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: **No.: LS-21-002** **LS-21-003** **LS-21-004** CITY'S RESPONSE TO APPELLANTS' CLOSING ARGUMENTS

I. INTRODUCTION

Appellants Baja Concrete USA Corp. ("Baja"), Newway Forming Inc. ("Newway"), and Antonio Machado ("Machado") assert they each are not joint employers, and they should not be held liable for the violations of SMC 14.16, 14.19 and 14.20. Newway requested that if found liable as joint employer, that it only be found liable for violations involving the ten Workers who testified. Each Appellant's arguments fail and the Findings of Fact, Determination and Final Order of the Director should be upheld. The City responds to all three briefs below.

The OLS Investigation, the testimony of witnesses and the exhibits admitted at trial prove that each appellant is a joint employer. The Appellants argued that application of the factors enumerated in *Becerra v. Expert Janitorial LLC* show that they were not joint employers. A proper application of these factors shows that their position is incorrect. All thirteen factors are not necessary to prove joint employment and the totality of the circumstances shows that each is a joint employer.

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I. STATEMENT OF FACTS

A detailed Statement of Facts is provided in the City's Closing Brief.[1]

II. ISSUES PRESENTED

Are the Appellants each jointly and severally liable for violations of Seattle's labor ordinances because they are joint employers of the Workers[2]? Yes

III. EVIDENCE RELIED UPON

The City relies upon the Hearing Examiner Exhibits and the testimony of the witnesses during the 14-day hearing from June 12, 2023 through September 20, 2023.

IV. ARGUMENT

A. THE JOINT EMPLOYMENT STANDARD.

OLS used the economic realities test from *Becerra v. Expert Janitorial LLC*, 181 Wn.2d 186 (2014), to decide if the Appellants jointly employed the Workers.[3] Joint employment relationships exist when an employee performs work that benefits two or more employers.[4] According to Seattle Human Rights Rule 90-045(3), determining whether employment is joint employment, or separate and distinct employment, depends upon all the facts in the particular case.[5] This Rule is consistent with the case law for joint employment.

In *Becerra*, the Washington Supreme Court considered whether employers were jointly liable for violations of Washington's Minimum Wage Act.[6] The trial court dismissed granted the plaintiff's summary judgment motion, finding that Fred Myer and Expert Janitorial LLC were not joint employers.[7] The Washington Supreme Court found that the summary judgment was improperly

[1] City's Closing Brief filed Oct. 25, 2023.
[2] "Workers," unless otherwise specified, refers to the workers whose payroll was processed by Baja.
[3] HE Ex. 87 (OLS Final Order) at TRIAL 00371; *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186 (2014).
[4] HE Ex. 87 (OLS Final Order) at TRIAL 00371.
[5] Seattle Human Rights Rule 90-045(3).
[6] *Becerra v. Expert Janitorial, LLC,* 181 Wn.2d 186 (2014) (citing *Torres-Lopez*, 111 F.3d 633 (9th Cir. 1997).
[7] *Becerra* at 189.

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granted and remanded for further proceedings. The Supreme Court instructed the trial court to apply the factors in *Torres-Lopez. Becerra v. Expert Janitorial, LLC,* 181 Wn.2d 186 (2014) (citing *Torres-Lopez*, 111 F.3d 633 (9th Cir. 1997).[8]

In *Torres-Lopez*, the court used thirteen nonexclusive factors. The first five are regulatory factors and the remaining eight are common law factors.[9]

The five regulatory factors are:

(A) The nature and degree of control of the workers;

(B) The degree of supervision, direct or indirect, of the work;

(C) The power to determine the pay rates or the methods of payment of the workers;

(D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; [and]

(E) Preparation of payroll and the payment of wages.

The eight common law factors are:

(1) whether the work was a specialty job on the production line;

(2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes;

(3) whether the premises and equipment of the employer are used for the work;

(4) whether the employees had a business organization that could or did shift as a unit from one [worksite] to another;

(5) whether the work was piecework and not work that required initiative, judgment or foresight;

(6) whether the employee had an opportunity for profit or loss depending upon managerial skill;

(7) whether there was permanence [in] the working relationship; and

(8) whether the service rendered is an integral part of the alleged employer's business.[10]

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[8] *Becerra* at 200; *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997).
[9] *Becerra v. Expert Janitorial, LLC,* 181 Wn.2d 186 (2014) (citing *Torres-Lopez*, 111 F.3d 633 (9th Cir. 1997).
[10] *Torres-Lopez*, 111 F.3d at 639-40 (internal quotation marks and citations omitted; alterations in original).

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B. THE *BECERRA* FACTORS SHOW THAT EACH APPELLANT JOINTLY EMPLOYED THE WORKERS.

Each Appellant argues that they are not joint employers, and that they should not be held responsible for violations of Seattle's labor ordinances. The Washington Supreme Court held that "[t]hese factors are not exclusive and not to be applied mechanically or in a particular order."[11] Joint employment must be evaluated by the totality of the circumstances. The tribunal "is also free to consider any other factors it deems relevant to its assessment of the economic realities.[12] As the court noted, "that's why toting up a score is not enough."[13]

a. The first factor, which is the nature and degree of control over workers, shows that Newway and Machado were joint employers.

