construction.[57]

Lastly, Baja's desire to eventually work for other entities does not erase the fact that Baja was created to provide labor to Newway and Newway was Baja's only contract.[58] During the relevant time period, the economic reality was that Baja was completely dependent on Newway. This supports OLS' finding of joint employment. Accordingly, the City's Motion should be granted.

IV. THE CASE LAW SUPPORTS OLS' FINDING THAT NEWWAY IS A JOINT EMPLOYER.

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."[59] A material fact is one upon which the outcome of the litigation depends in whole or in part."[60] In determining whether a genuine issue of material fact exists, the court views all facts and draws all reasonable inferences in favor of the nonmoving party.[61] Here, there is no genuine issue as to any material fact. Applying the joint employment test to the undisputed facts, Newway is a joint employer.

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[55] *Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir.1997) (emphasis added).
[56] 30(b)(6) Deposition of Kwynne Forler-Grant at page 90, line 24 to page 93, line 21.
[57] *Torres-Lopez*, 111 F.3d at 643.
[58] 30(b)(6) Deposition of Mercedes De Armas, page 89, lines 9-18.
[59] 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).
[60] *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)).
[61] *Id.*, at 899 (*citing Owen v. Burlington N. Santa Fe R.R. Co*., 153 Wn.2d 780, 787, (2005)).

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

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*.[62] 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*.[63] 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.[64]

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."[65] Rather, a court considering joint employment must examine the totality of the circumstances.[66] In addition, the court "is also free to consider any other factors it deems relevant to its assessment of the economic realities."[67] Taken as a whole, the undisputed evidence indicates that the Workers were jointly employed by Newway. Newway does not dispute that it exerted significant control over Workers' day-to-day working

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[62] 181 Wn.2d 186 (2014); *see also* SHRR 90-045(3) (indicating that joint employment requires a totality-of-circumstances analysis).

[63] *Becerra v. Expert Janitorial, LLC.*, 181 Wn.2d 186 (2014) (citing *Torres-Lopez*, 111 F.3d 633 (9th Cir. 1997).

[64] *Becerra*, 181 Wn.2d at 196 (citing *Torres-Lopez*, 111 F.3d at 639-40) (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).

[65] *Becerra*, 181 Wn.2d at 198.

[66] *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)).

[67] *Becerra*, 181 Wn.2d at 198 (quoting *Ling Nan Zheng v. Liberty Apparel Co*., 355 F.3d 61, 71-72 (2d Cir. 2003))

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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.[68] Machado was at the work site almost all of the time and was responsible for supervising each of the foremen.[69] Every day, he would assign tasks to his foremen, who in turn would pass on those instructions to the Workers.[70]

Newway's foremen oversaw workers directly employed by Baja.[71] Newway foremen instructed the Workers on where they should be stationed throughout the workday.[72] Workers would approach Newway foreman for instructions, and after a Worker finished a task, Newway foremen, not Soto Contreras, would tell him what to do next.[73] Newway foremen treated the Workers the same regardless of whether the workers were on Baja's payroll or Newway's payroll.[74] Newway informed Baja how many workers were needed each day,[75] and Newway implemented a timeclock system for Workers.[76]

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."[77] Machado directed his foremen as to when crews needed to begin work and when they

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[68] 30(b)(6) Deposition of Forler-Grant at page 122, lines 1-10.
[69] *Id.* at page 80, lines 2-6; Deposition of Antonio Machado, page 24, lines 18-25.
[70] Deposition of Antonio Machado at page 23, lines 22-24, page 42, lines 17-23.
[71] 30(b)(6) Deposition of Forler-Grant at page 79, lines 2-5; Deposition of Antonio Machado, page 49, line 25 to page 50, line 4, page 51, line 20 to page 52, line 10.
[72] 30(b)(6) Deposition of Forler-Grant at page 80, lines 14-17, *see also* page 13, lines 10-19.
[73] Machado Interview Statement, page 3 (SEATTLE-OLS-1062), lines 6-7, 19-20.
[74] Deposition of Antonio Machado at page 52, lines 13-21.
[75] 30(b)(6) Deposition of Forler-Grant at page 24, lines 4-16, page 53, lines 4-12.
[76] *Id.* at page 37, line 25 to page 38, line 5.
[77] *Torres-Lopez*, 111 F.3d at 642

