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 REPLY TO OLS CLOSING ARGUMENT

OLS argues that Mr. Machado is a joint employer of the Baja workers for only two reasons. First, OLS argues that Mr. Machado's role and duties as site superintendent showed sufficient supervision and control that as an "economic reality" he jointly employed the workers. Second, OLS contends that a single loan reimbursement from Baja evidenced Machado was in an "unusually close and intertwined" relationship between Machado and Baja. OLS closing at 6.

In fact, Mr. Machado is not a joint employer under the balance of the *Becerra* factors. OLS. Further, OLS relies purely on hearsay evidence that a reasonably prudent person would not customarily rely on to make its findings. RCW 34.05.452(1). As such, the finding that Mr. Machado is a joint employer is not supported by substantial evidence.

A. Mr. Machado's supervision and control over Baja works is not of the type or significance required to support a joint employer relationship.

1. Mr. Machado's role was that of a traditional foreman on a construction site.

Testimony and evidence show that any direction and control Mr. Machado had over the aggrieved workers was incidental to Machado's role as a traditional construction site foreman. Court interpretation of the joint employer doctrine shows that this is not enough to implicate a

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general contractor as a joint employer with its subcontractor, let alone a general contractor's individual employee.

Courts routinely recognize that the traditional relationship between contractors and subcontractors requires a certain measure of supervision and direction by the general contractor. For example, in *Bozung*, the court refused to hold a general contractor liable for a subcontractor's injury because the contractor exercised only the typical level of control over the method of the subcontractor's work or safety practices. *Bozung v. Condominium Builders*, 42 Wn. App. 442, 711 P.2d 1090, 1093 (1985) ("Such general contractual rights as the right to order the work stopped or to control the order of the work or the right to inspect the progress of the work do not mean that the general contractor controls the method of the subcontractor's work.")

The court reasoned that the general contractor's actual supervisory control over the subcontractor's work was limited to "that which is usually reserved to general contractors." *Id.* at 446. The court ruled that the right to order the work stopped, to control the order of the work, and the right to inspect the progress of the work did not mean that the general contractor controlled the method of the subcontractor's work. *Id.* at 447.

Mr. Machado, an employee of the general contractor, was also limited to the "usual" supervisory work that a general contractor reserves at a construction site. 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.* **Machado had no involvement in payroll or sick leave policies of either company, so he exercised no power over the very thing the city seeks to hold him liable for and did not profit from any lack of compliance.** If Machado is a joint employer, so is every mid-level manager for every employer, which is a result the law does not intend and against public policy.

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Mr. Machado was a conduit between the project managers who told him what stages of the project needed to be completed and the workers who completed the required tasks. Hearing Testimony Day 2 part 4 at (00:15:14) (Machado testimony that owners, developers, and foremen supervising the labor would meet and make a schedule based on the ultimate project goals). He simply relayed the schedule to laborers according to the overall project goals. Hearing Testimony Day 2 part 4 at (00:15:14) (Machado testifying that project managers determined the daily schedule as a group based on timing estimates from the superintendents of each construction team.) Any overtime hours accrued due to the daily schedule is attributable to the project managers' daily demands over which Mr. Machado had no control. 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. Hearing Trans. Day 2 pt. 4 at (00:12:43) (Machado testifying that Tom Grant did payroll). His contribution to setting the daily schedule was providing the project managers with timing estimates of certain tasks so that they could accurately plan. Hearing Testimony Day 2 part 4 at (00:15:14).

Investigator Ashley Harrison's testimony supports Mr. Machado's limited supervisory role. After testifying that Mr. Soto Contreras was "in charge" of Baja Concrete's presence at the work site, 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 regard 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." Hearing Testimony of Ashley Harrison, Day 10 at (03:14:30)– (03:15:47).

Holding Machado as a joint employer would have significant policy implications, uprooting the traditional contractor/subcontractor relationship. Machado's role as a construction site foreman necessitated some level of general direction and control of the worksite, especially on issues of safety. Holding him a joint employer for tasks necessary to the role that any construction site foreman performs results in potential liability for *every* construction site

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foreman who oversees subcontracted workers. It is contrary to good policy, and unsupported by evidence in this case. It could also virtually end construction in the city as good people seek to avoid unfair liability for the actions of others. There is no insurance for this kind of liability to protect people or companies from the surprising and massive liability sought by the city.

2. Mr. Machado did not exert sufficient direction or control to be a joint employer.

Mr. Machado also doesn't fit the bill of a joint employer in the context of determining liability under the FLSA (the federal analogue to Seattle's ordinances). Evidence and testimony show that Mr. Machado exercised the type of "macro-level" direction that does not support a joint employer relationship between a general and subcontractor. Mr. Machado bore no financial or managerial responsibility for the workers; he simply tasked them with the overall progress goals of the day—goals determined by others. There's no evidence that he had any say in how the Baja workers achieved these goals. In fact, evidence shows that he provided little guidance regarding how the Baja workers executed daily tasks.

