

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.,** ) **LS-21-003**  
**ROBERTO CONTRERAS, NEWWAY** ) **LS-21-004**  
**FORMING INC., and ANTONIO** )  
**MACHADO** ) CITY'S RESPONSE TO APPELLANT  
 ) ANTONIO MACHADO'S MOTION FOR  
from a Final Order of the Decision issued by ) SUMMARY JUDGMENT  
the Director, Seattle Office of Labor Standards )  
 )  
 )

**I. INTRODUCTION**

Appellant Antonio Machado's (Machado's) Motion for Summary Judgment should be denied. Machado fails to establish that he is entitled to summary determination as a matter of law. The facts Machado cites omit significant facts that show his liability as a joint employer. The City has Moved for Summary Judgment against Machado, and the facts in the record not only support summary judgment against Machado, those facts, at the very least, raise issues of material fact that preclude summary judgment in his favor.

**II. STATEMENT OF FACTS**

The facts in this case have been recited extensively in the City's Motion for Summary Judgment, which includes the salient facts about Machado's employment of the Workers in this

1 case. Machado's Motion for Summary Judgment omitted significant facts that will be discussed in  
2 this section.

3 In his motion, Machado emphasized the involvement of Baja Concrete USA's Roberto Soto  
4 Contreras (Contreras) in the oversight of the workers at Newway Forming Inc.'s (Newway) job  
5 sites. He claimed that Contreras supervised his employees by working closely with Newway's  
6 foremen, and that he attended morning meetings.<sup>1</sup> This is not consistent with testimony that  
7 Machado made repeatedly during this case.

8 In his deposition, Machado said that he did not see Contreras frequently:

9 **Q:** And how often did you see Roberto Soto Contreras at the Denny Way work site?

10 **A:** I don't see him very often. Sometimes once, sometimes twice, three times a week. Like I  
11 said, I used come early, very early in the morning. I was the first at the job site and the last  
one to leave.<sup>2</sup>

12 Machado also said in his Interview Statement to the Office of Labor Standards that he hardly  
13 saw Contreras:

14 **Q:** How did Baja Concrete get hired or involved in the 1120 Denny Way project?

15 **A:** I don't know. That's all paperwork and contracts, that has nothing to do with me, that's  
16 with the office. I saw their boss here on site a few times, I'd say "Roberto, how are you," but  
I was not involved with his employees.<sup>3</sup>

17 Machado also told OLS that there were no managers for Baja Concrete USA (Baja) on site:

18 **Q:** Who from Baja was in charge of directing the workers on site?

19 **A:** Those guys would come to the Newway foremen and the Newway foreman would guide  
20 them and give them directions, what to work on, when to go home. Sometimes concrete  
comes late or it's slow and you have to stay late, it's not uncommon for us to work 10 hours  
21 in a day and the form and let them know how late to stay.

---

22 <sup>1</sup> Appellant Machado's Motion for Summary Judgment and Exclusion of Evidence, p. 2.

23 <sup>2</sup> Cindi Williams Declaration, Exhibit B, Deposition of Anthony Machado, page 164, lines 11-16. (Previously filed in  
support of City's Motion for Summary Judgment)

<sup>3</sup> Daron Williams Declaration, Exhibit A, Interview Statement of Anthony Machado, page 2 a/k/a SEATTLE-OLS-  
1061, lines 24-26. (Previously filed in support of City's Motion for Summary Judgment)

1 Q: Does that mean that there were no managers on site for Baja workers at any point?

2 A: No. No managers, no.<sup>4</sup>

3 Machado also claimed in his motion that his supervision of the Baja workers was minimal.  
4 This claim is also controverted by Machado's own repeated statements that he was in charge of  
5 Baja's workers via his own foremen.

6 Q: Who gives the workers at 1120 Denny instructions on their day-to-day tasks?

7 A: On the - on the daily basis was, you know my cement finished foreman and my labor  
8 foreman.<sup>5</sup>

9 \*\*\*

10 Q: How much do you talk to your labor foremen throughout the day?

11 A: you know, in the morning. Then, if few plans change, I was go to talk to him.  
12 I will come down. We all sat in, you know, for lunch. If he has any concerns, he will talk  
13 to me. But you know, like I said, I -- keep touching, you know, bases with my foremans all  
14 the time.

15 Q: So if plans changed and you communicated that to your foreman, would the foreman  
16 then communicate that to his workers -- the change in plans?

