

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

I. INTRODUCTION

Undisputed facts show that Appellant Antonio Machado (“Machado”) is a joint employer in this case. The facts Machado cites in his opposition to the City’s motion omit significant facts to which he testified repeatedly. Machado jointly employed the workers (“Workers”) according to the definition of “employer in Seattle Municipal Code section 14.16.010, 14.19.010, 14.20.010 and based on the factors outlined in the case law cited in the City’s motion and below.

II. MACHADO MISSTATES MANY FACTS THAT ARE MATERIAL TO A FINDING THAT HE IS A JOINT EMPLOYER.

The facts in this case have been recited extensively in the City’s Motion for Summary Judgment and the City’s Responses to the Appellants’ Motions for Summary Judgment, which includes the salient facts about Machado’s employment of the Workers in this case. As was the case with Machado’s Motion for Summary Judgment, his response omitted significant facts that

1 will be discussed in this section. Machado has, in most of the instances describe in this section,
2 testified to facts that both contradict his current claims and support a finding of joint employment.

3 Machado makes a number of assertions not supported by the record and which are relevant
4 to the analysis of whether he is a joint employer of the workers. In his response, Machado states
5 that he “set the overall schedule for the 1120 Denny Way worksite but had little to no control over
6 start or end times for the day.”¹ In his testimony, however, he describes how he directs his foremen
7 regarding the length of the workday:

8 **Q:** Right. So who decided whether it would be an eight-hour day or a 10- or 11-hour day?
9 Who made that decision?

10 **A:** Who made – I – I did a lot of times. you know, if you need the guys to stay an hour or
11 two, I always go to the foreman, “Oh, today we got to stay a little late period we got to get,
12 you know, this or that done.”²

13 Machado testified repeatedly that he was in charge of any change to the plans, which would
14 dictate start and end times for all workers.

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.³

23 In his response, Machado claimed that “[o]f the workers that Baja USA brought onto the
1120 Denny Way site, Mr. Machado had truly little information or involvement with them.”⁴ This
claim that he had “little involvement with them” is diametrically opposed to his repeated testimony

¹ Appellant Antonio Machado’s Response to the City of Seattle’s Motion for Summary Judgment, p. 2.

² Cindi Williams Declaration, Exhibit B, Deposition of Anthony Machado, page 46, lines 13-20. (Previously filed in support of City’s Motion for Summary Judgment)

³ *Id.*, page 42, line 25 to page 44, page 20.

⁴ Appellant Antonio Machado’s Response to the City of Seattle’s Motion for Summary Judgment, p. 3.

1 that he directed and supervised the workers paid by Baja in exactly the same manner as the workers
2 paid by Newway. This claim is also controverted by Machado's own repeated statements that he
3 was in charge of Baja's workers via his own foremen.⁵ Machado succinctly summed up what he
4 repeatedly testified to on this subject:

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

6 **A:** On the - on the daily basis was, you know my cement finished foreman and my labor
7 foreman.⁶

8 Machado cites to the deposition testimony of Newway, which only vaguely addressed the
9 subject and claimed that the Baja workers were in with Contreras.⁷ In fact, Machado specifically
10 stated that he had little contact with Contreras at the job site. He testified that he rarely saw
11 Contreras at the Denny Way job site.⁸

12 Machado also claims that there existed additional Baja "supervisors" other than Roberto
13 Contreras.⁹ The evidence he relies on is a vague mention by Mercedes de Armas, in her individual
14 deposition, as she tried to explain deductions in the worker's paychecks.¹⁰ At no time were any
15 other "supervisors" named, identified, or described. There was no evidence that the workers had
16 any other supervisors other than Machado, the Newway foremen he directed, and, occasionally,
17 Contreras.

18 Machado specifically told OLS that there were no managers for Baja Concrete USA
19 ("Baja") on site:

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

21 **A:** Those guys would come to the Newway foremen and the Newway foreman would guide
22 them and give them directions, what to work on, when to go home. Sometimes concrete

23 ⁵ See City's Response to Appellant Anthony Machado's Motion for Summary Judgment, pp. 3-7.

⁶ Machado Deposition, page 42, lines 4-7.

⁷ Appellant Antonio Machado's Response to the City of Seattle's Motion for Summary Judgment, p. 4.