3. Mr. Machado's involvement in scheduling does not support that he was a joint employer.

OLS also contends that Mr. Machado is a joint employer because his involvement in daily scheduling affected the hours that Baja worked and whether they worked overtime. This is also insufficient to support joint employer liability. *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1178 (11th Cir. 2012). In *Layton*, drivers that subcontracted with DHL to make deliveries claimed DHL jointly employed them with the company they were hired by, partially because DHL "de facto controlled Drivers' hours" because it "made business decisions that directly impacted the length of the drivers' workdays." *Id.* The drivers contended that because DHL dictated what time the packages were available for pick-up each morning and occasionally had erratic pick-up orders to which Drivers had to respond, that DHL controlled what time their day began and effected when drivers had to work longer hours. Machado's role in controlling Baja

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employees' hours was even less direct, he simply passed along Newway's "business decisions" that had similar effects on Baja employees' hours.

In *Layton*, the court ruled that this "indirect type of control" was not "the type of control exercised by an employer" that is indicative of a joint employer relationship. *Id.* Like Mr. Machado's role in scheduling, the court ruled that DHL's conduct did not "evidence an 'overly active' role in the oversight" of the subcontractor drivers. Like in *Layton*, neither Newway nor Mr. Machado "involved [themselves] with the specifics" of how workers should go about meeting those scheduling goals. *Id.* Mr. Machado did not apportion tasks to individuals, specify how many individuals should be assigned to each task, or structure the chain of command among Baja employees. In no way did Mr. Machado's involvement in day-to-day scheduling implicate him as a joint employer.

4. Mr. Machado could not hire or fire Baja or Newway employees.

Though OLS contends that Baja workers testified that they believed Mr. Machado had some influence or input over hiring and firing Baja employees, they were unable to present specific evidence to support this. In fact, numerous workers testified that Mr. Soto Contreras or Baja made all the hiring decisions.[1]

Ultimately, Mr. Machado provided "limited and essential direction," as required by his role as a foreman for Newway, that he shared with other Newway foremen. This is not the type of direction and control that supports, as an economic reality, that Mr. Machado was a joint employer. *See Moreau v. Air Fr.*, 343 F.3d 1179, 1181 (9th Cir. 2003) (rejecting joint employer

[1] The OLS presented the information from 10 workers, each said that Roberto and/or Baja hired them. 40 HEX Hearing, Jonathan Ivan Parra Ponce Testimony; Day 1, part 1, page 30 and Day 2, part 1, page 12; Matias Catalan Toro Testimony, Day 2, part 1, page 40; Hector Amin Cespedes Rivera Testimony, Day 2, part 1, page 102; Raul Hernandez Fiol Martinez Testimony, Day 3, part 1, page 2; Claudio Ivan Gamboa Lopresti Testimony, Day 4, part 1, page 16; Angel Martin Gomez Chavez Testimony, Day 4, part 1, page 98; John Edward Hinestroza Diaz Testimony, Day 5, part 1, page 9; Jose Alfredo Acosta Caballero Testimony, Day 5, part 1, pages 93-94; Patricio Fernandez Borquez Testimony, Day 6, part 2, page 21; Jose Ascension Estrada Parra Testimony, Day 7, page 6 When the Workers quit or were fired, they also told Roberto. 41 *See*, for example, HEX Hearing, Raul Hernandez Fiol Martinez Testimony, Day 3 part 1, page 62.

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status of general contractor when it could not hire or fire employees, determine their pay, and did not maintain employment records, control schedules or working conditions). Mr. Machado, like the contractor in *Moreau*, provided only limited and essential direction to Baja employees. *Id.*

5. Machado was only one of several Newway foreman directing the worksite.

Further undermining OLS's conclusion that Mr. Machado was a joint employer because of his limited supervision and control, OLS itself acknowledges that Machado was only one of several Newway foreman directing the worksite. OLS offers no justification or evidence as to why Machado, out of all the foremen, should be singled out as a joint employer and subject to a $2 million liability.

