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 APPELLANT MACHADO'S MOTIONS IN LIMINE

I. INTRODUCTION

Respondents, the City of Seattle and the Seattle Office of Labor Standards (collectively "City") ask the Hearing Examiner to deny Appellant Antonio Machado's ("Machado") Motions in Limine pursuant to Hearing Examiner General Rule ("HER") 2.17. All of Machado's motions should be denied.

II. ARGUMENT

A. Machado's motion in limine for a finding as to the ultimate issue for contested hearing should be denied.

Relevant, material, and reliable evidence should be admitted in this hearing to demonstrate Mr. Machado acted as a joint employer. A motion in limine is a motion used to preclude *prejudicial*

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

or objectionable evidence.[1] They are not, however, meant as an exercise for a party to parrot legal axioms or to prematurely sidestep an evidentiary hearing. Not only does Machado fail to provide any legal authority for the court to find he is not a joint employer, but Machado also disguises a second summary judgment motion as a motion in limine. Machado argues that he should not be considered a joint employer because he is an individual.[2] In his Motion for Summary Judgment, which was denied, Machado argued that he is not a joint employer but merely an employee of Newway.[3] Just as the summary judgment motion was denied, the motion in limine should be denied.

Additionally, Machado argues that the Seattle Municipal Code ("SMC") does not allow an individual to be a joint employer, even though an employer is defined as

> *any individual*, partnership, association, corporation, business trust, or any entity, *person* or group of persons, or a successor thereof, that employs another person and includes any such entity *or person* acting directly or indirectly in the interest of an employer in relation to an employee. More than one entity may be the "employer" if employment by one employer is not completely disassociated from employment by the other employer[.][4]

Machado asks this court to read the definition of "employer" in a way that would lead to an absurd result. However, this Court should read the ordinance as a whole, and harmonize its provisions "by reading them in context with related provisions."[5] The court must also avoid absurd results when interpreting statutes.[6] Machado argues that *only* entities can be joint employers. This is absurd, given that the definition of employer includes partnerships, associations,

---

[1] *See Fenimore v. Donald M. Drake Const. Co*., 87 Wn.2d 85, 91, 549 P.2d 483 (1976); *see also State v. Blum*, 17 Wn. App. 37, 44, 561 P.2d 226 (Div. 2 1977) ("The motion In limine is appropriate in at least three instances of evidence admissibility determinations. It may be used when evidence should be excluded because its admissibility is prohibited by technical exclusionary evidence rules or statute, when previous case law has adjudged the evidence too prejudicial, or when counsel can convince the trial court that the probative value of the evidence is outweighed by its prejudicial effect.").

[2] Appellant Machado's Motions in Limine, p. 1.

[3] *See* Appellant Machado's Motion for Summary Judgment and Exclusion of Evidence, pp. 9-10.

[4] SMC 14.16.010, 14.19.010, 14.20.010 (emphasis added).

[5] *Segura v. Cabrera*, 184 Wn.2d 587, 593, 362 P.3d 1278 (2015).

[6] *State v. Larson*, 184 Wn.2d 843, 851, 365 P.3d 740 (2015).

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

and corporations. If the court were to interpret joint employment the way Machado believes it should be interpreted, then no corporation, association, or partnership could be a joint employer either. Clearly, this is not the intent of the legislature. The additional language explaining joint employers simply clarifies that more than one employer, whether it is an *individual*, a partnership, an association, corporation, business trust, entity, *person* or group of persons, or a successor thereof, can employ an employee. Any other reading of the language is contrary to the intent of the SMC[7] and accordingly, Machado's motion asking the court to find he is not a joint employer should be denied.

B. If Mr. Machado is permitted to observe the entire hearing, an OLS representative should be permitted to assist the City during trial.

The City does not oppose Machado's motion to allow Machado to observe the entire hearing, as long as this ruling is applied equally to all parties, including the City. In motions in limine, the City moved to exclude witnesses pursuant to Evidence Rule 615. The rule also allows "an officer or employee of a party which is not a natural person designated as its representative by its attorney" to be present during the hearing.[8] The City wishes to designate an employee of the Seattle Office of Labor Standards as a representative and the representative should be permitted to be present throughout the hearing.

C. The Hearing Examiner's de novo review should include all relevant evidence to determine whether substantial evidence supports the Director's Order.

