

**BEFORE THE COMMISSIONER  
OF THE BUREAU OF LABOR AND INDUSTRIES  
OF THE STATE OF OREGON**

In the Matter of:

**STEPHANIE NICHOLS dba Steph's  
Cleaning Service and STEPH'S  
CLEANING SERVICE L.L.C.,**

Respondent.

Case Nos. **11-03 and 23-03**

FINDINGS OF FACT  
ULTIMATE FINDINGS OF FACT  
CONCLUSIONS OF LAW  
OPINION  
ORDER

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**SYNOPSIS**

Respondent Steph's Cleaning Service LLC employed Claimant from October 15-24, 2001, at the agreed rate of \$8 per hour and did not pay him all earned wages. Respondent Stephanie Nichols was a successor employer. The LLC and Nichols were ordered to pay Claimant \$228 in due and unpaid wages. The LLC's failure to pay the wages was willful and the LLC was ordered to pay \$1,920 in penalty wages. The LLC failed to make and keep available records of the actual hours worked each week by Claimant and the total wages paid to Claimant and was assessed a civil penalty of \$1,000. The LLC failed to make the record of total wages paid to Claimant available for inspection upon request by the Agency and was assessed a civil penalty of \$1,000. As a successor employer, Respondent Nichols was not liable for the penalty wages, or civil penalties. ORS 652.140(2), *former* ORS 652.150, ORS 652.310, ORS 653.045(1) and (2); OAR 839-020-0080(1), OAR 839-020-0083(3).

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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

1 November 13, 2002, at the Eugene office of the Oregon Bureau of Labor and Industries,  
2 located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

3 The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by  
4 case presenter Cynthia L. Domas, an employee of the Agency. Wage claimant Joseph  
5 A. Francis (“Claimant”) was present and was not represented by counsel. Respondent  
6 Stephanie Nichols (“Nichols”) was present and was not represented by counsel.

7 The Agency called the following witnesses, in addition to the Claimant: Margaret  
8 Pargeter, Agency Compliance Specialist; William Owens, Claimant’s prospective  
9 stepfather; and Anna Francis, Claimant’s mother (by phone). Respondents called the  
10 following witnesses: Respondent Stephanie Nichols; Shane Van Horn, Nichols’s  
11 brother; and Rhonda Lane, Van Horn’s domestic partner.

12 The forum received into evidence:

13 a) Administrative exhibits X-1 through X-17 (submitted or generated prior to  
14 hearing);

15 b) Agency exhibits A-1 through A-9 (submitted prior to hearing), and exhibits  
16 A-10 through A-12 (submitted at hearing);

17 c) Respondent exhibits R-1, R-2, R-3 and R-6 (submitted prior to hearing),  
18 and exhibits R-7 and R-8 (submitted at hearing).

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

23 **FINDINGS OF FACT – PROCEDURAL**

24 1) On November 29, 2001, Claimant filed a wage claim with the Agency  
25 alleging that Respondent Steph’s Cleaning Service LLC had employed him and failed to  
pay wages earned and due to him. (Testimony of Francis; Exhibit A-1)

1           2)     At the time he filed his wage claim, Claimant assigned to the  
2 Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages  
3 due from Respondent. (Testimony of Francis, Exhibit A-2)

4           3)     Claimant brought his wage claim within the statute of limitations.  
5 (Testimony of Francis; Exhibit A-1; Official Notice)

6           4)     On April 17, 2002, the Agency issued Order of Determination No. 01-5354  
7 based upon the wage claim filed by Claimant and the Agency's investigation. The  
8 Order of Determination alleged that Respondent "Steph's Cleaning Service L.L.C.,  
9 Employer" owed a total of \$276 in unpaid wages and \$1,920 in civil penalty wages, plus  
10 interest, and required that, within 20 days, Respondent either pay these sums in trust to  
11 the Agency, request an administrative hearing and submit an answer to the charges, or  
12 demand a trial in a court of law. (Exhibit X-1a)