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needed to stay after hours.[78] Newway foremen would tell Workers when it was time to go home for the day.[79] Workers on Baja's payroll generally took breaks and paused for lunch at the same time as workers on Newway's payroll.[80] Workers worked the same hours as those on Newway's payroll.[81] There is no evidence to support the idea that Soto Contreras could or did bring Workers to the sites whenever he wanted. These undisputed facts favor joint employment with regard to Newway's control over hours, tasks, and meal and rest breaks.

Newway supervised Workers' performance directly and indirectly which also favors joint employment. Newway foremen routinely supervised Workers[82] and "[i]t is well settled that supervision is present whether orders are communicated directly to the laborer or indirectly through the contractor."[83] Machado was almost always present at the construction site[84] and was continuously monitoring Workers' performance.[85] 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.[86] Newway also required Workers to attend regular safety meetings.[87] A finding of joint employment is supported if a joint employer requires workers to attend frequent meetings.[88]

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

[78] Deposition of Antonio Machado at page 46, lines 13-19, page 54, lines13-21; *see also* Machado Interview Statement, page 3 (SEATTLE-OLS-1062), lines 6-7, page 4, lines13-15.
[79] Machado Interview Statement, page 7 (SEATTLE-OLS-1066), lines 11-13.
[80] 30(b)(6) Deposition of Forler-Grant at page 26, lines 1-3; Deposition of Antonio Machado, page 54, line 22 to page 55, line 5; Machado Interview Statement, page 3 (SEATTLE-OLS-1062), lines 23-24.
[81] Deposition of Antonio Machado at page 39, line 21 to page 40, line 7.
[82] 30(b)(6) Deposition of Forler-Grant at page 79, lines 2-5; *see also* Deposition of Antonio Machado, page 49, line 25 to page 50, line 4, page 51, line 20 to page 52, line 10.
[83] *Salinas*, 848 F.3d at 148 (2017) (quoting *Aimable v. Long & Scott Farms*, 20 F.3d 434, 441 (11th Cir. 1994)).
[84] Deposition of Antonio Machado, page 24, lines 18-21.
[85] *Id.* at page 23, lines 2-16, page 25, lines 15-18, page 29, lines 9-11.
[86] *Id.* at page 67, line 12 to page 68, line 19.
[87] 30(b)(6) Deposition of Forler-Grant at page 79, lines 15-23; Deposition of Antonio Machado, page 154, line 24 to page 155, line 14.
[88] *See Salinas*, 848 F.3d at 146-47.

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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 Workers were needed.[89] Newway's daily supervision and oversight favors a conclusion that it was a joint employer.

Newway also influenced how Workers were paid which is demonstrated by Newway requiring Workers to record their start- and end-times using a timeclock located in the Newway office.[90] Newway does not dispute that it collected and maintained records establishing the number of hours Workers worked.[91] Newway does not dispute that used these records to assist Soto Contreras with preparing invoices[92] for Newway's approval.[93] Newway signed off on Baja's invoices, approving the number of hours for which Baja billed Newway.[94] Newway yielded significant economic control over whether Workers were paid. Thus, this factor favors finding a joint employment relationship.[95]

Workers used Newway premises and equipment for their work which also favors joint employment.[96] Workers made daily use of Newway's physical office, where they would use a time clock supplied by Newway to clock in and out.[97] In addition, although Workers supplied their own small tools, the large equipment they used for their day-to-day work belonged to Newway.[98] These undisputed facts also favor a finding of joint employment.

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[89] Deposition of Antonio Machado at page 32, lines 14-15.
[90] 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 which was previously provided in support of City's Motion for Summary Judgment).
[91] *Id.* at page 57, lines 18-20.
[92] *Id.* at page 59, lines 18-24.
[93] *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.
[94] 30(b)(6) Deposition of Forler-Grant, 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.
[95] *Barfield v. N.Y.C. Health and Hosps. Corp.*, 537 F.3d 132, 144-45 (2nd Cir. 2008); *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).
[96] *Torres-Lopez*, 111 F.3d at 640-41 (internal quotations omitted).
[97] Deposition of Antonio Machado at page 133, lines 15-21.
[98] 30(b)(6) Deposition of Forler-Grant at page 95, lines 17-20.

