

**In the Matter of**  
**MAJESTIC CONSTRUCTION, INC., and**  
**YOGESH NARAYAN aka T.J. NARAYAN**

**Case No. 66-99**

**September 17, 1999**

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**SYNOPSIS**

Where Respondents submitted an answer to the Order of Determination and requested a hearing, but failed to appear at the hearing, the Commissioner found them in default of the charges set forth in the Order of Determination. Charges were dismissed against Respondent Majestic Construction, Inc. based on the Commissioner's determination that Respondent Majestic was not Claimant's employer. Respondent Narayan employed Claimant as a construction laborer and failed to pay him any wages for 885 hours of work performed at the agreed wage rate of \$6.00/hr., in violation of ORS 652.140(1). Respondent Narayan's failure to pay the wages was willful, and the forum ordered him to pay civil penalty wages of \$1,440.00, pursuant to ORS 652.150. ORS 652.140(1), 652.150.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 20, 1999, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David K. Gerstenfeld, an employee of the Agency. Salvador Lopez Hernandez (Claimant) was present throughout the hearing. Also present throughout the hearing was Terry Rogers, an Oregon court certified interpreter in Spanish, who translated the proceedings in their entirety. Respondents, after being duly notified of the time and place of this hearing, failed to appear and no representative appeared on behalf of Respondent Majestic Construction, Inc. ("MCI").

The Agency called the following witnesses: Salvador Lopez Hernandez, Claimant; Gerhard Taeubel, Wage & Hour Division Compliance Specialist; and Robin Beaulauier, a homeowner for whom Claimant and Respondent Narayan had performed work.

Administrative Exhibits X-1 through X-14 and Agency exhibits A-1 through A-4 were offered and received into evidence. The record closed on July 20, 1999.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

#### **FINDINGS OF FACT – PROCEDURAL**

1) On or about November 23, 1998, Claimant filed a wage claim with the Agency. He alleged that Respondents employed him and failed to pay wages earned and due to him.

2) At the time he filed his wage claim, Claimant assigned to the Commissioner of Labor and Industries, in trust for Claimant, all wages due from Respondents.

3) Claimant brought his wage claim within the statute of limitations.

4) On February 5, 1999, the Agency served Order of Determination No. 98-3765 on Respondent MCI based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that MCI owed a total of \$5,130.00 in unpaid wages and \$1,440.00 in civil penalty wages, plus interest, and required that, within 20 days, MCI either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On March 18, 1999, the Agency granted Respondent MCI an extension of time until April 12, 1999, to file an answer and request for hearing.

6) On April 9, 1999, Respondent MCI, through counsel Nancy M. Cooper, filed an answer to the Order of Determination and requested a hearing. In the answer, MCI denied that Claimant was an employee of MCI or that wages were earned by Claimant between September 23, 1996, through May 16, 1997. MCI further denied that it willfully failed to pay any wages to Claimant. MCI also asserted three affirmative defenses: that it was financially unable to pay any accrued wages; that the Agency, in the Order of Determination, failed to state ultimate facts sufficient to state a claim against MCI; and that MCI did not exist as a business until March 17, 1997.

7) On May 12, 1999, Respondent's counsel, Nancy M. Cooper, sent a letter to Taeubel that read as follows: "This letter is to inform you that I no longer represent Yogesh 'T.J.' Narayan or Majestic Construction."

8) On May 21, 1999, the Agency served a "BOLI Request for Hearing" on the forum and Yogesh Narayan, registered agent for Respondent MCI.

9) On June 4, 1999, the Hearings Unit issued a Notice of Hearing to Respondent MCI, the Agency, and the Claimant stating the time and place of the hearing as July 20, 1999, at 9:00 a.m., in Portland, Oregon. Together with the Notice of Hearing, the forum sent a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

10) On June 15, 1999, the Agency filed a motion for a discovery order seeking documents related to: Respondent MCI's corporate status; its alleged financial inability to pay Claimant's accrued wages; any predecessor businesses; hours and days worked by Claimant and other employees of MCI; the financial interest, if any, that Yogesh Narayan and Debra Reinke had in MCI; and payroll records of MCI and any predecessor business during the period encompassed by Claimant's wage claim. The

Agency's motion was accompanied by a letter setting out the Agency's unsuccessful attempts to obtain the documents by informal means. MCI did not respond and the forum granted the Agency's motion on June 23, 1999.