17 A: Yes. If it is a change on a plan, like I said, lot -- lot of times, we supposed to be pouring  
18 the floor let's say tomorrow morning. And then in the middle of the afternoon, I receive an  
19 e-mail or a phone call, Tony, the -- the pour is cancelled. Respond.  
20 So then I got to go tell my foreman, oh, we changed the plan. We know pouring the -- the  
21 slab, for example, at 5:00 a.m. We going to do the slab at 9:00 a.m. Or sometimes, you  
22 know, we going to do the slab next day.<sup>6</sup>

23 \*\*\*

24 Q: . . . Who supervised the -- the people we're calling Baja worker who were paid by Baja  
25 Concrete?

26 A: Who was supervising?

27 Q: Who was supervising those workers?

<sup>4</sup> *Id.*, page 4, a/k/a SEATTLE-OLS-1063, lines 11-18.

<sup>5</sup> Machado Deposition, page 42, lines 4-7.

<sup>6</sup> *Id.*, page 42, line 25 to page 44, page 20.

1       **A: My foremans.**

2       **Q:** Were those –

3       **A:** My labor –

4       **Q:** Did anyone who was being paid by Baja supervise those workers?

5       **A:** No. Was my foreman supervised –

6       **Q:** Okay.

7       **A:** Them.<sup>7</sup>

8       Machado described the relationship between his own supervision of Padro, one of his  
9 foremen, and the Baja workers:

10       **Q:** Okay. And did you communicate with Padro instructions that he was supposed to give  
11 the Baja worker?

12       **A:** No. I – yes. I was still appeared was in charge. And I tell him, you know, what it's got to  
13 be done. And then -- and then him was to do it -- you know, we do his job – would do his  
job, yes.

14       **Q:** And just to clarify, the – you said that Newway foreman were supervising the Baja  
workers.

15       **A:** Yeah, My –

16       **Q:** Were you –

17       **A:** Yeah, my foremans, the were supervising Baja, yes.

18       **Q:** And were you telling those foremen how to supervise the Baja workers and what to –  
19 what to ask the Baja workers to do?

20       **A:** Yeah. My foremans would tell them what to do, yes.<sup>8</sup>

23       

---

<sup>7</sup> *Id.*, page 49, line 25 to page 50, line 11.

<sup>8</sup> *Id.*, page 51, line 14 to page 52, line 10.

1 Machado also claimed that he did not set the workers' schedules, and he quoted Newway's  
2 30(b)(6) deposition to support his claim.<sup>9</sup> This claim is strongly controverted by his own testimony  
3 as cited above and at several other points in his Deposition and Interview Statement:

4 Q: So who tells workers when it's time to leave on a given day?

5 A: Well, we were based on 8 hours a day. But then you get the concrete crews. Sometimes  
6 --you know, Seattle was a busy industry. We ordered so many concrete -- meters of concrete  
7 in an hour.

8 And sometimes, because of the traffic of it -- any issues, last things steady takes six, seven  
9 hours; sometimes will take ten, eleven hours. So they guys, they were involve only -- you  
10 know, they were involve on -- on a concrete, they have to stay there until, you know, they  
11 finish.<sup>10</sup>

12 \*\*\*

13 Q: Right. So who decided whether it would be an eight hour day or a ten or eleven hour  
14 day? Who made that decision?

15 A: Who made -- I -- I -- I did a lot of times. You know, if you need the guys to stay an hour  
16 or two, I always go to foreman, "Oh, Today we got to stay a little late period we got to get,  
17 you know, this or that done." You know what I'm saying? So --<sup>11</sup>

18 Machado also directed the start times for the Baja workers. When the general contractor  
19 wanted the concrete workers to start early, Machado would communicate that to the Baja workers:

20 Q: OK. So when Onni wanted the work to start early on a given day, how would that -- how  
21 would that instruction be given to the workers? How would that get communicated down to  
22 the worker?

23 A: I will -- I will go to my foreman, and I let them know, tomorrow, we going to start re  
pouring concrete at 4:00 or 5:00 or sometimes even the 6:00 a.m. because -- I will tell -- and  
then him will choose his -- you know, would choose the guys he wants to bring with him.<sup>12</sup>

Machado also did not differentiate between Newway workers and Baja workers for the

<sup>9</sup> Machado Motion for Summary Judgment, p. 3.

<sup>10</sup> Machado Deposition, page 45, line 18 to page 46 line 4.