The first regulatory factor is "(A) the nature and degree of control of workers."[14] Applying this factor to Newway's control of the Workers in their day-to-day work shows that they are a joint employer. Newway and Machado determined the order in which work would be done at the 1120 Denny Way job site with no input from Baja. Newway determined the scope of the work which was stated by Kwynne Forler-Grant in her deposition and her testimony on Day 9 of the hearing.[15]

Antonio Machado, Site Superintendent for Newway, testified that he provided instructions to Newway foreman, who would then give direction to the Workers.[16] Machado would receive this information from Newway's upper management.[17] Machado was not involved in the meetings with

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[11] *Id*. 181 Wn.2d at 198.
[12] *Id*. 181 Wn.2d at 198 (quoting *Reyes v. Remington Hybrid Seed Co*., 495 F.3d 403, 408 (7th Cir. 2007)).
[13] *Id.* 181 Wn.2d at 198 (quoting 495 F.3d at 408-09).
[14] *See Torres-Lopez*, 111 F.3d at 639.
[15] Kwynne Forler-Grant ("Forler-Grant") Dep. 122:1-10; HE Hr'g, Forler-Grant Test., Day 9, Part 1 at 56:01-56:05.
** As used throughout, HE Hearing Testimony ("HE Hr'g Test.") refers to the day number of trial (Day 1-14). The "Part" number refers to the corresponding Part number (of the specified day) of the Hearing Examiner's audio file record that is the Court file.
[16] HE Hr'g, Antonio Machado ("Machado") Test., Day 9, Part 4 at 1:14:38-1:15:15.
[17] HE Hr'g, Machado Test., Day 10, Part 1 at 21:22-22:33.

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Onni and Newway to determine the scope of the work.[18] Machado testified to also approving a few timecards which he had the authority to do.[19]

All ten Workers testified consistently about Newway's scope of control over their daily work. They each said they went to Machado or one of the Newway foreman (also known as "leads") for questions about what to do next.[20] Three workers, Patricio Fernandez Borquez, Matias Catalan Toro and Jose Ascencion Estrada Parra, stated Roberto Soto Contreras as a point of contact for some questions or direction, but these three workers also testified that a Newway foreman answered the same information.[21]

Newway had control over how many of the Workers worked each day. In *Torres-Lopez*, the employer met this first factor by controlling the overall harvest schedule, the number of Workers needed for harvesting, direction regarding when to begin the harvest, and deciding which days were suitable for harvesting.[22] In the Newway 30(b)(6) deposition, Kwynne Forler-Grant testified that Newway told Baja how many workers it needed "at different points of relevant periods."[23] Machado testified that Tom Grant, Senior Project Manager of Newway, told Baja how many workers were needed and when.[24] Adam Pilling testified that he, Tom Grant, and Antonio Machado told Roberto Soto Contreras when more workers were needed for upcoming projects.[25] Adam Pilling revealed in

[18] HE Hr'g, Machado Test., Day 9, Part 4 at 1:14:38-1:15:15.
[19] *Id.* at 00:56:43-1:01:53; *See also* HE Ex. 43 (Baja Invoices and Timesheets) at TRIAL 01069, 01071.
[20] Newway foremen also being known as leads stated in HE Ex. 41 (Newway 30(b)(6) dep.) at TRIAL 00021 at 80:2-6.
[21] HE Hr'g, Matias Catalan Toro Test., Day 2, Part 3 at 1:06:37-1:07:50, 1:08:02-1:10:13; HE Hr'g, Patricio Fernandez Borquez Test., Day 6, Part 1 at 1:14:49-1:15:22; HE Hr'g, Jose Ascension Estrada Parra Test., Day 7, Part 1 at 31:37-36:08.
[22] *See Torres-Lopez*, 111 F.3d at 642.
[23] HE Ex. 41 (Newway 30(b)(6) dep.) at TRIAL 00014 at 53:13-18.
[24] HE Hr'g, Machado Test., Day 9, Part 4 at 00:43:05-00:43:17 and 00:44:13-00:44:35.
[25] HE Hr'g Transcript of Adam Pilling at Page 124 at 03:45:50, 03:46:25, 03:46:03, and 03:46:25.
** "Transcript," as referenced in footnotes throughout, refers to the transcripts that were attached as Word documents (via a Sharefile link) to Newway's Closing Brief on October 25, 2023.

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his testimony that Newway had the power to tell Baja not to bring anyone to the worksite.[26] In Forler-Grant's testimony, she indicated that Newway controlled whether volunteer hours were offered or not over the standard eight hours in a day.[27] Newway and Antonio Machado told the Workers when to start working.[28] This demonstrates the large degree of control that Newway and Machado had over the Workers.

Newway argues that in *Layton v. DHL Exp. (USA), Inc*., 686 F.3d 1172 (11th Cir. 2012), DHL was found not to be a joint employer when the DHL managers oversaw the employees load packages into their trucks.[29] DHL's oversight and Newway's oversight were very different. DHL provided "limited monitoring" while employees loaded their trucks.[30] They did not have constant oversight of the employees while they delivered packages to customers.[31] Newway's supervision of the Workers was more directly involved. Newway would supervise the Workers throughout the entire shift. They would tell the Workers where to work upon arrival to the site and constantly monitored their performance.