Machado cites to no authority to support his position that de novo review means additional evidence cannot be heard by this Court. Machado cites *Trimble v. Washington State University*,[9] but that case merely restates the de novo standard for an appellate court as being the same as the

---

[7] In 2015, Ordinance No. 124960 added "joint employment" to the SMC to extend liability "to "joint employers" even when there is no formal employment relationship if employment by one employer is not completely disassociated from employment by the other employer[.]"

[8] Evidence Rule ("ER") 615(2).

[9] *Trimble v. Washington State University*, 140 Wn.2d 88, 993 P.2d 259 (2000).

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

trial court. Several examples demonstrate that a de novo review includes additional evidence, particularly where a trial court reviews an administrative decision.

In *Len v. Office of the Superintendent of Public Instruction*,[10] an Administrative Law Judge ("ALJ") conducted a de novo review of a school district's disciplinary action and allowed additional evidence.[11] The Court of Appeals found no error with this procedure, as the ALJ followed RCW 34.05.449(2) and WAC 181-86-150. RCW 34.05.449(2) provides the general trial procedures for ALJ's and are not dissimilar to the Rules of Procedure for the Seattle Hearing Examiner governing evidence and trials.

In *Matter of Deming*,[12] the Washington Supreme Court distinguished between "de novo" and "de novo on the record." The court explained "From the power to permit the introduction of additional evidence, we conclude that our review is to be de novo. When no new evidence is received, our review must be de novo on the record."[13] The court cited to 2 Am.Jur.2n §698, p.597 (1962):

> A trial or hearing "de novo" means trying the matter anew the same as if it had not been heard before and as if no decision had been previously rendered.... Even though designated an "appeal," a review in which the court is not confined to a mere reexamination of the case as heard before the administrative agency but hears the case de novo on the record before the agency and such further evidence as either party may see fit to produce is to be regarded as an original proceeding. Thus, on a trial or hearing de novo it has been held immaterial what errors or irregularities or invasion of constitutional rights took place in the initial proceedings.[14]

Courts distinguish between "de novo" review and review in an appellate capacity. Only where there is specific authority that a trial court's review is appellate in nature may additional

---

[10] *Len v. Office of the Superintendent of Public Instruction*, 188 Wn. App. 1040, 1 (Not reported in P.3d, 2015).
[11] *Id.* at 4.
[12] *Matter of* Deming, 108 Wn.2d 82, 88, 736 P.2d 639 (1987).
[13] *Id.* (quoting *In re Kneifl*, 217 Neb. 472, 477, 351 N.W.2d 693, 696097 (1984) internal citations omitted).
[14] *Deming*, 108 Wn.2d at 88.

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

evidence by excluded.[15] In *In re Marriage of Balcom and Fritchle*, where a trial judge's review of a commissioner's ruling is constrained because under RCW 2.24.050, a trial judge acts in an appellate capacity for commissioner's rulings and should not hear additional evidence.[16] The Hearing Examiner rules contemplate the taking of testimony and additional evidence, and nothing in the Rules on Appeal restrict that activity. Hearing Examiner General Rule 3.18 governs evidence at hearings, and subsection (d) states:

> All evidence that a party plans to submit at hearing shall be exchanged with all other parties to the appeal, except as otherwise agreed by the parties or ordered by the Examiner. Any evidence offered at the hearing that was not disclosed by the party offering it may be excluded, unless the Examiner permits it for impeachment purposes, or the party demonstrates extenuating circumstances apply.

This subsection, in addition to the general rules governing evidence, contemplates that appeals will include additional evidence not found in the administrative record.

The Hearing Examiner Rules for Procedure clearly contemplate that appeals will include the introduction of new evidence, and do not specify that any appeal is either limited to the department's record or limited to the time during which the department's investigation took place. Rule for Appeal Cases 5.12 outlines Discovery and contemplates that considerable additional evidence may arise from the discovery process. The Hearing Examiner Rules also include sections 5.13 Subpoenas, 5.14 Parties' Rights and Responsibilities includes the right to presentation of evidence, 5.16 Hearing Format, and 5.17 Burden and Standard of Proof, subsection (e) which states: "Where an appellant fails to present evidence or argument at hearing (including in closing arguments) concerning an issue raised in its notice of appeal, such issue is generally considered abandoned, and will be dismissed." This implies that additional evidence is not only allowed but

[15] *See In re Marriage of Balcom and Fritchle*, 101 Wn. App. 56, 1 P.3d 1174 (2000).
[16] *Id.* at 59-60.