OLS lays this out in its own closing argument. It argues that "Pedro from Newway supervised the finishers and Victor Martinez from Newway supervised the laborers," that "different Newway foremen provided job task direction depending on the type of work." OLS closing at 6–7.[2] OLS attempts to show that Mr. Machado maintained a special supervisory role by alleging, "Fifty percent of the workers testified that Machado was the "boss" of the Newway worksite," but none of them explained in a level of detail why their opinion that he was the "boss" is evidence satisfying the relevant legal test.[3]

Further, OLS denied Mr. Machado the opportunity to examine the workers that testified in support of this otherwise unsupported contention. OLS redacted the names and substantial pieces of testimony from the worker interviews it relied on to prepare its determination, which

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[2] OLS also implicated numerous other Newway employees that shared general, macro-level control over the Baja workers, further showing that Mr. Machado did not have a uniquely close or direct relationship with Baja workers. *See* OLS closing at 6–7 ("Jonathan Ivan Parra Ponce, Matias Catalan Toro, Hector Amin Cespedes Rivera, Angel Pedro is who they would go to with questions. Raul Alejandro Fiol Martinez and John Edwards Hinestroza Diaz provided testimony that Victor Martinez, from Newway, told them what to do next when completing a job and they went to him with any questions. Jose Ascension Estrada Parra stated Juan Cantos told him what to do next and answered his questions. Cantos also worked for Newway.").

[3] This translates to only four of the alleged 53 aggrieved workers—fifty percent of the only eight workers OLS interviewed. OLS closing at 7. So, only half of the interested workers were willing or able to testify to this conclusory opinion.

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prevented Mr. Machado from access to discovery and from interviewing them as witnesses at the hearing. It also withheld information that the city may have relied upon or influenced its decision.

Mr. 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 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.

B. Even if supported, the balance of factors as to Machado does not indicate a joint employer relationship.

Even if OLS was able to support its contention that Mr. Machado had some characteristics of a joint employer, it still would not be enough to implicate Mr. Machado individually. OLS analyzes only a few of the *Becerra* factors yet ignores those most relevant to its underlying charges. Machado was not even incidentally involved in the most relevant aspects of joint employment in this situation: control over payroll, payroll processing, how and when employees were paid, etc. All the Workers testified that they negotiated their rate of pay with Roberto Soto Contreras who is in no way affiliated with Newway/Machado. HEX Hearing, Worker Testimony, days 1-7.

Machado had no control over the Newway or Baja purse strings—the most relevant factor in this *Becerra* analysis. The factors that are important in a particular employment situation depended on which revealed the economic reality of the working relationship. *Id.* Industry customs and historical practice should be consulted in weighing the factors. *See Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 73 (2d Cir. 2003). The importance of each factor in a

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joint employer analysis partially rests on its relevance to the alleged violations. *See SEFNCO Commcn's, Inc. v. Dep't of Labor & Indus.*, No. 82376-1-I, 22 Wn. App. 2d 1042, 2022 Wash. App. LEXIS 1368, at *17 (Ct. App. July 5, 2022). In SEFNCO the court held a general contractor liable as joint employer of traffic flaggers for purposes of WISHA liability because it retained control over flaggers work and had the right to cease work if flaggers made the worksite unsafe. Even though the general contractor did not hire, fire, determine flaggers pay rate or control payroll, because the relevant infraction was worker safety related, control over workers' safety was enough to establish it as a joint employer under WISHA. *Id.*

Here, OLS did the opposite—ignored those factors most relevant to the wage and hour violations and focused on those only nominally related to the actual violations. It is undisputed that Mr. Machado was not involved in hiring or firing the workers, had no involvement in their pay, no say over how they recorded their hours, how those hours were approved, and had no knowledge of or control over Baja workers' pay rates. *See* OLS closing argument at 5 ("All the workers provided testimony stating they were informed of their pay verbally by Soto Contreras . . . [t]hey understood they worked for Baja and were paid by Baja or Soto Contreras").

Even if OLS could prove that Mr. Machado had some control over finances, this would not implicate him as a joint employer. The case the city cited in support of that proposition, *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1998), supports only that a corporate officer may in some circumstances be held individually responsible for wage and hour violations when they themselves "control the purse-strings"—which Mr. Machado did not. *Baystate* also stands for the proposition that courts must be exceedingly cautious and take pains to avoid an over-expansive application of the definition of the term employer to a personal liability determination where the individual merely exercises control over the work situation. *Baystate Alternative Staffing, Inc., v. Herman*, 163 F.3d at 679. In the instant case, OLS took exactly this "untenable" view. *Id.*

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The factors have a specific purpose, which is why they are fluid, and their relevancy depends on the circumstances at hand. However, the purpose of the analysis never changes—to determine the workers' economic dependence on the purported joint employer in the course of their work. In short, the macro-control Machado had over workers does not support that the workers were economically dependent on Machado. *See Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1181 (11th Cir. 2012). Mr. Machado was in no way involved in the procedures most relevant to the underlying violations. Thus, even if OLS could support that Mr. Machado had sufficient control over workers (which it cannot), that does nothing to support holding him liable for the alleged violations here.