Newway changed the way Baja recorded their time, and Baja had no say in the matter. Newway had concerns about Baja overcharging them for labor.[32] Newway did not respond to its suspicion of Baja by terminating its contract or threatening to enforce the contract. Rather, it engaged in a practice that underscored the unusually intertwined relationship between Newway and Baja that was not a normal subcontractor relationship. In September of 2019, Newway required only the

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[26] HE Hr'g, Adam Pilling Test., Day 13, Part 6 at 00:11:34 – 00:11:59, *"So Newway did have the power to tell Baja not to bring anyone on the site? Yes, technically if they were not allowed to site by Onni or for some safety violation on our end, they would be banned from that project."*

[27] HE Hr'g, Forler-Grant Test., Day 9, Part 3 at 0:36:16-0:37:09; HE Hr'g Transcript of Adam Pilling, Day 13, Page 119-120 at 13:03:36:09.

[28] HE Hr'g Transcript of Adam Pilling, Day 13, Page 119-120 at 03:35:54 and 03:36:09.

[29] *Layton v. DHL Exp. (USA), Inc*., 686 F.3d 1172 (11th Cir.2012).

[30] *Id*. at 1179.

[31] *Id*.

[32] HE Hr'g, Forler-Grant Test., Day 9, Part 1 at 1:02:30-1:02:59.

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Workers to come into the office to utilize a timeclock provided by Newway.[33] This timeclock requirement, along with Newway's regular meetings to reconcile the timesheets and invoices, showed that its response to its own suspicion of Baja was to exert even more control over the Workers. This is not an arms-length solution that evidences normal approach to a contract dispute.

Newway argues they are similar to *Bozung v. Condominium Builders, Inc.*, 42 Wash.App. 442 (1985) because their control exercised over the Workers was limited to its role as a contractor.[34] This is simply not true. In *Bozung,* the subcontractor was hired because it was a specialist in the earth moving business and the general contractor had no experience in this work.[35] The general contractor exercised no control over how the subcontractor performed its work and the site superintendent only interacted with the subcontractors' foremen unlike with Newway.[36] The Newway foremen interacted directly with the Workers and provided them direction daily.[37] Newway also had their own cement finishers, who performed the same work as the Workers.[38] Newway exercised more control than the general contractor in *Bozung* and therefore meets this joint employer factor.

b. Newway and Machado Controlled The Degree of Supervision of the Workers, Whether Direct or Indirect.

Another factor considered for joint employment is "(B) the degree of supervision, direct or indirect, of the work."[39] Newway supervised the Workers directly and indirectly from February 2018 through August 2020. During the hearing, Workers testified that while they were paid by Baja, they would go to Machado or another Newway foreman with questions or assignments. All but one of the Workers testified that Machado or the Newway foreman corrected them when they did something

[33] *Id.* at 01:00:17-1:00:32; 1:10:05-1:10:25; 1:06:16-1:06:40.
[34] *Bozung v. Condominium Builders, Inc*., 42 Wash.App. 442 (1985).
[35] *Id*. at 448.
[36] *Id*.
[37] HE Hr'g Transcript of Adam Pilling, Day 13, Page 150 at 04:46:12 and 04:46:28.
[38] HE Hr'g, Forler-Grant Testimony, Day 9, Part 2 at 16:06-17:45; HE Hr'g Transcript of Adam Pilling, Day 13, Page 137 at 04:18:30 and 04:18:46.
[39] *See Torres-Lopez*, 111 F.3d at 640.

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wrong. Machado testified that he would delegate the corrections or discipline of these Workers to his Newway foremen.[40]

Most Workers testified that Machado was known to all of these Workers as the "boss" or the person in charge of the entire site.[41] He was only present at the 1120 Denny Way site in Seattle where he was aware of the Workers' performance.[42] Machado testified that he relayed duties for the day to the foreman who relayed to all workers including Baja.[43] "The fact that [the putative joint employer] effect[s] the supervision by speaking to the crew leaders, who in turn sp[eak] to the [workers], rather than directly to the worker does not negate a degree of apparent on the job control over the [workers]."[44] Machado asserted his role as the "boss" to the point of overriding direction that other Newway foremen gave the Workers.[45] Machado testified that he corrected a Worker on the subject of safety but he regularly notified his foremen to correct the Workers if he witnessed any Workers onsite exhibiting unsafe behaviors.[46]

The Workers were required to attend Newway safety meetings. According to Forler-Grant, if a subcontractor did not conduct its own safety meeting, those workers had to attend Newway's meeting. The Workers did not have a separate safety meeting.[47] The Workers were required to sign in at these meetings, and some Workers listed Newway as their employer.[48] Hector Cespedes, Jose