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

is generally required to support an appellant's position.

All of these indicate that the appeal process includes the introduction of new evidence. Nowhere in the SMC or the Hearing Examiner Rules for Appeal does it state that review is limited to the record and Machado failed to provide any authority upon which the court can rely to rule in his favor. Each of the Ordinances under which the Office of Labor Standards issued its Order allows for "de novo" review, not "de novo on the record" review.[17]

D. Machado's motion to exclude relevant evidence, depositions of affected workers, should be denied pursuant to ER 801(d).

Machado asks to exclude the depositions of affected workers because they were taken after the issuance of the Director's Final Order. Machado's motion should be denied. As stated above in section C, de novo review does not require the hearing examiner to decide the case in a vacuum. In addition, unless there is some other legal basis for exclusion, a witness's deposition is not hearsay. Pursuant to ER 801(d), a statement is not hearsay if the "declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is … (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive…." If a party attacks the credibility of an employee witness who has been deposed, then ER 801(d) allows the City to present the witness's prior deposition testimony.

E. The Hearing Examiner should hear relevant evidence, including testimony from affected workers.

Without any legal authority, Machado asks this court to exclude the testimony from affected workers. However, relevant evidence should be admissible. In this case, relevant evidence will

[17] *See* SMC 14.20.070, et al.

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

come from, but is not limited to, those employees who worked in Seattle at the 1120 Denny Way worksite during the relevant time period. All of the workers on the City's witness list fall in that category, clearly making them relevant. Unless there is some legal basis for exclusion, all of the City's witnesses are relevant and should be permitted to explain the working conditions at the worksite. Accordingly, Machado's motion to exclude certain witnesses should be denied.

F. Certain witness statements are protected under the government informant privilege.

Machado motion asking government sources to reveal confidential information should be denied. Courts have held that the legitimate concern for protecting confidential sources of information makes nondisclosure essential to effective law enforcement.[18] The City is not required to disclose complainants' identifying features such as addresses, current or former positions held, or names of employers if nondisclosure is essential to effective law enforcement.[19] Disclosure of confidential information shared during investigation of the case will have a "chilling effect" on future investigations and enforcement process.[20] Because some of the witnesses are concerned about retaliation, some information should remain confidential. Machado's motion for disclosure of confidential information should be denied.

III. CONCLUSION

The City respectfully requests that the Hearing Examiner deny Machado's motions in limine.

DATED this 9th day of June, 2023.

[18] *Tacoma News, Inc. v. Tacoma-Pierce Cty. Health Dep't*, 55 Wn. App. 515, 522–24, 778 P.2d 1066 (1989).
[19] *Id.* at 523.
[20] *See id.* at 524.

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

ANN DAVISON
Seattle City Attorney

By: */s/Lorna S. Sylvester*

Lorna S. Sylvester, WSBA #29146
Cindi D. Williams, WSBA #27654
Trina L. Pridgeon, WSBA #54697
Assistant City Attorneys
701 Fifth Avenue, Suite 2050
Seattle, Washington 98104-7097
Email: cindi.williams@seattle.gov
Email: lorna.sylvester@seattle.gov
Email: trina.pridgeon@seattle.gov
Attorneys for Respondent,
The Seattle Office of Labor Standards

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

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, **City's Response to Appellant Machado's Motions in Limine** on the parties listed below and in the manner indicated:

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

(**x**) Email: wolfe@oles.com

Mark D. Kimball
Alex T. Larkin
MDK Law
777 108th Ave NE, Suite 2000
Bellevue, WA 98004
Attorneys for Appellant, Baja Concrete USA Corp

(**x**) Email: mkimball@mdklaw.com
(**x**) Email: alarkin@mdklaw.com

Aaron Rocke
Allen McKenzie
Rocke Law Group, PLLC
500 Union Street, Suite 909
Seattle, WA 98104
Attorney for Appellant, Antonio Machado

(**x**) Email: aaron@rockelaw.com
(**x**) Email: allen@rockelaw.com

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

Dated this 9th day of June, 2023, at Seattle, Washington.

/s/Natasha Iquina
NATASHA IQUINA

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200