11) On June 23, 1999, the ALJ issued a case summary order requiring the Agency and Respondent MCI each to submit a list of witnesses to be called, copies of documents or other physical evidence to be introduced, a statement of any agreed or stipulated facts. The Agency was additionally ordered to submit wage and penalty calculations and a brief statement of the elements of the claim. Respondent MCI was additionally ordered to submit a brief statement of any defenses to the claim. The ALJ ordered the participants to submit case summaries by July 9, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

12) On June 25, 1999, the Agency filed a motion to amend the Order of Determination "to include Yogesh Narayan, aka T.J. Narayan, as a Respondent, and to make all references to Majestic Construction, Inc. or Employer in the Order of Determination also refer to Yogesh Narayan, aka T.J. Narayan." The proposed amendment was based on Respondent MCI's answer alleging that MCI did not exist as a corporation until March 17, 1997, and Claimant's assertion that "his employment relationship never changed during the time periods at issue in this action, and that at all times he dealt with Yogesh Narayan in regards to his employment."

13) The Agency filed its case summary, with attached exhibits, on July 7, 1999. Neither MCI nor Yogesh Narayan filed a case summary.

14) On July 2, 1999, a certified true copy of the Agency's motion to amend was served upon Yogesh Narayan, aka T. J. Narayan, at 5227 NE 14<sup>th</sup> Place, Portland, Oregon, the same address where the forum had addressed all of its orders to Respondent MCI.

15) On July 7, 1999, the forum granted the Agency's motion to amend the Order of Determination. The forum based its ruling on the fact that Yogesh Narayan, aka T. J. Narayan, Respondent MCI's registered agent, had been served with the original Order of Determination and Notice of Hearing and all subsequent orders issued by the forum, as well as the Agency's motions; that Yogesh Narayan, aka T. J. Narayan, appeared to be Claimant's employer during all or part of the time for which unpaid wages were sought; and that no prejudice or surprise could be claimed by Yogesh Narayan, aka T. J. Narayan, in these circumstances and that justice would be best served by granting the amendment.

16) The hearing was scheduled to begin at 9 a.m. on July 20, 1999. At that time, Respondent Yogesh Narayan, aka T.J. Narayan, did not appear and had not previously announced that he would not appear. Likewise, no one made an appearance on behalf of Respondent MCI. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondents did not appear or contact the hearings unit by telephone during that time, the ALJ declared Respondents Yogesh Narayan, aka T.J. Narayan, and MCI in default at 9:35 a.m. and commenced the hearing.

17) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

18) During the course of the hearing, the Agency moved to amend the Order of Determination to increase the amount of Claimant's unpaid wages by \$412.50 and penalty wages from \$1,440 to \$1,680.<sup>1</sup> The forum denied the Agency's motion. In a default situation, amounts stated in the Order of Determination limit the relief the forum can award.<sup>2</sup> That ruling is hereby confirmed.

19) During the course of the hearing, the Agency moved to amend the Order of Determination to name T. J. Narayan as a separate Respondent, based on Robin Beaulauier's testimony indicating that Yogesh Narayan and T. J. Narayan might be different persons. The Agency's Order of Determination had previously been amended to add "Yogesh Narayan aka T. J. Narayan" as a Respondent.<sup>3</sup> The ALJ reserved ruling on the motion to the Proposed Order. Based on the forum's conclusion that Yogesh Narayan and T. J. Narayan are the same person, the Agency's motion is moot and is denied.

20) On August 24, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. The Forum received no exceptions.

## **FINDINGS OF FACT – THE MERITS**

1) During all times material herein, Yogesh Narayan, aka “T. J. Narayan” (“Narayan”), an individual person, did business under the assumed business name of Majestic Construction.

2) “Yogesh Narayan” and “T. J. Narayan” are the same person, an individual whose proper name is “Yogesh Narayan.” “T. J. Narayan” is another name that “Yogesh Narayan” is also known by.