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[40] HE Hr'g, Machado Test., Day 9, Part 4 at 44:58-45:25, and at 1:16:40-1:17:05.
[41] HE Hr'g, Matias Catalan Toro Test., Day 2, Part 3 at 1:10:16-1:10:33 "*Who was in charge of the entire worksite? Tony. You mean Tony Machado? Yes*"; *See also* HE Hr'g, Hector Cespedes Rivera Test., Day 2, Part 5 at 0:38:49-0:40:37 "*Tony worked for Newway, in fact he was the person who managed the whole operation, he was the one in control and in charge of moving along the operation*."
[42] HE Hr'g, Forler-Grant Test., Day 9, Part 3 at 0:3:25-0:3:30; HE Ex. 47 (Machado Dep.) at 23:2-16: 25:15-18: 29:9-11.
[43] HE Hr'g, Machado Test., Day 9, Part 4 at 1:14:38-1:15:00.
[44] *Salinas v. Commercial Interiors, Inc*., 848 F.3d 125, 147-148. (4th Cir. 2017) (quoting *Aimable v. Long & Scott Farms,* 20 F.3d 434, 441 (11th Cir. 1994); *see also Hodgson*, 471 F.2d at 238).
[45] HE Hr'g, Hector Cespedes Rivera Test., Day 2, Part 5 at 0:42:38-43:40; HE Hr'g, Matias Catalan Toro Test., Day 2, Part 3 at 1:06:37-1:07:50.
[46] HE Hr'g, Machado Test., Day 9, Part 4 at 1:16:06-1:16:35; HE Ex. 47 (Machado Dep.) at 67:12-68:19.
[47] HE Hr'g, Forler-Grant Test., Day 9, Part 2 at 0:11:27-0:12:27.
[48] HE Ex. 4 at TRIAL 02059-02066, 02068-02070; HE Ex. 7 at TRIAL 00350; HE Ex. 8 at TRIAL 02218-02219; HE Ex. 9 at TRIAL 02248. (Aforementioned HE exhibits in this footnote [HE 4, 7, 8, 9] are various Newway Safety Sign-In Sheets.)

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Alfredo Acosta Caballero, Patricio Fernandez Borquez and Jose Ascension Estrada Parra all testified that they signed their employer as Newway on the safety sheets because they were told to do so or they did not know to list anything different.[49] In *Salinas v. Commercial Interiors, Inc*., 848 F.3d 125, 151. (4th Cir. 2017), the court held that the subcontractor and general contractor were joint employers.[50] The general contractor provided "feedback and direction directly through frequent mandatory meetings" and the subcontractor "instructed plaintiffs to tell anyone who asked that they worked for" the general contractor.[51] The Fourth Circuit stated "that although a majority of factors are not necessary to support a finding that two or more entities are "not completely disassociated" with respect to a worker's employment, based on these facts, nearly all of the factors we identified above support such a finding."[52]

Newway argues that their supervision of the Workers was not continuous and frequent enough to amount to being considered a joint employer, and that it was necessary for Newway to exercise some degree of supervision over the Workers. However, in *Salinas*, the [defendant] emphasized the very same point about supervision by having their foremen supervise plaintiffs' work and going through the subcontractors' supervisors to "demand corrections" of the workers was to ensure quality control and not joint employment.[53] As in *Salinas,* Newway went "far beyond "double-check[ing] to verify that the task was done properly."[54] Newway foremen engaged in daily oversight of the Workers' work and Machado would even reassign work who had already been given direction by other Newway foremen. The Newway foreman would correct the work of the Workers and

[49] HE Ex. 4 (Newway Safety Sign-In Sheets) at TRIAL 02062-02066, 02068-02070; HE Ex. 8 (Newway Safety Sign-In Sheets) at TRIAL 02218-02219; HE Hr'g, Patricio Fernandez Borquez Test., Day 6, Part 2 at 06:48-09:26; HE Hr'g, Jose Ascension Estrada Parra Test., Day 7, Part 1 at 00:58:45-1:02:37.
[50] *Salinas v. Commercial Interiors, Inc*., 848 F.3d 125, 151 (4th Cir. 2017).
[51] *Id*. at 146-147.
[52] *Id*. *at* 146.
[53] *Salinas v. Commercial Interiors, Inc*., 848 F.3d 125, 147-148. (4th Cir. 2017)
[54] *Id.* 848 F.3d 125, 147-148 (quoting *Moreau v. Air France*, 356 F.3d 942, 951 (9th Cir. 2004)).

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sometimes so would the Newway superintendent. As discussed above, the Workers were also required to attend Newway's daily safety meetings. These facts show "extensive supervision…indicative of an employment relationship," rather than an assessment of compliance with contractual quality and timeliness standards."[55]

Newway also argues that verifying services are performed adequately for quality control purposes is not joint employment. *Jacobson v. Comcast Corp*., 740 F. Supp. 2d 683, 690 (D. Md.2010). *Jacobson* also cites *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947) stating the "nature of the control exercised by a putative joint employer" is key in the analysis to determine the existence of joint employment.[56] Newway exercised control over the Workers daily as stated earlier by telling the Workers where to start work, monitoring their performance, correcting their work and answering their questions which was more than just quality-control. This joint employer factor was met by Newway.

c. Newway Influenced the Workers' Pay.

Factors that indicate joint employment also include "(C) the power to determine the pay rates or the methods of payment of the workers" and "(E) preparation of payroll and the payment of wages."[57] There was consistent testimony from several witnesses and Newway that Roberto Soto Contreras, a Baja representative, made the offers to the Workers and determined their pay rates.[58] In September 2019, Newway required Workers to sign in and sign out each day by using a Newway timeclock.[59] Newway was concerned about the accuracy of invoices and implemented its own

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[55] *Id.* 848 F.3d 125, 147-148 (quoting *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, at 74; see also *Torres-Lopez*, 111 F.3d at 642 (finding that the putative joint employer's "daily presence" on the jobsite and ability to "inspect all the work performed…both while it was being done and after" its completion weighed in favor of finding joint employment)).
[56] *Jacobson v. Comcast Corp*., 740 F. Supp. 2d 683, 690 (D. Md.2010) (citing *Rutherfood Food Corp. v. McComb,* 331 U.S. 772, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947)).
[57] *See Torres-Lopez*, 111 F.3d at 640.
[58] HE Hr'g, Forler-Grant Test., Day 9, Part 3 at 0:38:22-0:38:37, 0:39:47-0:40:18.
[59] HE Hr'g, Forler-Grant Test., Day 9, Part 1 at 1:00:17-1:00:32; 1:01:09-1:01:30.

