BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

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| In the Matter of the Appeal of:<br>**BAJA CONCRETE USA CORP.,**<br>**NEWWAY FORMING INC., and**<br>**ANTONIO MACHADO**<br><br>From a Final Order of the Decision issued by the Director, Seattle Office of Labor Standards | Hearing Examiner File:<br>**No:** LS-21-002<br>LS-21-003<br>LS-21-004<br><br>CLOSING ARUGMENT |

**A. Antonio Machado is not a joint employer.**

The OLS erroneously determined that Mr. Machado is a joint employer of the aggrieved employees. Mr. Machado's role as site superintendent does not make him a joint employer. First, OLS did not meet its burden to show joint employment under the *Becerra* factors. Second, holding Mr. Machado liable as a joint employer contradicts the policy goals of the joint employer doctrine and the City Ordinances. Machado echoes arguments by Newway against finding joint employment or liability.

**1. The evidence does not support the claim that Mr. Machado is a joint employer under the *Becerra* factors.**

Antonio Machado was an employee of Newway Concrete and was not responsible for the alleged violations in this action. Mr. Machado was the site superintendent at the 1120 Denny Way site and reported to the site's Project Manager. OLS's determination that Mr. Machado is a



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joint employer does not hold up under a complete analysis of the economic realities test using accurate facts supported by the record.

**a. Evidence shows that unanalyzed *Becerra* factors do not support a finding Mr. Machado jointly employed aggrieved workers.**

OLS argues Mr. Machado is a joint employer based on its analysis of the "economic reality" of his relationship with the aggrieved workers. Determination at 16. To reach this conclusion, it purported to analyze the factors outlined in *Becerra* and found that they showed Mr. Machado jointly employed Baja workers. Determination at 18. However, OLS did not fully analyze applicable factors or explain why it failed to consider some exculpatory factors at all.

OLS's support for its finding is that Mr. Machado "set hours of work," "supervised," and "directed" employees' work "regardless of whether Newway or Baja paid them." Hearing Determination at 8. It also relied on a worker's statement that Mr. Machado "sometimes instructed Roberto Soto Contreras, the Baja supervisor, to fire specific workers." OLS also found that Mr. Machado had sufficient control over workers because he directed them by passing instructions through Roberto Soto Contreas, the Baja Supervisor. *Id.* The evidence does not support these allegations, and they are insufficient to establish joint employment.

OLS's analysis considers only three regulatory factors and only partially analyzes them: degree of control, degree of supervision, and ability to hire and fire. *Becerra* at 421, 12 (describing the five regulatory factors). Though the *Becerra* court pointed out that the factors need not be applied mechanically or in a particular order, it also noted, "[T]he determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity." *Becerra*, at 14 ("The court is also free to consider any other factors it deems relevant to its assessment of the economic realities.") (citing *Rutherford,* 331 U.S. at 730; *see also*, *Zheng,* 355 F.3d at 71-72). Like the lower court in *Becerra*, which the Washington Supreme Court overturned, OLS "did not consider all the relevant factors ... or sufficiently identify why it deemed certain factors to be not relevant." *Id.*



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The appliable factors that OLS ignored show that Mr. Machado is not a joint employer as contemplated by the ordinances. Mr. Machado had no control over the "purse strings" of either Newway or Baja. He had no authority to determine pay rates for the workers. He had no hand in preparing payroll or administering payments to workers. He was not involved in the contracts between Newway and its contractors. He did not handle accounts receivable or accounts payable. Mr. Machado had no opportunity for profit or loss depending on Baja workers' skills—Newway paid him the same rate regardless of the Baja workers' productivity. He is not a chief corporate officer of either Newway or Baja USA. He did not exercise operational control over significant aspects of Newway or Baja USA's day-to-day finances, nor is he alleged to have any ownership interest in either company.

Evidence supports Mr. Machado's isolation from either company's core operations. Mr. Machado testified that Tom Grant facilitated these operations for Newway. Hearing Trans. Day 2 pt. 4 at (00:12:43). Tom Grant also coordinated and assigned workers to each worksite. *Id.* In fact, Mr. Machado stated that he "wasn't involved [in] any high-end" tasks of this sort and that he only specialized in "field work." *Id.*

Mr. Machado's explanation of "field work" shows how different his role was from someone like Mr. Grant. Mr. Machado's role was to meet with project managers and decide how best to maintain the construction schedule for the day based on what they told him about project goals. *Id.* at (00:13:45)- 00:14:00). In contrast, he described that Mr. Grant and others "did all the paperwork." As superintendent, Mr. Machado had no role in approving invoices or signing paychecks on a day-to-day basis, which was also Tom Grant's job. *Id.*at (00:14:51)–(00:14:57). Mr. Machado presented uncontroverted evidence that he had no check writing power on either company's behalf. *Id.* at (00:14:57)–(00:16:27).