⁸ Machado Deposition, page 164, lines 11-16.

⁹ Appellant Antonio Machado's Response to the City of Seattle's Motion for Summary Judgment, p. 3.

¹⁰ Sara Kincaid Declaration, Exhibit 4, 20(b)(6) Deposition of Mercedes de Armas, page 161, line 22 to page 162, line 14.

comes late or it's slow and you have to stay late, it's not uncommon for us to work 10 hours in a day and the form and let them know how late to stay.

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

A: No. No managers, no.¹¹

Machado also claims that he had little to do with the relationship between Baja and Newway. He neglects to mention repeated loans to support the workers Baja was hiring for Newway. He had a close relationship with Baja founder Carlos Ibarra, and his brief claims that “Because Mr. Ibarra had issues sometimes obtaining American money” the repayment from Baja’s accounts was necessary, however nothing in the record supports this explanation. There is no explanation anywhere in the record for why a contractor’s employee needed to loan money to a subcontractor to support its “normal” contract with Newway. If the contract was so typical and so normal in the industry, why is a Newway employee loaning money to the subcontractor, thus having a personal financial stake in the subcontractor’s success? Machado never provides a satisfactory explanation for this part of the relationship.

III. THE DECLARATION OF JONATHAN PARRA PONCE IS PROPERLY CONSIDERED BY THE HEARING EXAMINER

Machado argues that the Declaration of Jonathan Parra Ponce should be disregarded as untrustworthy. He cites authorities that are all distinguishable from a sworn declaration from a worker who describes his personal observations and experiences on the worksite. The cases Machado cites involve a conclusion regarding a criminal suspect’s identity,¹² a conclusion based on a hypothetical set of facts,¹³ a conclusory declaration about damage to the person’s reputation and

¹¹ Daron Williams Declaration, Exhibit A, Interview Statement of Anthony Machado, page 2 (SEATTLE-OLS-1061), lines 24-26. (Previously filed in support of City’s Motion for Summary Judgment)

¹² *State v. Jamison*, 93 Wn.2d 974, 613 P.2d 776 (1980).

¹³ *Ulve v. City of Raymond*, 51 Wn2d 241, 316 P.2d 908 (1957)

1 finances without specific supporting facts,¹⁴ an opinion about whether instructions were followed,¹⁵
2 and an opinion about criminal insanity.¹⁶

3 In contrast to all of the cases Machado cites, Mr. Parra Ponce described his personal
4 experience and what he heard and observed regarding: being paid incorrect amounts, how long his
5 days were, how he traveled to the worksite, what he had been told by Contreras. The one conclusion
6 that he stated was that “Tony was the boss.”¹⁷ He said multiple times in his declaration that “Tony”
7 (“Machado”) was in charge and was using foremen or Contreras to communicate his orders. This
8 particular fact is uncontroverted by Machado’s own testimony about how much control he had over
9 the worksite and *all* workers, as discussed in Section II *supra* and in the City’s Motion for Summary
10 Judgment. Mr. Parra Ponce described what he saw and heard Machado doing in his capacity as the
11 “boss” of the worksite. His statements are not based on conjecture or conclusions, but on his own
12 experience and observations, and no authority supports the Hearing Examiner disregarding this
13 evidence.

14 **IV. THE UNDISPUTED FACTS IN THIS CASE SHOW THAT MACHADO WAS A** 15 **JOINT EMPLOYER OF THE WORKERS**

16 Under Seattle’ Labor Ordinances, “[m]ore than one entity may be the ‘employer’ if
17 employment by one employer is not completely disassociated from employment by the other
18 employer.”¹⁸ Based on the undisputed material facts of this case, Baja, Newway, and Machado are
19 all joint employers.

20 The Seattle Human Rights Rules (“SHRR”) govern the practices of OLS in administering
21 requirements for minimum wage and minimum compensation under SMC section 14.19.¹⁹

22 ¹⁴ *Don Wan Kim v. O’Sullivan*, 133 Wn. App. 557, 137 P.3d 61 (2006).

23 ¹⁵ *Radanite Co. v. Smith*, 172 Wn. 390, 20 P.2d 33 (1933).

¹⁶ *State v. Smith*, 16 Wn. App. 300, 555 P.2d 431 (1976).

¹⁷ Declaration of Jonathan Parra Ponce, ¶ 14.