3) Claimant arrived in the United States on September 16, 1996. Claimant learned that he could find employment as a construction laborer by going to the corner of Grand Avenue and Burnside in Portland. On September 23, 1996, Claimant went to the corner of Grand and Burnside and was approached by Narayan. Claimant told Narayan he had done construction work, and Narayan offered Claimant \$6.00/hr. to work for him doing construction labor. Claimant accepted Narayan’s offer of employment.

4) Narayan told Claimant he would be paid weekly. Because Claimant was homeless and had recently been robbed while living on the streets, Claimant asked Narayan to hold onto Claimant’s wages until he was able to open a bank account or find permanent housing. Narayan agreed to do this.

5) Although Claimant’s native language is Spanish and Narayan speaks no Spanish, Claimant understands and speaks enough English so that he and Narayan were able to communicate in English.

6) Claimant worked for Narayan from September 23, 1996, through December 13, 1996. Claimant did construction labor. Each day, Claimant met Narayan at the corner of Grand and Burnside, was taken to work by Narayan, and worked side by side with Narayan. During this time period, Claimant worked from 9 a.m. until 5 p.m., Monday through Friday, with a 30-minute break for lunch, for a total of 442.5 hours.

7) Calculated at the wage rate of \$6.00/hr., Claimant earned a total of \$2,655.00 between September 23, 1996, and December 13, 1996.

8) Claimant stopped working for Narayan after December 13, 1996 because of bad weather and Narayan's lack of work. Narayan told Claimant he would take a break for several months, then pay Claimant \$7.00/hr. when work resumed in the spring.

9) Claimant began working for Narayan again on March 3, 1997, and continued working for Narayan through May 16, 1997. As before, Claimant did construction labor and met Narayan each day at the corner of Grand and Burnside, was taken to work by Respondent Narayan, and worked side by side with Respondent Narayan. During this time period, Claimant worked from 9 a.m. until 5 p.m., Monday through Friday, with a 30-minute break for lunch, for a total of 412.5 hours. Part of this work was performed at a house owned by Robin Beaulauier and her husband. Claimant performed this work at the agreed wage rate of \$7.00/hr. No one ever told Claimant that his employer was any other person or entity than Narayan.

10) Respondent MCI incorporated as a domestic corporation in the state of Oregon on March 17, 1997, and involuntarily dissolved on May 14, 1998. According to the Oregon Corporation Division, Yogesh Narayan was MCI's registered agent.

11) Calculated at the wage rate of \$7.00/hr., Claimant earned a total of \$2,887.50 between March 3, 1997, and May 16, 1997.

12) Claimant stopped working for Narayan because Narayan told Claimant there was no more work. Claimant asked Narayan to be paid his wages, and Narayan said he would be paid all his wages.

13) At the time of Claimant's termination, Narayan owed Claimant \$5,542.50 in unpaid wages.

14) Narayan has not paid Claimant any wages.

15) The Forum computed civil penalty wages as follows for Claimant, in accordance with ORS 652.150: \$7.00/hr. multiplied by 8 hours per day equals \$56.00; \$56.00 multiplied by 30 days equals \$1,680.00.

16) Taeubel, a Compliance Specialist employed by the Agency for the last two years, investigated Claimant's wage claim. During his investigation, he asked Respondents to provide copies of payroll and time records regarding Claimant. Respondents did not respond to his request. Taeubel also attempted unsuccessfully to contact Respondent Narayan.

17) The testimony of Claimant was credible. His testimony was consistent with prior statements on his wage claim. He responded to questions in a straightforward manner and did not attempt to embellish the facts surrounding his employment, although he could have easily done so in Respondent Narayan's absence.

18) The testimony of Taeubel was credible.

19) Robin Beaulauier's testimony was credible and reliable in all material respects except for her statement that Yogesh and T. J. Narayan were father and son. The forum did not find this testimony reliable because there was no other evidence to support it and because Beaulauier did not provide a convincing reason for her belief that Yogesh and T. J. were two separate individuals.

#### **ULTIMATE FINDINGS OF FACT**

1) During all times material herein, Respondent Yogesh Narayan, aka T.J. Narayan, was an individual person who engaged the personal services of one or more employees in the State of Oregon.