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timekeeping system.[60] The timeclock was onsite in a Newway trailer, and the timecards were provided by Newway.[61]

The timecards from the Newway timeclock were compared against the Baja time information attached to the invoices. The invoices were provided to Newway by Roberto Soto Contreras and or Mercedes de Armas. The invoices were approved with a signature from a Newway manager – Adam Pilling, Tom Grant or others.[62] If Newway did not sign invoices, then the payment was not sent to Baja. According to Forler-Grant's testimony, Newway was in control of whether or not Baja was able to pay their workers because Newway was in control of when Newway paid Baja.[63] This means that if Newway did not pay Baja, then the Workers were not paid, therefore the Workers' income was dependent on Newway paying Baja. Newway's timeclock requirement for these Workers was not required of other subcontractors' workers, which is additional evidence of Newway's influence over the Workers' pay.[64] This also demonstrates Newway's unusually close relationship with Baja.

Mr. Contreras tracked the time of each Worker, and this information was attached to the invoices sent to Newway. [65] Grant and Contreras met often to compare the Newway timecards to the Contreras timesheets of the Workers.[66] The invoices showed how the Workers constantly worked over 40 hours in a work week. Not only that, but the overtime was also voluntary and had to be approved by Machado.[67] This shows that Newway had notice that the Workers should be paid overtime.[68] Newway representatives testified that they were concerned about accurate billing, so

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[60] HE Hr'g, Forler-Grant Test., Day 9, Part 1 at 1:00:17-1:05:37.
[61] *Id.* at 1:06:16-1:06:54.
[62] *Id.* at 1:14:59-1:18:50; HE Hr'g, Machado Test., Day 9, Part 4 at 1:15:17-1:15:50.
[63] HE Hr'g, Forler-Grant Test., Day 9, Part 3 at 35:33-35:52.
[64] HE Hr'g, Forler-Grant Test., Day 9, Part 1 at 1:10:05-1:10:10.
[65] *Id.* at 1:04:12-1:05:24.
[66] *Id*. at 1:08:56-1:09:49; HE Ex. 41 (Newway 30(b)(6)) at TRIAL 00006 at 18:16-22.
[67] HE Hr'g, Machado Test., Day 10, Part 1 at 27:46-28:05; HE Hr'g Forler-Grant Test., Day 9, Part 3 at 36:16-36:46.
[68] HE Hr'g, Forler-Grant Test., Day 9, Part 3 at 16:41-16:53 (aware that Workers worked more than 40 hours in a week and entitled to overtime).

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they installed timeclocks for the Workers, but they did not even bother to calculate whether the invoices received were correct in relation to a standard billing rate versus premium pay or overtime amounts.[69] When it became concerned that Baja was dishonest about reporting hours, Newway should have investigated more than just the hours each worker worked. If Newway never saw overtime rates, it should have known that something was wrong with regard to overtime.

In *Barfield v. New York City Health and Hospitals Corp*., the Second Circuit Court of Appeals found that a putative joint employer's practice of only maintaining records of hours worked leaned in favor of joint employment, notwithstanding the putative employer's "apparent failure to organize these records in a way that readily alerted it to when an employee…worked more than 40 hours in a given week."[70] In *Salinas*, the Fourth Circuit also held that a general and subcontractor both jointly employed drywall installers where, similar to Newway and Baja, the subcontractor issued workers' paychecks, but the general contractor "recorded Plaintiffs' hours on timesheets, maintained those timesheets, and required Plaintiffs to sign in and out each day."[71] Newway was aware through the information provided by Contreras and/or Mercedes de Armas via their invoices, in addition to Newway's very own timecards that the Workers worked over 40 hours in a given week.[72]

Newway representatives approved the number of hours worked in the Baja invoices by signing/initialing the invoice.[73] Newway would sign the Baja timesheets for approval.[74] Tom Grant (Newway) met regularly with Contreras for Newway to review and approve these hours by comparing

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[69] HE Hr'g, Forler-Grant Test., Day 9, Part 1 at 1:02:30-1:02:59 (Testimony concerning Baja being dishonest and overcharging for labor).
[70] *Barfield v. New York City Health and Hospitals Corp*., 537 F.3d 132, 144 (2008).
[71] *Salinas*, 848 F.3d 125, 147 (4th Cir. 2017); *see also Chao*, 709 F.Supp.2d at 1063 (requirement that putative joint employer required laborers to track their time sheet worksheets and turn them in weighed in favor of joint employment).
[72] *Barfield*, 537 F.3d at 139. "*On the record, the district court determined that no other conclusion was possible than that Bellevue knew or had reason to know the total number of hours Barfield worked for them each week, making them responsible for overtime compensation when those hours exceeded 40*."
[73] HE Exs. 12 and 13 (Baja Invoices and Timesheets); HE Hr'g, Forler-Grant Test., Day 9, Part 1 at 1:14:59-1:18:50.
[74] HE Exs. 12 and 13 (Baja Invoices and Timesheets); HE Hr'g, Forler-Grant Test., Day 9, Part 1 at 1:14:59-1:18:50; HE Hr'g Transcript of Adam Pilling, Day 13, Page 111 at 03:17:50-03:18:36 and 03:17:53-03:18:34.