13          5)     On June 29, 2002, Nichols filed an answer and request for hearing. The  
14 answer admitted that Claimant "had worked for me (Steph's Cleaning)" from October 26  
15 through October 31, 2001, for a total of 26 hours at the agreed rate of \$8.50 per hour  
16 and that he had been paid a total of \$238. (Exhibit X-1d)

17          6)     On October 3, 2002, the Agency filed a "BOLI Request for Hearing" with  
18 the forum. (Exhibit X-1)

19          7)     On October 2, 2002, the Agency filed a motion to add Nichols as an  
20 individual Respondent and to amend the amount of wages due Claimant from \$276 to  
21 \$228. (Exhibit X-3)

22          8)     On October 4, 2002, the Hearings Unit issued a Notice of Hearing to  
23 Respondent, the Agency, and Claimant stating the time and place of the hearing as  
24 November 13, 2002, at 1400 Executive Parkway, Suite 200, Eugene, Oregon. Together  
25 with the Notice of Hearing, the forum sent a copy of the Order of Determination, a

1 document entitled "Summary of Contested Case Rights and Procedures" containing the  
2 information required by ORS 183.413, and a copy of the forum's contested case  
3 hearings rules, OAR 839-050-000 to 839-050-0440. (Exhibit X-2)

4 9) On August 28, 2002, the Agency issued a Notice of Intent to Assess Civil  
5 Penalties against Steph's Cleaning Service LLC and Stephanie Nichols dba Steph's  
6 Cleaning Service. The Notice proposed to assess civil penalties in the amount of  
7 \$2,000 based on alleged violations of ORS 653.045(1) and ORS 653.045(2). (Exhibit  
8 X-6a)

9 10) On October 10, 2002, Nichols filed an answer and request for hearing by  
10 fax in response to the Agency's Notice of Intent. (Exhibit X6-f)

11 11) On October 15, 2002, the Agency moved to consolidate the cases  
12 generated by the two charging documents issued against Respondents. (Exhibit X-7)

13 12) On October 15, 2002, the ALJ issued an interim order granting the  
14 Agency's motion to add "Stephanie Nichols" as an individual Respondent and to reduce  
15 the amount of unpaid wages sought to \$228. (Exhibit X-9)

16 13) On October 15, 2002, the forum ordered the Agency and Respondents  
17 each to submit a case summary including: lists of all persons to be called as witnesses;  
18 identification and copies of all documents to be offered into evidence; a brief statement  
19 of the elements of the claim (for the Agency only); and a statement of any agreed or  
20 stipulated facts; and any wage and penalty calculations (for the Agency only.) The  
21 forum ordered the participants to submit case summaries no later than November 1,  
22 2002, and notified the Agency and Respondents of the possible sanctions for failure to  
23 comply with the case summary order. The forum also enclosed a form designed to  
24 assist *pro se* respondents in filing a case summary. (Exhibit X-10)

1           14) On October 18, 2002, the ALJ issued an interim order granting the  
2 Agency's motion to consolidate. (Exhibit X-12)

3           15) On October 29, 2002, the Agency filed a motion for order of default based  
4 on the fact that Respondents had filed their answer and request for hearing with regard  
5 to the Agency's Notice of Intent by fax. (Exhibit X-14)

6           16) On October 30, 2002, the Agency filed its case summary with exhibits.  
7 (Exhibit X-15)

8           17) On October 31, 2002, the ALJ conducted a telephonic pre-hearing  
9 conference with Ms. Domas and Ms. Nichols. During the conference, Ms. Nichols  
10 stated that she had never received a Notice of Hearing and did not know the date  
11 scheduled for hearing. The ALJ reviewed the Notice of Hearing and determined that it  
12 had been incorrectly addressed to Ms. Nichols. The ALJ scheduled another conference  
13 for the following day and instructed Ms. Nichols to bring her original answer and request  
14 for hearing. The next day, the ALJ conducted a second pre-hearing conference with  
15 Ms. Nichols present and Ms. Domas participating by telephone. Prior to the hearing,  
16 the ALJ gave Ms. Nichols a copy of the Notice of Hearing, Wage & Hour Division  
17 Summary of Contested Case Rights & Procedures for non-attorneys, and a copy of the  
18 administrative rules governing contested case hearings in this forum, OAR 839-050-  
19 0000 *et seq.* The ALJ also obtained from her a copy of her answer and request for  
20 hearing in response to the Agency's Notice of Intent. After the pre-hearing conference,  
21 the ALJ forwarded one copy to Ms. Domas and another to the Hearings Unit Portland  
22 office to be included as an administrative exhibit in the original hearing file. During the  
23 conference, Ms. Nichols stated that she would be able to attend the hearing on  
24 November 13, 2002. Ms. Domas moved to withdraw the Agency's motion for order of  
25 default, and the ALJ granted the motion. During the conference, the ALJ also provided