2) Narayan employed Claimant in Oregon from September 23, 1996, through December 13, 1996, and from March 3, 1997, through May 16, 1997.

3) Claimant was not employed by Respondent MCI during times material herein.

4) Claimant earned \$5,542.50 in wages during his employment with Narayan.

5) Narayan did not pay Claimant any wages during Claimant's employment.

6) Claimant's employment was involuntarily terminated due to lack of work on May 16, 1997. At that time, Narayan owed Claimant \$5,542.50 in unpaid wages. Narayan has not paid Claimant any unpaid wages since May 16, 1997.

7) Narayan willfully failed to pay Claimant \$5,542.50 in earned, due, and payable wages no later than May 19, 1997, the first business day after Claimant's employment was terminated, and more than 30 days have elapsed from the date Claimant's wages were due.

### **CONCLUSIONS OF LAW**

1) During all times material herein, Respondent Yogesh Narayan, aka T.J. Narayan, was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material herein, Respondent Yogesh Narayan, aka T.J. Narayan, employed Claimant.

2) During all times material herein, Respondent Majestic Construction, Inc. was not Claimant's employer.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.414.

4) At times material, ORS 652.140(1) provided:

"Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination."

Respondent Narayan violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than May 19, 1997, the end of the first business day after Narayan discharged or terminated Claimant. Those wages amount to \$5,542.50. However, the forum is limited in its award to \$5,130.00, the amount of back wages sought in the Order of Determination.<sup>4</sup>

5) ORS 652.150 provides:

“If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued.”

Respondent Narayan is liable for \$1,440.00 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(1).<sup>5</sup>

6) OAR 839-050-0330(1) and (2) provide, in pertinent part:

“(1) Default can occur in four ways:

“ \* \* \* \*

“(d) Where a party fails to appear at the scheduled hearing.

“(2) When a party notifies the agency that it will not appear at the specified time and place for the contested case hearing or, without such notification, fails to appear at the specified time and place for the contested case hearing, the administrative law judge shall take evidence to establish a prima facie case in support of the charging document and shall then issue a proposed order to the commissioner and all participants pursuant to OAR 839-050-0370. Unless notified by the party, the administrative law judge shall wait no longer than thirty (30) minutes from the time set for the hearing in the notice of hearing to commence the hearing.”

Respondents did not appear at the hearing at all and were properly found to be in default when 30 minutes had elapsed after the specified time for the contested case hearing.

7) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondents to pay Claimant his earned, unpaid, due and

payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

## **OPINION**

### **INTRODUCTION**

The Agency alleged in its amended Order of Determination that Claimant was employed by Respondents Yogesh Narayan, aka T. J. Narayan, and Majestic Construction, Inc. from September 23, 1996, through December 13, 1996, and from March 3, 1997, through May 6, 1997. The Agency further alleged that Claimant worked a total of 855 hours and was paid nothing, and that he is entitled to \$5,130.00 in unpaid wages and \$1,440.00 as penalty wages. Respondents defaulted by their failure to appear at the hearing. However, Respondent MCI denied all the allegations in the original Order of Determination and alleged several affirmative defenses in its Answer and Request for Hearing. Those denials and defenses are rendered moot because of the forum's determination that MCI was not Claimant's employer. Accordingly, the charges against Respondent MCI are dismissed.

### **DEFAULT**

Respondents failed to appear at hearing and the forum held both Respondents in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Leslie and Roxanne DeHart*, 18 BOLI 199, 206 (1999). The task of this forum, therefore, is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. *DeHart*, 18 BOLI at 206.

### **PRIMA FACIE CASE**

In this wage claim case, the elements of a prima facie case consist of proof of the following: (1) Respondent Narayan employed Claimant; (2) Claimant's agreed upon rate

of pay, if it was other than minimum wage; (3) Claimant performed work for which he was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999).