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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 which favors the conclusion that Newway was a joint employer. Newway was hired to handle the concrete components of several high-rise construction projects.[99] Baja performed the cement finishing tasks[100] and these tasks "constituted one small step in the sequence of steps" in Newway's broader effort to perform concrete work for high-rise construction.[101] Workers' responsibilities were like "specialty job[s] on the production line."[102]

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.[103] 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. Thus, like the cucumber pickers in *Torres–Lopez* and the beef boners in *Rutherford,*[104] 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.

Baja worked exclusively for Newway and the Workers did not have a "business organization" that could shift as a unit from one construction site to another.[105] The undisputed evidence indicates that Baja Concrete USA was formed for the purpose of providing labor to Newway.[106] Newway and

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[99] *Id*. at page 90, line 24 to page 93, line 21.
[100] *Id*. at page 92, lines 2-18.
[101] *Torres-Lopez*, 111 F.3d at 643.
[102] *Id*. (quoting *Rutherford*, 331 U.S. at 730).
[103] *Torres-Lopez*, 111 F.3d at 644 (internal quotations and citation omitted).
[104] *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).
[105] *Torres-Lopez*, 111 F.3d at 644 (quoting *Rutherford*, 331 U.S. at 730); *see also* 30(b)(6) Deposition of Mercedes De Armas at page 89, lines 16-18.
[106] *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").

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Baja were intimately intertwined.[107] It was Baja's first and only contract.[108] Money flowed informally between Baja and Machado, further contradicting the idea of an independent, run of the mill, general contractor-subcontractor relationship between the two companies.[109] Baja's overwhelming economic reliance on Newway, and its use of Workers exclusively at Newway's work sites, demonstrates a joint employment relationship.

The "typical contractor-subcontractor relationships" do not negate joint employment. Newway claims, without offering any support, that its 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. 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."[110] By inserting itself into Baja's billing process, by collecting information for payroll and tracking hours, and by not signing off on invoices until after reviewing all of the timeclock records with Soto Contreras each week, and by its other aforementioned actions, Newway became a joint employer. Whether Newway intended to be a joint employer is not dispositive as to whether they codetermined the key terms and conditions of the Workers' employment or whether they are joint employers.[111]

[107] SMC 14.16.010. 14.19.010, 14.20.010
[108] 30(b)(6) Deposition of Mercedes De Armas at page 88, lines 9-17, page 89, lines 1-15.
[109] 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 which was previously provided in support of City's Motion for Summary Judgment).
[110] *Salinas v. Commercial Interiors, Inc.*, 848 F.3d at 144 (emphasis added).
[111] *See id.* at 145.

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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.

C. Cases cited by Newway support a finding that Newway jointly employed the Workers.

In *Jacobson v. Comcast Corp.*,[112] cable technicians directly employed by multiple installation companies brought an action against Comcast seeking overtime wage payments, claiming that Comcast was their joint employer.[113] The court analyzed the technicians' relationship with Comcast using the four factors outlined in *Bonnette*.[114] The terms of the contracts between Comcast and the installation companies expressly provided that the technicians were independent contractors of Comcast, the technicians did not submit pay records or timesheets to Comcast for approval, Comcast only supplied technicians with one tool, and technicians did not work on Comcast's premises.[115] In ruling that Comcast was not a joint employer, the Maryland court stated the issue was "not free from doubts," almost indicating some hesitation at reaching its ruling.[116]

In this case, there were no contracts expressly providing that the Workers were independent contractors, Baja's timesheets were submitted to Newway for approval, and the tools needed to perform the work were provided by Newway. All of these factors weigh in favor of finding joint employment.