<sup>11</sup> *Id.*, page 46, lines 14-20.

<sup>12</sup> *Id.*, page 54, lines 13-21.

1 purpose of quality control, which also controverts his claim that all supervisory communications  
2 were passed through Contreras.

3 Q: Okay. What would happen if the work that the Baja workers was doing didn't get done  
4 on time?

5 A: They didn't do -- again, my foremans, they never complained. They mix, you know, Baja  
6 guys with, you know -- with our guys. So I guess they -- they were work fine working  
7 together.

8 Q: I'm sorry. Can you repeat that last thing you said?

9 A: You know, my foreman, they never complained. If they need something done, they will  
10 mix, you know, guys with a Baja with our guys; Right? So to make sure they get them done.  
11 I mean, we wouldn't -- we wouldn't separate for the guy -- the Baja guys in one -- you know,  
12 one side and our employees on the other. No. They were working together.<sup>13</sup>

13 Machado also emphasized his own supervision of Baja workers' schedules in his Interview  
14 Statement:

15 Q: Did that foreman coordinate with Roberto about how many hours the workers would  
16 work in a day?

17 A: No, the foreman figures out how long they work. It's hard to predict sometimes which  
18 days will go late period but the end of the day we all stay late period sometimes we work 8  
19 hours, sometimes 9, 10. You've got to work as we need, that's how we work.<sup>14</sup>

20 Machado also claims that his general supervision and feedback communications went  
21 through Contreras, which is inconsistent with all of his prior testimony. Machado supervised Baja  
22 workers' progress and whether they completed their work on schedule, and did not use Contreras  
23 as a middleman for those communications. In his deposition he testified:

Q: Whose -- whose job was it to make sure that the Baja workers were getting their work  
done on time?

A: A foreman.

<sup>13</sup> *Id.*, page 59, line 25 to page 60, line 5.

<sup>14</sup> Machado Interview Statement, page 7 a/k/a SEATTLE-OLS-1066, lines 10-13.

1 If we had any issues -- you know, I asked him, can we -- can we get this done, you  
2 know, this week? Depends on how big the job was. And, if he was any issues, my  
3 foreman will come and report to me. But he never did.  
He never came and report to me, "Oh, Baja, they don't want to do," or, "Our guys,  
they don't want to" -- I never heard any complains.<sup>15</sup>

4 Machado's involvement with the workers was much more comprehensive than is portrayed  
5 in his motion. Machado does not discuss Contreras' role in supervision, schedules or quality control  
6 in any of his prior testimony. Machado also claims that he had nothing to do with selecting or firing  
7 Baja workers, which is controverted by the testimony of Jonathan Parra Ponce: "Tony had the  
8 authority to hire and fire workers. He would tell Roberto if he needed more workers or wanted to  
9 let someone go. I heard the discussions between Tony and Roberto to this effect."<sup>16</sup>

10 There is a legitimate issue of material fact as to whether Machado participated in retaliation  
11 to keep the workers from complaining about wage theft and other violations. Parra Ponce noted  
12 Machado's participation in retaliation against workers: "Workers were in no position to complain  
13 about underpayment. Both Roberto and Tony would frequently threaten to report workers to ICE,  
14 and when workers asked Roberto for more pay, Roberto would then make the same threat."<sup>17</sup>

15 Machado's involvement with Baja went far beyond merely supervising the day-to-day work  
16 of a subcontractor's workers. Machado loaned money to Baja to support the workers they were  
17 providing to Machado and Newway. He loaned about \$12,000 to \$13,000 to Baja to support the  
18 workers' housing and food.<sup>18</sup> He individually purchased food for the workers when they needed  
19 it.<sup>19</sup> He made the loan directly to Carlos Ibarra, with whom he has been friends with for years.<sup>20</sup>

---

21 <sup>15</sup> Machado Deposition, page 61, lines 14-23. *See also, Id.*, page 66, lines 2-7, page 68, lines 13-19, Machado  
Interview Statement page 3 a/k/a SEATTLE-OLS-1062, lines 18-20.

22 <sup>16</sup> Declaration of Johnathan Parra Ponce, ¶ 17. (Previously filed in support of City's Motion for Summary Judgment)

23 <sup>17</sup> Declaration of Johnathan Parra Ponce, ¶ 13.

<sup>18</sup> Machado Deposition, page 108, lines 19-23, page 110, line 25 to page 111, line 3.