1 Ms. Nichols with another copy of the interim order for case summaries, along with a  
2 form to assist her in completing the case summary. The ALJ ordered her to file it by  
3 November 5, 2002, instructing her that it must be postmarked by that date and to send  
4 two copies to the Hearings Unit in Portland and one to Ms. Domas in Salem. The ALJ  
5 further advised her that failure to file a case summary or to include names of witnesses  
6 or copies of exhibits she intended to offer could result in witnesses and exhibits being  
7 excluded or rejected at the hearing. (Exhibit X-17; Statement of ALJ)

8 18) On November 4, 2002, Respondents filed a case summary, accompanied  
9 by six exhibits. (Exhibit X-18)

10 19) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ orally  
11 advised the Agency and Nichols of the issues to be addressed, the matters to be  
12 proved, and the procedures governing the conduct of the hearing. (Statement of ALJ)

13 20) At the start of the hearing, the ALJ asked Nichols if she intended to  
14 represent Steph's Cleaning LLC, as the LLC's authorized representative. Nichols stated  
15 that she was a managing member of the LLC and did intent to represent the LLC as an  
16 authorized representative. The ALJ instructed Nichols to write out a statement to that  
17 effect, and Nichols did so. (Statement of ALJ; Exhibit X-19)

18 21) The ALJ issued a proposed order on December 5, 2002, that notified the  
19 participants they were entitled to file exceptions to the proposed order within ten days of  
20 its issuance. No exceptions were filed.

#### 21 **FINDINGS OF FACT – THE MERITS**

22 1) Respondent Steph's Cleaning Service L.L.C. ("the LLC") was a limited  
23 liability company that registered with the Oregon Corporation Division on April 9, 1997,  
24 and was involuntarily dissolved sometime in 2002. Its members were Respondent  
25 Stephanie Nichols and her grandmother. Nichols was the LLC's registered agent and

1 manager. The LLC did business in Eugene, Oregon. (Testimony of Nichols; Exhibit A-  
2 12)

3 2) The business of the LLC was cleaning construction sites. (Testimony of  
4 Nichols)

5 3) In November 2001, the LLC had subcontracted with Meili Construction Co.  
6 to clean up construction that Meili was performing for Harvest House, a Eugene  
7 company. (Testimony of Nichols; Exhibit A-10)

8 4) Nichols hired Claimant to work for the LLC in October 2001. Nichols  
9 agreed to pay Claimant \$8.00 per hour. Claimant was hired to perform cleanup at the  
10 Harvest House construction site. (Testimony of Nichols, Claimant, Pargeter; Exhibit A-  
11 1)

12 5) Claimant worked six days in total for the LLC between October 15 and  
13 October 24, 2001. He worked with Anthony Vargas. Nichols also worked on the  
14 Harvest House job site for part of each of Claimant's shifts. (Testimony of Claimant,  
15 Nichols, Owens, Lane, Francis)

16 6) Claimant worked five hours for the LLC on October 15 and 17, and eight  
17 hours on October 16, 22, 23, and 24, 2001, earning \$336 ( $\$8 \times 42 \text{ hours} = \$336$ ).  
18 Complainant wrote down the hours he worked at the end of each day of work on a Meili  
19 Construction Co. timecard given to him by Nichols. (Testimony of Claimant; Exhibit A-4)

20 7) Nichols paid Claimant a total of \$108. Nichols paid Claimant \$10 in cash  
21 and \$98 by two separate money orders. Nichols purchased a \$60 money order on  
22 November 28, 2001 and had it delivered to Claimant that day. Nichols subsequently  
23 purchased a \$38 money order and had it delivered to Claimant on a later date.  
24 (Testimony of Nichols, Claimant; Exhibit A-1)