There's no evidence Mr. Machado was involved in the administrative or financial management of Newway or Baja.



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**a. Evidence undermines OLS's finding that Mr. Machado was a joint employer under the analyzed factors.**

Mr. Machado's role was not to direct or control Baja workers.

Mr. Machado's testimony regarding his role at Newway undermines the findings OLS made in its determination. Testimony at the hearing shows that worker statements on which OLS based its findings in the determination were either misstated or taken out of context and, under further scrutiny, do not support finding Mr. Machado was a joint employer. This evidence failed to properly capture the reality of Mr. Machado's role as a site superintendent.

OLS found that Mr. Machado was a joint employer because he "supervised" the Baja workers indirectly through the Newway foreman. Still, it ignored that his supervision did not relate to the alleged violations. *See Moreau v. Air France*, 343 F.3d 1179, 1188 (9th Cir. 2003) ("supervision of workers not indicative of joint employment where principal merely gave 'specific instructions to a service provider' concerning performance under a service contract"). Supervision that is perfectly consistent with a typical, legitimate subcontracting arrangement does not indicate a joint employer relationship. *Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 75 (2d Cir. 2003). Mr. Machado was the site superintendent. To the extent Mr. Machado

supervised the workers, indirectly, he did so as an employee of Newway Forming and in the interest of his designated role within the company.

Evidence shows Mr. Machado did not have the authority to hire or fire employees of either Newway or Baja.

Mr. Machado testified that he had no authority or influence over hiring or firing employees of either Newway or Baja. Hearing Testimony of Machado Day 2 part 4 at (00:17:54)– (00:18:18) "I never hired anybody from Baja, no . . . I never fired anybody. Never."

He also had no hand in the contract arrangement between Newway and Baja. When asked whether, as superintendent of the project, he would "contract[ ] with subcontractors," he answered, "No, I don't . . . I don't hire anybody . . . I have nothing to do with that." Hearing



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Testimony of Machado Day 2 part 4 at (00:13:23-00:13:31). Mr. Machado explained that his role doing "field work" entailed telling workers broadly what projects should be worked on for the day (instructions he received from the project managers above him) and ensuring workers complied with safety regulations. [cite].

Evidence shows Mr. Machado did not control employee hours or have the power to influence overtime.

Mr. Machado was a conduit between the project managers who told him what needed to get done every day and the workers who completed the required tasks. He simply relayed the schedule to laborers according to the overall project goals. Any overtime hours accrued due to the daily schedule is attributable to the project managers' daily demands, which Mr. Machado had no control over. Further, it was not Mr. Machado's task to track employee hours, so he had no reason to know workers accrued overtime, let alone whether Baja paid them for it. His contribution to setting the daily schedule was providing the project managers with timing estimates of certain tasks so that they could accurately plan.

For example, Mr. Machado testified that the owners, developers, and foremen supervising the labor would meet and make a schedule based on the ultimate project goals. Mr. Machado testified that the project managers determined the daily schedule as a group based on timing estimates from the superintendents of each construction team. Hearing Testimony Day 2 part 4 at (00:15:14) ("every Monday…all the trades, plumber, electrician, rebar [would] sit and have a meeting. [They'd ask] Tony, how long is going to take you to fly the tables? Then we would ask the rebar guys, how long is going to take you to do the robotics? So that's the plan everybody. And then we make a schedule.")

Evidence at the hearing does not contradict Mr. Machado's characterization of his role. It also does not support that he directed and controlled Baja workers in the manner contemplated by the relevant ordinances. In fact, Investigator Ashley Harrison's testimony reveals that he did not. Hearing Testimony of Ashley Harrison, Day 10 at (03:14:30)– (03:15:47): After testifying that Mr. Soto Contreras was "in charge" of Baja Concrete's presence at the work site,



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Ms. Harrison explained that "[Mr. Soto Contreras ] seems to have been the primary local point of contact speaking on behalf of Concrete USA, whether that was in regards to employee relations or people at the job site with Newway who needed to work with Baja . . . I'm not aware of any other person to whom somebody needing to work with Baja would've directed their questions." *Id.*

**a. The OLS investigation did not elicit evidence sufficient to show joint employer liability as to Machado.**

Evidence at the hearing shows that OLS investigators did not explain material terms, ask substantive follow-up questions, or attempt to elucidate facts rather than legal conclusions in its interviews to support its finding that Mr. Machado was a joint employer.