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the timecards to the timesheets weekly.[75] Newway had a verbal agreement with Baja which established the unilateral rate that Newway paid Baja for the Workers' labor. These actions taken together "effectively set a cap on" Workers' pay and thus suggest in favor of joint employment.[76] A final consideration is the labor broker, Roberto Soto Contreras, worked only for one company and had no other income sources to pay the Workers.[77]

d. The hiring and firing of Workers was indirectly controlled by Newway and Machado.

Newway had indirect influence over the hiring and firing of Workers which shows that they jointly employed the Workers. This factor is "[t]he right directly or indirectly, to hire, fire, or modify the employment conditions of the workers."[78] There is no dispute that Contreras hired the workers on behalf of Baja. No testimony was offered that the Workers worked anywhere else other than Newway's locations at 1120 Denny Way, 707 Terry Avenue or 2014 Fairview Avenue all in Seattle, WA.[79]

Newway communicated to Baja regularly about the number of Workers needed. There was testimony by Adam Pilling, Newway Layout Man/Supervisor, that he, Tom Grant, Antonio Machado would communicate directly with Contreras about the manpower needed.[80] Machado testified that Grant would speak to Contreras about needing more people.[81] This shows Newway's involvement in the indirect hiring of the workers by determining the hiring needs.

Newway had indirect involvement in the firing of workers. The Workers testimony directly conflicted with the testimony of Newway representatives. Jonathan Parra Ponce stated in his

[75] HE Hr'g, Forler-Grant Test., Day 9, Part 1 at 1:08:56-1:09:59.
[76] *Barfield*, 537 F.3d at 144-145.
[77] HE Ex. 37 (Baja 30(b)(6) Dep.) at TRIAL 00118 (Page 23) and 89:16-18.
[78] *Torres-Lopez*, 111 F.3d at 640.
[79] HE Ex. 87 (OLS Final Order) at TRIAL 00359.
[80] HE Hr'g Transcript of Adam Pilling, Day 13, Page 124 at 03:45:50, 03:46:25 and 03:46:03, 03:46:25.
[81] HE Hr'g, Machado Test., Day 9, Part 4 at 0:44:13-0:44:35.

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declaration that Antonio Machado had the ability to hire and fire Workers.[82] Adam Pilling testified that Newway technically had the power to tell Baja not to bring anyone to the site.[83]

Newway had indirect control over the hiring and firing of the Workers. In *Barfield*, "the fact that the referral agencies themselves may have exercised "ultimate" authority in these areas," (as Baja did) "does not alter the fact that Bellevue also exercised some authority which helps establish the economic reality of its status as a joint employer."[84] Barfield worked for Bellevue Hospital Center ("Bellevue") through three different referral agencies. Although Bellevue had the right to hire and fire agency employees, it was ultimately done through Barfield's referral agency. This right existed in addition to the hospital supervising and controlling onsite work schedules.[85] Grant would discuss with Contreras when more Workers were needed for Newway.[86] When Contreras brought potential Workers to the worksite, Newway could accept or reject offers of additional labor based on skill set.[87] This proves that Newway did not have direct control over hiring and firing, but they had indirect control over the hiring and firing of the Workers.

Newway argues that removing an employee from a worksite does not constitute joint employment and cites *Godlewski v. HDA*, 916 F. Supp. 2d 246 (E.D.N.Y. 2013).[88] In this case, the plaintiffs were hired by Home Development Association, Inc. ("HDA"), a not-for-profit home healthcare agency. HDA had a state-approved model contract with New York City's Human

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[82] HE Ex. 2 (Jonathan Ivan Parra Ponce Decl.) ¶ 17.
[83] HE Hr'g, Adam Pilling Test., Day 13 at 11:34-11:59 (So Newway did have the power to tell Baja not to bring anyone to the site? Yes, technically, if they were not allowed by Onni or some safety violation); HE Hr'g Transcript of Adam Pilling, Day 13, Page 135 at 04:14:28 and 04:14:32. "*Right to hire or fire Baja employees? ….we could ask that an employee be removed from site…we would contact Roberto and say, unfortunately, so-and-so's not allowed to remain at this site*."
[84] *Barfield*, 537 F.3d at 144.
[85] *Id*.
[86] HE Hr'g, Machado Test., Day 9, Part 4 at 44:13-44:35; HE Hr'g Transcript of Adam Pilling, Day 13, Page 124 at 03:45:50-03:46:31, and 03:46:03-03:46:39.
[87] HE Ex. 41 (Newway 30(b)(6)) at TRIAL 00023 at 87:21-88:5.
[88] *Godlewska v. HDA,* 916 F. Supp. 2d 246 (E.D.N.Y. 2013), aff'd sub nom. *Godlewska v. Hum. Dev. Ass'n, Inc.,* 561 F. App'x. 108 (2d Cir. 2014).

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Resources Administration ("HRA") where the terms were non-negotiable.[89] HDA performed hiring, firing, supervision, performance evaluations and checked timecards of the home assistants.[90] HRA had no involvement in these items which is different than Newway who had the opportunity to accept or turn away potential Workers. Therefore, this joint employment factor is met.

e. Newway demanded specialty work of cement finishers and laborers that was an integral part of Newway's performance of its contractual duties and provided no opportunities for profit and loss.