<sup>19</sup> *Id.*, page 120, line 25 to page 121, line 16.

<sup>20</sup> *Id.*, page 123, line 8 to page 124 line 6.

1 Ibarra's sister owns Baja<sup>21</sup> and Ibarra negotiated the agreement for Baja to provide workers to  
2 Machado and Newway.<sup>22</sup> There were no formal agreements associated with these loans,<sup>23</sup> and  
3 Machado was repaid in full from Baja from the same accounts from which they paid their workers.<sup>24</sup>

### 4 III. EVIDENCE RELIED UPON

5 The City relies on the pleadings, stipulations, declarations, and attachments already on file  
6 with the Hearing Examiner, including the following: City's Motion for Summary Judgment and  
7 Declaration of Cindi Williams in Support of City's Response to Antonio Machado's Motion for  
8 Summary Judgment and attached exhibits.

### 9 IV. ARGUMENT

#### 10 A. Summary Judgment Standard

11 Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories,  
12 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to  
13 any material fact and that the moving party is entitled to a judgment as a matter of law."<sup>25</sup> A material  
14 fact is one upon which the outcome of the litigation depends in whole or in part."<sup>26</sup> In determining  
15 whether a genuine issue of material fact exists, the court views all facts and draws all reasonable  
16 inferences in favor of the nonmoving party.<sup>27</sup> Here, to the extent that there are genuine issues of  
17 material fact, Machado's motion should be denied as a matter of law.

---

18  
19 <sup>21</sup> *Id.*, page 123, lines 1-7,

20 <sup>22</sup> Cindi Williams Declaration, Exhibit A, Deposition of Kwynne Forler-Grant, page 28, lines 3-10. (Previously filed in support of City's Motion for Summary Judgment)

21 <sup>23</sup> Machado Deposition, page 109, lines 7-18.

22 <sup>24</sup> *Id.*, page 115, lines 3-6.

23 <sup>25</sup> 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).

24 <sup>26</sup> *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)).

25 <sup>27</sup> *Id.*, at 899 (citing *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, (2005)).



1 Baja's success, lest he not be repaid his loans to the company. Machado was a participant in the  
2 close, intertwined relationship between Newway and Baja. The opacity of their arrangement, and  
3 Machado's uniquely personal involvement in the arrangement via his financial support of their  
4 logistics is critical to his relationship to the workers and their overall access to work with Newway.  
5 He is not an employee who merely controlled the "work situation" of the workers, he was a key  
6 intermediary between Newway, Baja, and the workers with a personal financial interest in the  
7 success of the arrangement. There are legitimate issues of material fact regarding whether  
8 Machado's activities place him distinctly outside of the class of employee the *Baystate* and *Agnew*  
9 courts sought to protect from regulatory overreach.

10 Each of these facts, as applied to the joint employment factors expressed in *Becerra v.*  
11 *Expert Janitorial, LLC*,<sup>32</sup> and *Torres-Lopez v. May*,<sup>33</sup> show that Machado was a joint employer  
12 along with Baja and Newway. The factors should not be applied in a particular order, and a court  
13 should focus on the totality of the circumstances.<sup>34</sup> The character of the work that the workers were  
14 doing for Newway is discussed at length in pages 12 to 16 of Respondent City of Seattle's Response  
15 to Appellant Newway Forming, Inc., Motion for Summary Judgment. That character of work and  
16 the relationship between Baja and Newway contribute to a finding that Machado was also a joint  
17 employer, in addition to the unique aspects of Machado's supervision.

18 As for Machado's individual involvement with the workers, he made decisions about start  
19 and finish times for workers that dictated whether they were working overtime on any given day.  
20 Not only is the nature and degree of control of the workers a joint employment factor,<sup>35</sup> but in this  
21

22 <sup>32</sup> 181 Wn.2d 186.

23 <sup>33</sup> 111 F.3d 633 (9<sup>th</sup> Cir. 1997).

<sup>34</sup> *Becerra*, 181 Wn.2d at 198.

<sup>35</sup> *Torres-Lopez*, at 639-40.

1 case Machado's control over this part of the workers' daily lives is uniquely significant. One of  
2 Baja's violations was failure to pay overtime to its workers, so this is a significant factor because  
3 Machado actively contributed to the nonpayment of overtime wages for the workers if he was  
4 knowingly making them work over eight hours a day. A court "is also free to consider any other  
5 factors it deems relevant to its assessment of the economic realities."<sup>36</sup> Because Machado's control  
6 over the start and finish times of workers is so significant in relation to the violation, it factors  
7 strongly in favor of a finding that Machado jointly employed the workers.