OLS did not define or explain legal terms to interviewees.

OLS investigators did not attempt to develop facts to substantiate workers' opinions. For example, Investigators failed to provide the legal definition of "rest break" when interviewing workers. "Rest break" is a term of art that has a specific legal meaning in this context. Namely, rest breaks can be satisfied by "intermittent breaks" throughout the day that add up to the full paid break to which an employee is entitled. WAC 296-126-092 ("Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for every 4 hours worked, scheduled rest periods are not required."); Washington Labor & Industries Guidance on Workers' Rights[1] ("In some jobs, "mini" rest breaks can be taken instead of a scheduled rest break."). Intermitted rest breaks satisfy the legal requirements. Without the legal definition, workers could not accurately assess whether they received these breaks. Thus, the workers' testimony is, at best, their opinion based on their personal understanding of "rest break."

[1] Machado asks that the hearing examiner take judicial notice of such guidance as OLS testified they relied on L&I guidance on meal and rest breaks at hearing. https://www.lni.wa.gov/workers-rights/workplace-policies/rest-breaks-meal-periods-and-schedules



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Further, during the hearing, evidence showed witnesses testified to having such "inactive time." Hearing Testimony Day 12. The answer was unequivocal— "yes." OLS did not ascertain whether intermittent breaks satisfied this requirement; instead, they merely asked for the employees' opinions about whether they got breaks, and all workers answered "no." Hearing Testimony of Igner, Day 12 at (02:44:55–02:45:46). However, when asked about relevant underlying facts during the hearing, the evidence showed employees received intermittent breaks within the legal definition. WAC 296-126-092(5).

OLS did not attempt to substantiate worker's opinions and conclusions.

OLS relied on workers' conclusory opinions without the logical follow-up to corroborate them. For example, OLS did not interview anyone about Newway's payroll practices to corroborate or support its finding that Mr. Machado had any part in the alleged violations. Hearing Testimony of Ashley Harrison Day 10 at (04:18:21–04:18:42) (Q: "Did you request to take the interview of anyone involved with Newway's Payroll, how they process payroll?" A: "Newway's payroll? No.").

Ms. Harrison also testified that OLS did not request to interview anyone from Newway involved in paying Bajas invoices, despite agreeing that preparation of payroll and payment of wages was a factor OLS considered in its joint employer determination. *Id.* at 04:19:16–04:19:41 ("It's fair to say that would be important for the OLS to interview or at least attempt to interview someone from new informing who is involved in [payroll preparation and wage payment]?" "A: Could have been helpful, yeah.").

**2. Holding Mr. Machado liable as a joint employer is contrary to the policy & purpose of joint employer liability.**

To hold Mr. Machado liable for any violations that may have been committed here would be to hold him liable for something he had no control, authority, or say in and could do nothing to prevent. This runs counter to the purpose of the economic realities test, which is to determine the parties responsible for the violations by ascertaining whether "as a matter of economic reality



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[the worker] is dependent on the [putative employer]" *See* Summary & Fiscal Note for Ordinance 124960. Holding Mr. Machado responsible for the alleged violations achieves none of these policy goals.

Holding Machado liable for violations he had no hand in perpetuating and no control or power to mitigate does not serve these ordinances' policy and legislative intent—to punish and deter violators. A $2 million liability cannot deter Mr. Machado from committing violations he had no power to commit. He cannot be culpable for deeds done by others over which he had no say.

Moreover, Machado had as much or less control over the affected workers as the foremen below him and the contractor above him. It is unfair to hold him liable for millions. Also, it deters mid-level management from working in the trades. This decision could negatively affect building in all of Seattle if the market perceives it as an unfair overreaction by OLS regulators that could hold manages liable for sub-contractors' wages and workplace posters.

In short, OLS failed to support its analysis of the *Becerra* factors and the conclusion it reached based on its analysis. Evidence and testimony plainly show that Mr. Machado had no influence, power, or control to create or administer policies or ensure compliance with them. Further, the finding that Mr. Machado is a joint employer does nothing to promote the policy of punishment or deterrence that the joint employer doctrine is meant to serve. It is purely punitive.