¹⁸ SMC 14.16.010, 14.19.010, 14.20.010.

¹⁹ SHRR 90-001.

1 Specifically, SHRR 90-045(3) provides guidance to determine whether employment is joint
2 employment, or separate and distinct employment in a given case.²⁰ Whether employment is joint
3 employment or not “depends upon all the facts in the particular case.”²¹ Joint employment may be
4 found where: the employee performs work that simultaneously benefits two or more employers, or
5 one employer is acting directly or indirectly in the interest of the other employer (or employers) in
6 relation to the employee, or the employers are not completely disassociated with respect to the
7 employment of a particular employee and they share control of the employee, directly or indirectly,
8 by reason of the fact that one employer controls, is controlled by, or is under common control with
9 the other employer.²²

10 *Becerra Becerra v. Expert Janitorial, LLC*²³ provides guidance for joint employment. This
11 case held that the factors outlined in *Torres-Lopez*²⁴ should be used as an “economic reality” test to
12 determine whether a joint employment relationship exists under minimum wage statutes.²⁵ The
13 “economic reality” test involves an examination of 13 nonexclusive factors, including five formal
14 or regulatory factors²⁶ and eight common law or functional factors.²⁷ However, these “factors are
15 not exclusive and are not to be applied mechanically or in a particular order.”²⁸ A court considering

16 ²⁰ SHRR 90-045(3).

17 ²¹ *Id.*

18 ²² *Id.* (emphasis added).

19 ²³ *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 332 P.3d 415 (2014).

20 ²⁴ *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir.1997).

21 ²⁵ *Becerra*, 181 Wn.2d at 196-97.

22 ²⁶ *Id.* (citing *Torres-Lopez*, 111 F.3d at 639-40) (the 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).

23 ²⁷ *Torres-Lopez*, 111 F.3d at 639-40 (internal quotation marks and citations omitted; alterations in original) (the 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).

24 ²⁸ *Becerra*, 181 Wn.2d at 198.

1 joint employment must examine the totality of the circumstances and the “circumstances of the
2 whole activity.”²⁹

3 In addition to the 13 factors, a court can “consider any other factors it deems relevant to its
4 assessment of the economic realities.”³⁰ The economic reality test “offers a way to think about the
5 subject and not an algorithm.”³¹

6 Most of the cases cited by Machado involve corporate officers at a high level of a
7 corporation. While Machado was not the CEO of Newway, his level of control and involvement
8 over the particular group of workers in this case was unique. Machado cites to *Baystate Alternative*
9 *Staffing, Inc. v. Herman*, in which the court expressed concern that “an expansive application of the
10 definition of an ‘employer’” to any employee who controls the “work situation” is untenable.³² The
11 case that the *Baystate* court followed, however, had found corporate officers liable where they had
12 control over significant aspects of the corporation’s day to day functions.³³

13 Machado’s role here was unique. He does not dispute the facts that show that his role with
14 the workers paid by Baja exceeded the typical site supervisor relationship. Machado was not a
15 typical “middle manager” to the extent that finding him liable sets a problematic precedent. He was
16 uniquely involved in the offsite support for the workers, loaning large amounts of money to Baja’s
17 owner’s brother, Carlos Ibarra, to support the workers’ housing and other needs. Ibarra’s deal with
18 Newway was verbal and not well-understood by Newway’s 30(b)(6) representative and this opaque
19 agreement was propped up by Machado’s willingness to invest his own money in it.

22 ²⁹ *Id.* (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).

³⁰ *Becerra*, 181 Wn.2d at 198 (quoting *Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71-72 (2d Cir. 2003))

23 ³¹ *Becerra*, 181 Wn.2d at 198 (quoting *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007)
(emphasis added).

³² *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 677-78 (1st Cir. 1998).

³³ *Donovan v. Agnew*, 712 F.2d 1509, 1514 (1st Cir. 1983).

1 Machado's loans were repaid directly from Baja.³⁴ As such, he had a financial interest in
2 Baja's success, which highlighted his close, intertwined relationship between Machado, Newway,
3 and Baja. Machado did not merely control the "work situation" of the workers, he was a key
4 intermediary between Newway, Baja, and the workers with a personal financial interest in the
5 success of Baja.