Additional factors that the court can consider, including whether the putative joint employer had knowledge of the wage and hour violation, also weigh against finding Mr. Machado a joint employer. *Dep't of Lab. & Indus. v. Tradesmen Int'l, LLC*, 198 Wn.2d 524, 537, 497 P.3d 353, 360 (2021). Here, Mr. Machado had no knowledge of the wage and hour violations.

C. OLS's implication that Mr. Machado received a 'kickback' is unsupported and irrelevant to the *Becerra* analysis.

OLS fails to explain how a single payment from Baja to Mr. Machado is "suspicious" or how it shows "an unusually close and intertwined relationship with Baja." OLS closing at 6. Further, OLS provides no support for how this supposed "relationship" is relevant to the joint employer analysis. Mr. Machado has consistently maintained throughout his testimony that the check was a reimbursement for a loan. The city has not provided any evidence that contradicts this explanation. Further, nowhere in its closing argument does OLS explain or support why such reimbursement shows Mr. Machado jointly employed the Baja workers.

Further, OLS's finding that Machado was involved in some kind of kickback arrangement is not supported by substantial evidence. Foremost, the information presented was not admissible first-hand knowledge and insufficient to prove Machado had a financial interest in the payroll.

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Despite the liberal admissibility of lay opinions under ER 701, counsel should be able to keep out opinions that are unduly speculative or conclusory (i.e., not "rationally based on sense perceptions"), or are not helpful to the jury (e.g., that "invade its province"). 1 Law of Evidence in Washington § 8.02 (2023).[4]

If the city's theory were true, one would expect to find a pattern, not a single transfer. Specifically, OLS relied on, and presented at the hearing, inadmissible hearsay evidence presented by interested parties of this action to make this finding. Evidence, including hearsay evidence, is admissible if, in the judgment of the presiding officer, it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. RCW 34.05.452(1); *See also* RCW 34.05.461(4) ("Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial."). However, the presiding officer cannot base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. RCW 34.05.461(4); *Robinson v.*

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[44] *State v. Carlson*, 80 Wn. App. 116, 906 P.2d 999, 1005 (1995) (error to permit a physician to testify as a lay expert that a child had been molested when the physician had examined the child but had no first-hand knowledge of molestation); *State v. Farr-Lenzini*, 93 Wn. App. 453, 970 P.2d 313, 316 (1999) (admission of state trooper's testimony that defendant was attempting to elude trooper held to be error as improper opinion on the core issue of defendant's state of mind); *Mitroff v. Xomox Corp*., 797 F.2d 271, 275 (6th Cir. 1986) (error to admit statement of assistant personnel manager for defendant that pattern of age discrimination existed at company; statement was not rationally based on sense perceptions); *Chef'n Corp. v. Trudeau Corp*., 2009 U.S. Dist. LEXIS 47013 (W.D. Wash. 2009) (order granting defendant's summary judgment motion) (expert witnesses' declarations held inadmissible as lay witness opinions because they were based on declarants' professional experience and there was no indication either declarant had personal knowledge of ordinary observers' perceptions); *Ashley v. Hall*, 138 Wn.2d 151, 978 P.2d 1055, 1059 (1999) (lay witness's opinion that an auto accident involving a child pedestrian was unavoidable was admitted in error because it was a conclusion and was unsupported by the witness's limited observations); *Plush Lounge Las Vegas LLC v. Hotspur Resorts Nev., Inc*., 371 Fed. App'x 719, 721 (9th Cir. 2010) (unpublished) (trial court erred in admitting witness' market definitions as lay opinions because "the applicable market definition is not an opinion based on [witness's] sensory perception").

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Emp't Sec. Dep't, 2017 Wash. App. LEXIS 1670 *; 2017 WL 3017297 (affirming remand of an agency denial of unemployment benefits because the key evidence the agency relied on to deny benefits was unreliable hearsay—an employer's summarization of the contents of emails).

OLS relied on unnamed witnesses' unsubstantiated opinions that there was "some kind of arrangement" between Mr. Machado and Baja and sought to introduce those statements as evidence during the hearing. Hearing Testimony of Ashley Harrison Day 12 at (02:00:50). Further, OLS redacted the names of these witnesses under an inapplicable or non-existent "government informant privilege," and, as a result, Mr. Machado was prejudiced in his ability to defend against these allegations. He was unable to question these witnesses at the hearing and was denied the opportunity to impeach their testimony.

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 OLS investigation at every step, was not responsible for the alleged violations, and should not be fined or penalized.

RESPECTFULLY SUBMITTED this 15th day of November, 2023.

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DECLARATION OF SERVICE

I caused a copy of the foregoing Appellant Antonio Machado's Reply to OLS Closing Argument to be served to the following in the manner indicated:

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On today's date.

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 15th day of November 2023 in Seattle, Washington.

s/Savannah Rowe
Savannah Rowe, Legal Assistant

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