**B. OLS assessed damages that are unconstitutionally excessive and punitive against Mr. Machado and not supported by substantial evidence of wrongdoing.**

**1. OLS did not support the facts underlying its finding that Mr. Machado and Baja were financially intertwined.**

OLS wrongly determined that Mr. Machado jointly employed aggrieved workers implicitly based on one "payment" Machado received from Baja. However, OLS has not substantiated this insinuation of a purported "kickback arrangement." OLS relied on the baseless contentions of an unnamed employee from an unsworn interview to insinuate in its findings that



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Machado received kickbacks from Baja. It relied on this insinuation to support its conclusion that Mr. Machado and Baja had intertwined finances and Mr. Machado was a joint employer. Hearing Testimony of Ashley Harrison, Day 10 at (05:32:06) (Q: Was th[e] finding [that Mr. Machado was a joint employer] influenced by the payment that has been referenced?" A: "yes, I believe it was part of what we took into account.").

OLS offered only circumstantial evidence of a single check issued to Mr. Machado from Baja. Hearing Examiner Exhibit 35. OLS entirely failed to support that this check was a kickback by the appropriate evidentiary standard. At the hearing, investigators testified that no worker alleged witnessing any additional evidence of an "arrangement" between Mr. Machado and Baja. Hearing Testimony of Ashley Harrison, Day 10 at (05:33:10)– (05:34:01) ("I'm not aware of witnessing [payment from Mr. Soto Contreras to Mr. Machado], no.").

Mr. Machado provided uncontroverted testimony that the check was a reimbursement for a loan to Mr. Soto Contreras and that he believed Mr. Soto Contreras was the source of the check. OLS relied on an unsupported conclusory opinion of an interviewed worker to make this finding. Determination at 12. The Hearing Examiner should disregard this argument entirely because it is improper, does not support OLS's finding, and the statements upon which it is based are a worker's pure conjecture, not personal knowledge.

**2. The damages and penalties assessed are unconstitutionally excessive, as applied to Mr. Machado.**

Assessing $2 million in fines against an individual employee for alleged infractions of his employer is unconstitutionally punitive. The Eighth Amendment to the United States Constitution and Article I, section 14 of the Washington Constitution prohibit excessive fines. *State v. Grocery Mfrs. Ass'n*, 198 Wn.2d 888, 897-98, 502 P.3d 806, 811 (2022).
A fine is excessive "if it is grossly disproportional to the gravity of a defendant's offense." *Id.* at 334. *Grocery Mfrs. Ass'n*, 198 Wn.2d at 899. Courts apply the *Bajakajian* analysis set forth by the Supreme Court to punitive civil fines. *Id.* The four *Bajakajian* factors are: "'(1) the nature



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and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused.'" *United States v. Bajakajian*, 524 U.S. 321, 332, 118 S. Ct. 2028, 2035, 141 L.Ed.2d 314, 328 (1998). Washington courts also consider the individual's ability to pay the fine. *Long*, 198 Wn.2d at 173).

Under the four *Bajakajian* factors, holding Mr. Machado responsible for Baja's failings is a manifest injustice. Mr. Machado was not the employer of record, was not the actual violator, had no control over compliance, and did not contribute meaningfully to Baja's noncompliance. To hold him liable for $2 million in damages—an amount he has no realistic chance of paying within his lifetime—is an unconstitutionally excessive punitive fine.

Further, the factors the ordinances provide for consideration in calculating remedies due to aggrieved parties do not support OLS's determination that Mr. Machado, as an individual, should be jointly and severally liable for them.

The factors for consideration include matters over which Mr. Machado had no control or power to mitigate (the total amount of unpaid wages; the nature and persistence of the violations; the substantive or technical nature of the violations) and considerations that weigh against assessing any damages against Mr. Machado at all (the extent of the respondent's culpability, which as to Mr. Machado is zero; the size, revenue, and human resources capacity of the respondent; the circumstances of each situation; and the respondent's ability to pay). *See* Seattle, Washington Municipal Code Sec. 14.16.080(A)(3); 14.19.080(A)(3); 14.20.060(A)(3).

In short, OLS decided to hold Mr. Machado liable to the same degree as Baja for failings entirely attributable to Baja based on an unsupported finding that Mr. Machado and Baja had "an arrangement." This unsupported finding cannot justify the unconstitutionally excessive liability OLS seeks to impose on Mr. Machado.