6 Machado supervised the Newway foremen who directed the Workers.³⁵ Machado's foremen
7 assigned tasks to Workers throughout the workday.³⁶ Machado walked around all day to ensure
8 everyone was working safely.³⁷ Machado spent 90 to 95 percent of his time at the construction site.³⁸
9 Machado and his foremen controlled Workers' daily schedules.³⁹ Machado directed his foremen
10 regarding the time crews needed to begin work and when they needed to stay after hours.⁴⁰

11 Machado was almost always present at the construction site⁴¹ and was continuously
12 monitoring workers' performance.⁴² If Machado discovered a performance problem, he would
13 address it with his own foreman, regardless of whether the workers were on Newway's or Baja's
14 payroll.⁴³

15 Machado was a joint employer along with Baja and Newway, as shown by the joint
16 employment factors expressed in *Becerra v. Expert Janitorial, LLC*,⁴⁴ and *Torres-Lopez v. May*.⁴⁵

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18 ³⁴ Cindi Williams Declaration in Support of Response to Antonio Machado's Motion for Summary Judgment, Exhibit
19 A, Deposition of Mercedes de Armas (individually), page 46, line 11 to page 47, line 19.

³⁵ Cindi Williams Declaration, Exhibit A, Deposition of Kwynne Forler-Grant, page 80, lines 2-6. (Previously filed in
20 support of City's Motion for Summary Judgment).

³⁶ Deposition of Antonio Machado, page 42, lines 4-14, page 49, line 55 to page 53, line 5.

³⁷ Deposition of Antonio Machado, page 23, lines 2-20.

³⁸ *Id.* at page 24, lines 18-25.

³⁹ *Id.* at page 46, lines 13-19, page 54, lines 13-21.

⁴⁰ Deposition of Antonio Machado at page 46, lines 13-19, page 54, lines 13-21; *see also* Machado Interview
22 Statement, page 3, lines 6-7, page 4, lines 13-15.

⁴¹ *Id.* at page 24, lines 18-21.

⁴² *Id.* at page 23, lines 2-16, page 25, lines 15-18, page 29, lines 9-11.

⁴³ *Id.* at page 67, line 12 to page 68, line 19.

⁴⁴ 181 Wn.2d 186.

⁴⁵ 111 F.3d 633 (9th Cir. 1997).

1 The factors should not be applied in a particular order, and a court should focus on the totality of
2 the circumstances.⁴⁶ The character of the work that the Workers were doing, which made them
3 indistinguishable from Newway workers, lends itself to the conclusion that Machado was a joint
4 employer.

5 The nature and degree of control over the Workers is a joint employment factor that is central
6 to the analysis. Machado's complete control over the workers also points to joint employment.
7 Because Machado's control over the start and finish times of Workers is so significant in relation
8 to the violation, it factors strongly in favor of a finding that Machado jointly employed the Workers.

9 Jonathan Parra Ponce stated that Machado had a say in who was hired and fired, which is
10 another joint employment factor.⁴⁷ Even if the Hearing Examiner disregards that assertion,
11 Machado testified that his foremen influenced Baja to fire workers if they didn't like them.⁴⁸ While
12 he fails to discuss it in his Response, it is undisputed that Machado managed and controlled the
13 Workers' day-to-day performance through his foremen. Machado had daily control over all of the
14 workers and would assign them tasks via his foremen. Contreras had little to no control over the
15 workers on the job site, there were no other "Baja managers." Machado consistently controlled all
16 of the workers on his site, regardless of whether they were paid by Newway or Baja.

17 V. CONCLUSION

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

20 DATED this 17th day of August, 2022.

21 [SIGNATURE BLOCK ON THE FOLLOWING PAGE]
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23 ⁴⁶ *Becerra*, 181 Wn.2d at 198.

⁴⁷ *Torres-Lopez*, at 639-40.

⁴⁸ Interview Statement of Antonio Machado, page 3 (SEATTLE-OLS-1062), lines 9-12.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify under penalty of perjury under the laws of the State of Washington that, on
3 this date, I caused to be served true and correct copies of the foregoing document:

4 **Respondent City of Seattle's Reply to Appellant Antonio Machado's Response to the
5 City's Motion for Summary Judgment;**

6 on the parties listed below and in the manner indicated:

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

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

/s/ Sheala Anderson
SHEALA ANDERSON