Three non-regulatory, or common law factors, also support a finding that Newway is a joint employer of the Workers. They include: "(1) whether the work was a "specialty job" on the production line;" "(6) whether the employee had an "opportunity for profit or loss depending upon [the alleged employee's] managerial skill;"- "(8) whether "the service rendered is an integral part of the alleged employer's business.""[91] Newway was hired to handle the concrete portion for Onni Group at three locations in Seattle: 1120 Denny Way, 707 Terry, and 2014 Fairview.[92] Baja was hired as a subcontractor to provide labor to perform the duties of cement finishing and laborer.

Newway's interpretation of the first factor is incorrect. This factor was met in *Torres-Lopez* because "the court understood the farmworkers' only job was to pick cucumbers according to standard industry practice and what they did constituted one small step in the sequence of steps taken by Bear Creek Farms to grow the cucumbers and prepare them for processing at the cannery."[93] This is similar to the Workers performing the cement finishing role as part of the concrete work for Newway's Onni project. This means the Workers responsibilities were similar to "specialty job[s] on the production line."[94]

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[89] *Id*. at 251.
[90] *Id*. at 252-253.
[91] *Torres-Lopez*, 111 F.3d at 640.
[92] HE Ex. 41 (Newway 30(b)(6)) at TRIAL 00120 at 95:17-20.
[93] *Torres-Lopez* 111 F.3d at 643.
[94] *Id*. (quoting *Rutherford* Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947) at 730).

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Newway states that its subcontractors not an integral part of Newway's business so not a joint employment relationship.[95] Newway has its own cement finishers that did the same work as the Workers.[96] The cement finishers are all necessary to perform the work Newway was hired to do by Onni, which is the concrete components of high-rise buildings. In *Lopez-Torres,* the Supreme Court found evidence of a joint-employment relationship where workers performed a discrete task in a larger production process.[97]

Workers "require[d] no great initiative, judgment, or foresight, or special skill" and provided no "opportunity for profit or loss depending on [the Workers'] managerial skills.[98] The Workers depended on the success of Newway's business for them to be paid. In *Zheng v. Liberty Apparel Co., Inc.,* 355 F.3d 61 (2003)*,* a case cited by Newway, the court recognized that the opportunity "for profit and loss" is helpful in distinguishing independent contractors from employees, however independent contractor cases are different from joint employment cases, the Second Circuit never suggested that other factors relevant to a joint employment analysis should be ignored.[99] The Workers were paid by the hour and all ten testified to not being paid overtime. In addition, none of these Workers testified that they were offered promotions, so the opportunity for profit or loss did not exist.

f. Newway's unwritten contract with Baja was industry standard, which supports a finding of joint employment.

Onni and Newway had a contract based on square footage according to Adam Pilling.[100] Forler-Grant testified that it was normal to not have written contracts with the subcontractors unless

[95] Appellant Newway Forming Inc.'s Closing Brief at 49:17-19.
[96] HE Hr'g, Forler-Grant Test., Day 9, Part 2 at 16:27-16:33.
[97] *Torres-Lopez*, 111 F.3d at 649-650 (quoting *Rutherford*, 331 U.S. at 730, 67 S.Ct. at 1477 – "boners" hired by an independent contractor were employees of the slaughterhouse where they worked).
[98] *Torres-Lopez*, 111. F.3d at 644 (internal quotations and citations omitted).
[99] *Zheng v. Liberty Apparel Co., Inc.,* 355 F.3d 61, 67-68 (2003).
[100] HE Hr'g Transcript of Adam Pilling, Day 13, Page 139 at 04:22:23.

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they requested them so the lack of a written contract between Baja and Newway was normal.[101] Another factor used in determining the existence of joint employment is "(2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without "material changes."[102] In *Torres-Lopez*, the terms of the oral contracts between Bear Creek Farms and farm labor contractors such as Ag-Labor were considered standard for the industry and involved little negotiation.[103] Newway provided no evidence that the subcontractor (verbal) contracts were different amongst the subcontractors providing the same type of labor. Therefore, this factor favors a finding of joint employment.

g. Newway's premises and equipment were used for work.

Another joint employment factor is "(3) whether the "premises and equipment" of the employer are used for the work."[104] Newway's premises and equipment were used by all subcontractors at the 1120 Denny Way location. Newway had a contract with Onni to provide the concrete structure.[105] Pilling testified that Newway had two trailers on site: a lunchroom trailer and an office trailer.[106] The timeclocks used by the Workers were located in the lunchroom trailer. Some of the Workers testified that they purchased their own small tools, or the cost of tools was deducted from their pay and that they also used the large equipment onsite provided by Newway.[107] Pilling testified that all subcontractors used Newway's equipment onsite which included jack hammers, grinders, vacuums, skill saws and cranes.[108]