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**C. The Hearing Examiner's evidentiary rulings were in error.**

**1. OLS investigators are not neutral parties reliable for admissible hearsay.**

Much of the evidence proffered by OLS in support of its determination that Mr. Machado is a joint employer is irrelevant and inadmissible, and the Hearing Examiner's failure to exclude such evidence is in error.

During the hearing, the Hearing Examiner allowed OLS investigators to testify about what workers told them during interviews and to admit unsworn statements by non-testifying witnesses into evidence. HER 3.18(a) states that the Hearing Examiner may admit evidence, including hearsay if the Examiner determines it is relevant, comes from a reliable source, and has probative value. (emphasis added). A reliable source is a source that a reasonable and ordinary person would rely on. "Evidence, including hearsay, may be admitted if the Examiner determines that it is relevant to the issue on appeal, comes from a reliable source, and has probative (proving) value. Such evidence is that on which responsible persons would commonly rely in the conduct of their important affairs." Hearing Examiner's Rules of Practice and Procedure (HER) 2.17(a). The Examiner may exclude irrelevant, unreliable, immaterial, unduly repetitive, or privileged evidence. HER 2.17(b).

The Hearing Examiner ruled that city investigators (an interested party in the case) are a reliable source to present hearsay evidence as to what witnesses told them during interviews. This ruling was made without context or proof of reliability. City investigators are not neutral sources because they are interested parties to the outcome of the hearing. In fact, when asked whether she understood her role as an investigator to oblige her to advocate for a particular party, the Investigator replied that her "job…is to defend the work of my office." The two city investigators took the stand and testified to what employees told them. The Hearing Examiner erred by allowing such testimony because a reasonable person would not rely on hearsay from a party whose admitted interest is advocating for the City.



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Further, the Hearing Examiner allowed OLS to introduce unsworn witness statements that do not meet various evidentiary standards, including that the statements include hearsay. The witness statements have serious reliability issues. OLS investigations created these witness statements by typing responses given to them by the witnesses. However, OLS never provided witnesses with the OLS-typed statements to review for accuracy, and witnesses did not sign their statements. Also, witnesses were not under oath when they gave the statements. OLS then kept the identity of all but one of these witnesses anonymous and heavily redacted information from the witness statements themselves. OLS also never took steps to ensure the witnesses testified from personal knowledge and did not ask obvious follow-up questions about the credibility and reliability of the responses. Finally, because OLS redacted these witnesses' names and contact information, Mr. Machado did not have the opportunity to examine these witnesses while preparing for his hearing.

(1) Mr. Machado presented these arguments in his motion for summary judgment, and the Hearing Examiner rejected them with prejudice. Mr. Machado believes this ruling was in error.

**2. OLS's privilege claim prejudiced Machado's ability to prepare for the hearing.**

OLS's redactions prejudiced Machado's ability to prepare and argue his case. It relied on unnamed witnesses and redacted interview statements in its determination letter to find that Machado was a joint employer with Baja. It relied on these interviews without divulging the information Machado needed to appropriately prepare his defense, making it impossible to depose or serve discovery on these witnesses. Machado was denied the opportunity to call the interviewees as witnesses at the hearing.

Machado thus could not cross-examine or impeach material witnesses against him, as the Seattle Administrative Code entitles him to. The Seattle Administrative Code explicitly delineates that every party shall have the right to cross-examine witnesses who testify and shall have the right to



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submit rebuttal evidence. SMC 3.02.090(M). The Board of Hearing Examiner Rules of Practice echo this, granting parties the right "to notice of hearing, presentation of evidence, rebuttal, objection, cross-examination, argument and other rights determined by the Hearing Examiner as necessary for the full disclosure of facts and a fair hearing." Board of Hearing Examiner Rule of Practice 3.13.

**D. Conclusion**

The Hearing Examiner should rule that Mr. Machado is not a joint employer of the aggrieved workers and should not hold him jointly and severally liable for the alleged violations. He cooperated with the investigation and should not be fined or penalized. The city should be liable for his attorney's fees and costs defending against the determination and appeal.

ENTERED this 25th day of October, 2023.

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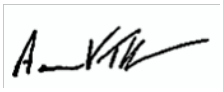

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**DECLARATION OF SERVICE**

I caused a copy of the foregoing Appellant Antonio Machado's Closing Argument 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 25th day of October 2023 in Seattle, Washington.

*s/ Savannah Rowe*

Savannah Rowe, Legal Assistant



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