8 The ability, directly or indirectly, to hire, fire, and modify the employment conditions of the  
9 workers is a factor in the joint employer analysis.<sup>37</sup> Jonathan Parra Ponce stated that Machado had  
10 a say in who was hired and fired, and there is evidence that Machado participated in retaliation  
11 against workers who alleged underpayment of wages. The degree of supervision is another factor.<sup>38</sup>  
12 It is undisputed that Machado managed and controlled the workers' day-to-day performance  
13 through his foremen, and he repeatedly emphasized his status as the "boss" of all of the workers on  
14 his job site. Machado had daily control over all of the workers and would assign them tasks via his  
15 foremen. Contrary to Machado's claims in his Motion, Contreras and Baja had little to no control  
16 over the workers on the job site, as it was Machado consistently giving all the orders.

## 17 V. CONCLUSION

18 For the reasons stated above, the City respectfully requests that the Hearing Examiner deny  
19 Machado's Motion for Summary Judgment.

20  
21 **[SIGNATURE BLOCK ON THE FOLLOWING PAGE]**

22  
23 <sup>36</sup> Becerra, 181 Wn.2d at 198 (quoting *Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71-72 (2<sup>nd</sup> Cir. 2003)).

<sup>37</sup> *Torres-Lopez*, at 639-40.

<sup>38</sup> *Id.*

1 DATED this 3<sup>rd</sup> day of August, 2022.

2 ANN DAVISON  
3 Seattle City Attorney

4 By: /s/ Cindi Williams  
5 **Cindi Williams, WSBA #27654**  
6 **Lorna Staten Sylvester, WSBA #29146**  
7 Assistant City Attorneys  
8 701 Fifth Avenue, Suite 2050  
9 Seattle, WA 98104-7095  
10 Email: [cindi.williams@seattle.gov](mailto:cindi.williams@seattle.gov)  
11 Email: [lorna.sylvester@seattle.gov](mailto:lorna.sylvester@seattle.gov)  
12 *Attorneys for Respondents,*  
13 *The City of Seattle and*  
14 *The Seattle Office of Labor Standards*  
15  
16  
17  
18  
19  
20  
21  
22  
23

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

**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 true and correct copies of the foregoing documents:

1. **City's Response to Appellant Antonio Machado's Motion for Summary Judgment**
2. **Declaration of Cindi Williams in Support of City's Response to Appellant Antonio Machado's Motion for Summary Judgment**

on the parties listed below and in the manner indicated:

Jason R. Wandler  
Nicole Wolfe  
701 Pike Street, Suite 1700  
Seattle, WA 98101  
*Attorneys for Appellant,  
Newway Forming Inc.*

(x) Email: [wandler@oles.com](mailto:wandler@oles.com)  
(x) Email: [wolfe@oles.com](mailto:wolfe@oles.com)  
(x) Email: [stroeder@oles.com](mailto:stroeder@oles.com)  
(x) Email: [smith@oles.com](mailto:smith@oles.com)

Mark D. Kimball  
Alex T. Larkin  
MDK Law  
777 108<sup>th</sup> Ave NE, Suite 2000  
Bellevue, WA 98004  
*Attorneys for Appellant  
Baja Concrete.*

(x) Email: [mkimball@mdklaw.com](mailto:mkimball@mdklaw.com)  
(x) Email: [alarkin@mdklaw.com](mailto:alarkin@mdklaw.com)  
(x) Email: [paulo@mdklaw.com](mailto:paulo@mdklaw.com)

Aaron Rocke  
Sara Kincaid  
Rocke Law Group, PLLC  
101 Yesler Way, Suite 603  
Seattle, WA 98104  
*Attorney for Appellant,  
Antonio Machado*

(x) Email: [aaron@rockelaw.com](mailto:aaron@rockelaw.com)  
(x) Email: [sara@rockelaw.com](mailto:sara@rockelaw.com)  
(x) Email: [alex@rockelaw.com](mailto:alex@rockelaw.com)  
(x) Email: [tori@rockelaw.com](mailto:tori@rockelaw.com)

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

Dated this 3<sup>rd</sup> day of August, 2022, at Seattle, Washington.

*/s/ Sheala Anderson*  
SHEALA ANDERSON