BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: **BAJA CONCRETE USA CORP.,** **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 APPELLANT MACHADO'S MOTIONS IN LIMINE

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I. Motion for a prehearing finding that Mr. Machado was not a joint employer as a matter of law.

Mr. Machado submitted a prehearing memorandum of law on this subject. He incorporates that memorandum into this motion by reference. The Seattle Municipal Code is clear on its face: a person is not an entity, and only entities may be joint employers. Because Mr. Machado is a person rather than an entity, OLS's determination that he was a joint employer under the Code was erroneous as a matter of law.

II. Motion for an order that Mr. Machado be permitted to observe the entire hearing.

Mr. Machado has the right to cross-examine the witnesses. See Hearing Examiner Rules of Practice and Procedure (HER) 3.12(a), (i). To effectively exercise this right, Mr. Machado needs to be allowed to be present to hear each witness' testimony. Mr. Machado is in the best position to inform his counsel whether the witnesses are testifying truthfully, or untruthfully, and if

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untruthfully how best to demonstrate this. If he is not permitted to hear the witnesses' testimony live, he cannot effectively exercise his right to cross-examine them through counsel.

It should be noted that Evidence Rule 615 permits the court to order a witness excluded from the courtroom so that they cannot hear the testimony of other witnesses, except when that witness is a party. The Hearing Examiner should take ER 615 into consideration. Mr. Machado is not just a witness he is a party. He should not be excluded from the proceedings.

III. Motion for an Order declaring that the City may not rely on information OLS did not possess as of August 25, 2021, to justify OLS' Findings of Fact, Determination and Final Order.

The proper question on appeal is whether OLS' Finding of Fact, Determination and Final Order (Determination) was correct when it was issued in light of the evidence OLS actually considered, not whether evidence developed after the Determination was issued supports its legitimacy.

When a respondent appeals a Director's Order issued pursuant to SMC 14.20, 14.19, or 14.16, as the appellants have here, "[t]he review shall be conducted de novo". See SMC 14.20.070.A, 14.19.090.A, 14.16.090.A. Generally, de novo review means the appellate court engages in the same inquiry as the trial court. *See, e.g., Trimble v. Wash. State Univ.,* 140 Wn.2d 88, 92, 993 P.2d 259, 261 (2000). In other words, the appellate court reviews the evidence that was presented below giving the trial court's findings of fact and conclusions of law no deference; the appellate court does not re-open the case for the submission of new evidence.

HER 3.12(b) provides: "Testimony and argument are limited to matters relevant to the Examiner's decision." The Hearing Examiner may exclude evidence that is irrelevant or immaterial. HER 3.18(b). *See also* HER 3.18(a) (emphasis added) (Evidence… may be admitted if the Examiner determines it is relevant…"); 3.18(g) (permitting the Hearing Examiner to consider the Washington State Rules of Evidence); ER 402 ("Evidence which is not relevant is not admissible.")

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Here, evidence developed by the City after OLS issued its Determination was not considered by OLS in making its Determination. In reviewing the propriety of OLS's Determination, the Hearing Examiner should not consider evidence that OLS itself did not consider.

By contrast, evidence developed by the appellants after the Determination was issued, which tends to show that OLS's Determination was incorrect at the time it was issued, is clearly probative of whether OLS's Determination was sound.

IV. Motion to exclude after-acquired evidence.

Mr. Machado moves the Hearing Examiner for an Order excluding the City's exhibits 12 and 26-33, and Baja's exhibit 158 which is the same as the City's exhibit 12, except for purposes of impeachment. OLS had none of this information at the time it issued its Determination, thus this evidence is not probative of whether the OLS's Determination was correct when it was issued.

Moreover, to the extent that the City intends to offer exhibits 12 and 26-33, or Baja intends to offer exhibit 158, to prove the truth of the statements contained therein, those statements are hearsay. They would not be hearsay if they were offered as proof of inconsistent prior sworn testimony, or of proof of consistent prior testimony to rebut a charge of fabrication or improper influence or motive, of course. See ER 801(d)(1). But neither the City nor Baja has made any such offer of proof.

Mr. Machado understands that hearsay evidence may be admitted if the Hearing Examiner determines it is relevant, reliable and has probative value. But again, evidence developed by the City after the Determination was issued is neither relevant nor probative, because OLS did not rely on that evidence in making its decision.

V. Motion to limit the testimony of certain of the City's proposed witnesses.

OLS interviewed eight workers in the course of its investigation. The City has submitted the unsworn, unsigned interview notes from six of those witness interviews as evidence. See City's exhibits 134, 137-141. Mr. Machado has no objection to the City calling Mr. Parra Ponce, Mr.

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Gamboa Lopresti, Mr. Fernandez Borquez, Mr. Catalan Toro, Mr. Gomez Chavez, or Mr. Hinestroza Diaz as witnesses, provided that the City limits its questions to those which will elicit the information those witnesses gave OLS investigators prior to the issuance of the Determination.

In addition to those six workers, the City also listed Messers. Cespedes Rivera, Arriagada Aguillera, Fiol Martinez, Acosta Caballero, and Estrada Parra as witnesses. At least three of those individuals could not have been among the workers interviewed by OLS, since OLS only interviewed eight workers total. The City intends to ask these five additional workers to testify about the working conditions at the 1120 Denny Way construction project. *See* Respondent City of Seattle's Witness and Exhibit List (Final), dated May 24, 2023. As such, it appears that the City intends to develop evidence for the first time on appeal. This should not be permitted.

VI. Motion for an Order declaring that none of the workers identified as City witnesses are, or ever were, City clients, thus no attorney-client privilege protecting the communications between those workers and City attorneys exists.

The attorney-client privilege does not arise unless an attorney-client relationship actually exists. *See, e.g., Dietz v. Doe*, 131 Wash. 2d 835 (1997). The party seeking to assert the privilege bears the burden of proving the existence of the attorney-client relationship or other protected relationship. *Id* at 851. An attorney's bare claim of the privilege is not dispositive. *Id.*

The City has repeatedly taken the position that OLS was and is a neutral fact-finder, and that the workers were not and are not its clients. The City should therefore be estopped from claiming that any communications its attorneys had with the workers are protected by the attorney-client privilege.

Mr. Machado recognizes that the City has designated some of the worker-witnesses to have been confidential government informants in the past, and that the City has, in the past, taken the position that the identity of those workers was privileged information. However, to the extent that the City is now disclosing those workers' identities, that prior assertion of a protected relationship has been waived. Regardless, even if a government informant privilege were extant, this would

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not bar appellants' attorneys from questioning the workers about conversations they had with City attorneys at the hearing, because the City's attorneys are not, by the City's own admission, the witnesses' attorneys.

RESPECTFULLY SUBMITTED this 7th day of June, 2023.

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DECLARATION OF SERVICE

I caused a copy of the foregoing Appellant Antonio Machado's Motions in Limine to be served to the following in the manner indicated:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

Signed and DATED this 7th day of June 2023 in Seattle, Washington.

s/ Elena Maltos
Elena Maltos, Paralegal

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