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[101] HE Hr'g, Forler-Grant Test., Day 9, Part 1 at 40:12-40:52.
[102] *Torres-Lopez*, 111. F.3d at 640.
[103] *Torres-Lopez,* 111. F.3d at 643.
[104] *Id*. at 640.
[105] HE Hr'g Transcript of Adam Pilling, Day 13, Page 148 at 03:44:33, 03:04:43, 03:04:41 and 03:04:46.
[106] HE Hr'g Transcript of Adam Pilling, Day 13, Page 102 at 03:03:26 and 03:03:31.
[107] HE Hr'g, Jonathan Ivan Parra Ponce Test., Day 1, Part 3 at 35:58-36:24; HE Hr'g, Matias Catalan Toro Test., Day 2, Part 3 at 1:10:36-1:12:21; HE Hr'g, Hector Cespedes Rivera Test., Day 2, Part 5 at 47:32-48:31; HE Hr'g, Raul Alejandro Fiol Martinez Test., Day 3, Part 1 at 25:30-27:25; HE Hr'g, John Edward Hinestroza Diaz Test., Day 5, Part 3 at 27:09-29:17.
[108] HE Hr'g Transcript of Adam Pilling, Day 13, Pages 112-113 at 03:20:26, 03:20:48, 03:20:59, 03:21:06, and 03:20:46, 03:20:50, 03:21:05 and 03:21:14.

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In *Lopez-Torres*, the Ninth Circuit recognized that "Bear Creek Farms made a considerable investment in equipment and materials for purposes of harvesting and delivering the cucumbers…," "the Ag-Labor nor the farmworkers had any ownership interest in the land" and "the workers provided only simple hand-held tools" which is similar to the Workers situation on the Newway site.[109] The Workers purchased their own small tools needed to perform their job. In *Zhao,* Bebe was found not to be a joint employer with Apex because, unlike Newway, Bebe did not provide any equipment and workers went to Apex's premises to work rather than Bebe's location.[110] Other factors in *Zhao* were considered and failed to meet the joint employment threshold, such as Baja had no supervision, direct or indirect of the work and no control over workers payroll records, wages or working conditions. This factor of Workers using the premises and equipment shows Newway was a joint employer.

h. Workers worked exclusively for Newway.

The Workers worked exclusively for Newway during the February 2018 – August 2020. Another factor considered for joint employment is "(7) whether there was "permanence [in] the working relationship."[111] The Workers worked exclusively for Newway between February of 2018 and August of 2020. All the Workers testified that they worked at one or more of three Newway locations in Seattle. They did not work for anyone other than Newway. Baja registered in Washington for the exclusive purpose of providing workers to Newway.[112] In *Salinas*, Commercial (general contractor) and J.I. (subcontractor) were found to be joint employers and one of the factors was "the

[109] *Torres-Lopez*, 111 F.3d at 643-644.
[110] *Zhao v. Bebe Stores, Inc*., 247 F. Supp. 2d 1154, 1159 (C.D. Cal. 2003).
[111] *Torres-Lopez*, 111 F.3d at 640.
[112] HE Ex. 37 (Baja 30(b)(6) Dep.) at TRIAL 00118 at 89:9-18 (stated *Baja existed in WA to provide labor to Newway*); HE Hr'g, Forler-Grant Test., Day 9, Part 1 at 46:25-46:39 (stated *Baja was not asked to incorporate to provide this service to Newway*).

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Workers worked almost exclusively on [putative joint employer's] jobsite."[113] Newway meets this factor of joint employment.

C. REMEDIES ARE WITHIN THE DIRECTOR'S AUTHORITY TO ASSESS.

Once liability has been established under SMC 14.16, SMC 14.19 and SMC 14.20, "the remedies and penalties imposed by the Director shall be upheld unless it is shown that the Director abused discretion."[114] The Washington State Supreme Court held that a "decision is manifestly unreasonable if the [decision maker], despite applying the correct legal standard to the supported facts, adopts a view no reasonable person would take.[115] The OLS Director's assessment of wages and interest owed by Appellants is entirely reasonable based upon the criteria of the Ordinances and methods for determining wages.

Where an employer is in violation, it "shall be liable for full payment of unpaid wages plus interest in favor of the aggrieved party…and other equitable relief."[116] The OLS Director has the authority to assess liquidated damages in an additional amount of up to twice the unpaid wages for initial violations and assess civil penalties up to $500 per aggrieved party for an employer's first violation.[117] In this case, the OLS Director did not abuse his discretion and the remedies should be upheld.

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[113] *Salinas*, 848 F.3d 125 at 147.
[114] SMC 14.16.090.A; SMC 14.19.090.A; SMC 14.20.070.A.
[115] *Yousoufian v. Office of Ron Sims*, 268 Wn.2d 444, 459 (2010) (citations and internal quotations marks omitted).
[116] SMC 14.16.080.B; 14.19.080.B; SMC 14.20.060.B.
[117] *Id*. (permitting the same recovery of back wages, interest, and liquidated damages "for full payment of unpaid compensation").

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V. CONCLUSION

The City has shown that Appellants Baja, Newway and Machado are joint employers and that they violated SMC 14.20, SMC 14.19 and SMC 14.16 as found by the OLS Director. The City has shown, by a preponderance of the evidence, that each Appellant is jointly liable for the total amount of back wages, liquidated damages, civil penalties, and fines assessed by OLS in the amount of $2,055, 204.10 plus interest. The City asks the Hearing Examiner to deny the Appellants' requests for dismissal of the Director's Order.

DATED this 15th day of November, 2023.

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By: */s/Trina Pridgeon*

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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 Response to Appellants' Closing Arguments,** on the parties listed below and in the manner indicated:

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the foregoing being the last known addresses and email address of the above-named party representatives, and pursuant to the e-service agreement.

Dated this 15th day of November, 2023, at Seattle, Washington.

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