The first element is established by the credible testimony of Claimant, who testified that his employment relationship was exclusively with "T. J. Narayan," and in the course of six months of employment, he was given no inkling that he was employed by anyone else. Claimant's employment with Narayan is corroborated by Beaulauier's testimony that Claimant worked on her house with "T. J. Narayan," and Exhibit A-2, a handwritten statement by Antonio Perez Cruz, Claimant's co-worker, affirming that he and Claimant were both employed as laborers by "Mr. T. J. of Majestic Construction." Although Beaulauier believed that "Yogesh" and "T. J." Narayan were two separate persons, this belief was not given credence by the forum because she never saw two separate persons and because there was no other reliable evidence to support it. Finally, although Corporation Division records indicate the Respondent MCI incorporated on March 17, 1997, with Yogesh Narayan as the registered agent, this evidence, standing alone, is insufficient to overcome the weight of credible evidence on the record that Narayan was Claimant's employer at all times material.<sup>6</sup> Accordingly, the forum concludes that Yogesh Narayan, aka "T. J. Narayan," was Claimant's sole employer at all times material herein.

The second and third elements are established by Claimant's credible testimony, including the written information he provided to the Agency on his wage claim form and calendar showing the dates and hours he worked.

The final element of the Agency's prima facie case requires proof of the amount and extent of work performed by Claimant. The Agency's burden of proof can be met by producing sufficient evidence from which "a just and reasonable inference may be

drawn.” *In the Matter of Graciela Vargas*, 16 BOLI 246, 254 (1998). Claimant credibly testified that he worked from 9 a.m. to 5 p.m., Monday through Friday, with a 30-minute break each day for lunch, from September 23, 1996, through December 13, 1996, and from March 3, 1997, through May 16, 1997. The total number of hours reflected by this testimony is set out in Findings of Fact – The Merits ## 5 & 8. There is no evidence on the record whatsoever that casts doubt on this credible testimony,<sup>7</sup> which the forum concludes satisfies the fourth element of the Agency’s prima facie case.

### **PENALTY WAGES**

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *In the Matter of Troy R. Johnson*, 17 BOLI 285, 292 (1999), *citing Sabin v. Willamette Western Corp.*, 276 Oregon 1083, 557 P2d 1344 (1976). Respondent Narayan, as an employer, had a duty to know the amount of wages due his employees. *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277, 285 (1999). As a matter of fact, Narayan worked side by side with Claimant every day of Claimant’s employment and was well aware of the hours that Claimant worked. There is no evidence that Narayan acted other than voluntarily or as a free agent. The forum concludes that Narayan acted willfully and assesses penalty wages in the amount of \$1,440.00, the amount sought in the Order of Determination. This figure is computed by multiplying \$6.00 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

### **ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages he owes as a result of his violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders

**Yogesh Narayan, aka T. J. Narayan**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in trust for Salvador Lopez Hernandez in the amount of SIX THOUSAND FIVE HUNDRED AND SEVENTY DOLLARS (\$6,570.00), less appropriate lawful deductions, representing \$5,130.00 in gross earned, unpaid, due, and payable wages and \$1,440.00 in penalty wages, plus interest at the legal rate on the sum of \$5,130.00 from June 1, 1997, until paid and interest at the legal rate on the sum of \$1,440.00 from July 1, 1997, until paid.

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<sup>1</sup> The basis for the Agency's motion to amend was testimony by Claimant that T. J. Narayan agreed to pay him \$7.00 per hour for his work in 1997.

<sup>2</sup> See *In the Matter of Jack Crum Ranches*, 14 BOLI 258, 260-62 (1995); *In the Matter of Secretarial Link*, 12 BOLI 58, 59 (1993).

<sup>3</sup> See Finding of Fact – Procedural #14, *supra*.

<sup>4</sup> See Findings of Fact – Procedural ## 4 & 18, *supra*, and footnote 2.

<sup>5</sup> Although the forum has computed Claimant's civil penalty wages at \$1,680.00 (see Finding of Fact – The Merits #14, *supra*), the amounts stated in the Order of Determination limit the relief the forum can award in a default situation. See *In the Matter of Jack Crum Ranches*, 14 BOLI 258, 260-62 (1995); *In the Matter of Secretarial Link*, 12 BOLI 58, 59 (1993).

<sup>6</sup> See, e.g., *In the Matter of Leslie and Roxanne DeHart*, 18 BOLI 199, 205-6 (1999)

<sup>7</sup> Respondent Narayan did not file an Answer to the amended Order of Determination.