Citing to *Jacobson*, Newway emphasizes a joint employment analysis "should not subsume typical independent contractor relationships."[117] Newway omits the very next paragraph in *Jacobson* where the court indicates there "is no mechanical test to evaluate the "economic reality" between

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[112] 740 F.Supp.2d 683 (D.Md.2010)
[113] *Id.* at 685-86.
[114] *Bonnette v. Cal. Health and Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir.1983).
[115] *Jacobson*, 740 F.Supp.2d at 689-93.
[116] *Id.* at 693.
[117] Newway Response Brief, page 19 (quoting *Jacobson*, 740 F.Supp.2d at 689).

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employees and putative joint employers."[118] And, the court goes on to explain that in considering the joint employment factors, "a court need not decide that every one of them weighs against joint employment…. Instead, the question of joint employment turns on the entire relationship" in its totality.[119] Considering the totality of the circumstances, there is nothing to suggest that Newway had a "typical contractor" relationship with Baja, especially given Newway's willingness to take on the role of payroll processing instead of requiring Baja to fix their own billing problems or face losing the contract.

Chen v. Street Beat Sportswear, Inc.[120] involved unpaid minimum wage and overtime compensation claims by garment workers against the contractors for whom they worked and the manufacturer of those garments.[121] The New York court used the six-factor test announced in *Zheng v. Liberty Apparel Co., Inc.*[122] *Chen* is distinguishable from this case because in *Chen*, the contractors assembled garments for the manufacturer on the contractor's own premises using their own equipment.[123] Also, in *Chen*, there were questions of fact regarding whether the employees were employed as a unit that could or did shift from one manufacturer to the other.[124] No such question exists here. Workers worked only for Newway throughout the relevant time period. In *Chen*, the court did not find joint employment because there were several genuine issues of material facts.[125] *Chen* does not help Newway because no material facts are disputed involving Newway's control over Workers or whether Workers used Newway's premises for their work.

On the other hand, *Barfield v. New York City Health and Hospitals Corp*.[126] supports OLS'

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[118] *Jacobson*, 740 F.Supp.2d at 689.
[119] *Id.* (citations omitted).
[120] 364 F.Supp.2d 269 (E.D.N.Y.2005).
[121] *Id.* at 273.
[122] 355 F.3d 61 (2d Cir.2003).
[123] *Id.* at 280.
[124] *Id.* at 281.
[125] *Id.* at 289.
[126] 537 F.3d 132, 139 (2d Cir.2008)

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finding that Newway was a joint employer. The court used the six-factor test from *Zheng* in agreeing with the lower court's finding that the hospital was a joint employer.[127] In this case, Workers performed their work on Newway's premises, using Newway's equipment; Workers did not shift as a unit from one employer or another; Workers performed work which was integral to Newway's operation; Newway demonstrated effective control over Workers' schedules; Workers worked exclusively for Newway; and Workers had the same responsibilities as workers paid by Newway. All of these factors were also present in *Barfield*.[128]

It is clear from Newway's Response that it believes it is not a joint employer. However, to assert that the City's position would "turn the construction industry upside down" is an exaggeration and is without merit.[129] OLS did not find Onni or any of the other subcontractors liable as joint employers. OLS' determination was based on the undisputed facts indicating Newway exercised significant control over the Workers. OLS' finding was based on Newway's control over Workers' hours and breaks, the timeclocks, the equipment, the day-to-day activities, the manner in which tasks were performed, the way payroll was processed, and the way Baja and Newway were intertwined, and other factors. Baja was not independent of Newway. Baja was an extension of Newway and Newway took on the role of monitoring Baja, especially in the area of payroll. Newway cannot now claim monitoring of a subcontractor would be overly burdensome.

V. CONCLUSION

For the reasons stated above, the Office of Labor Standards respectfully requests that the Hearing Examiner grant the City'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.

[127] *Id.* at 136 (citing *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 72 (2d Cir.2003)).
[128] *Id.* at 138.
[129] Newway's Response Brief, page 19.

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DATED this 17th day of August, 2022.

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By: */s/Lorna Staten Sylvester*

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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 Reply to Appellant Newway Forming, Inc.'s Response to City's Motion for Summary Judgment including Declaration of Lorna S. Sylvester with Exhibit A**, on the parties listed below and in the manner indicated:

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

Dated this 17th day of August, 2022, at Seattle, Washington.

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