1           8)     Claimant quit the LLC's employment because he was not getting paid.  
2 October 24, 2001, was his last day of work. (Testimony of Claimant)

3           9)     Nichols and the LLC did not create or maintain a record of Claimant's  
4 actual dates and hours worked while Claimant was employed by the LLC. (Entire  
5 Record)

6           10)    On December 12, 2001, BOLI sent a wage claim "demand" letter to  
7 Steph's Cleaning Service, LLC, stating that Claimant had filed a wage claim for  
8 "[u]npaid wages of \$276.00 at the rate of \$8.00 per hour from October 15, 2001 to  
9 October 31, 2001." The LLC did not respond to this letter. (Testimony of Pargeter;  
10 Exhibit A-16)

11          11)    On March 5, 2002, Pargeter sent a letter to Nichols, in Nichols's capacity  
12 as registered agent for the LLC. In the letter, Pargeter stated her conclusion that  
13 Claimant was owed unpaid wages and asked Nichols to "review the computations and  
14 take one of the following actions by March 15, 2002:

15                "1.     Submit to me a check payable to Joseph A. Francis in the gross  
16 amount of \$276.00, along with an itemized statement of lawful deductions,  
if any.

17                "2.     Submit evidence that Mr. Francis was not employed by you or the  
hours claimed.

18                "3.     Submit evidence that my computations are not correct.

19                "If I did not hear from you by March 15, 2002, I will pursue collection of the  
20 wages owed through the Administrative Process in which case interest  
and civil penalties will be added to the wages owed."

21 (Testimony of Pargeter; Exhibit A-7)

22          12)    Nichols and the LLC did not respond to Pargeter's March 5 letter. On  
23 March 18, 2002, Pargeter sent another letter to Nichols that stated, in pertinent part:

24                "[I]n addition to the \$276.00 in wages owed, penalties have accrued to the  
25 amount of \$1,920.00. \* \* \* We would prefer to resolve this matter prior to  
litigation. However, without your cooperation, this is not possible. You  
may stop this action by responding no later than March 28, 2002, with

1 payment or, if you dispute the claim, with the appropriate records and/or  
2 information pertinent to this matter.”

3 (Testimony of Pargeter; Exhibit A-8)

4 13) On March 22, 2002, Pargeter and Nichols talked by phone. Nichols told  
5 Pargeter she had paid Claimant in full with money orders. Pargeter instructed Nichols  
6 to send copies of the money orders to her. Nichols said she would fax copies of the  
7 money orders to Pargeter by March 25, 2002. (Testimony of Pargeter; Exhibit A-9)

8 14) On April 4, 2002, Pargeter sent a third letter to Nichols that stated, in  
9 pertinent part:

10 “Per our phone conversation on March 22, 2002, you stated you would fax  
11 me copies of money orders paid to Joseph Francis showing he had been  
12 paid in full by Monday, March 25, 2002. I have not received that  
13 information from you.

14 “As stated in my previous letter, Mr. Francis worked as a construction  
15 clean-up worker for year business during the period October 15, 2001, to  
16 October 24, 2001. He worked a total of 42 hours at the rate of \$8.00 per  
17 hour earning \$336.00, of which \$60.00 has been paid, leaving a balance  
18 due and owing of \$276.00.

19 “Please take one of the following actions by April 15, 2002:

20 “1. Submit to me a check payable to Joseph A. Francis in the gross  
21 amount of \$276.00, along with an itemized statement of lawful deductions,  
22 if any.

23 “2. Submit evidence that Mr. Francis has been paid in full.

24 “If I do not receive either payment in full or copies of money orders paid to  
25 Mr. Francis by April 15, 2002, I will pursue collection of the wages owed  
through the Administrative Process in which case interest and civil  
penalties of \$1,920.00 will be added to the wages owed.

“If you have any questions, please call me at the number listed below.”

(Testimony of Pargeter; Exhibit A-9)

15) Pargeter mailed all her letters to P.O. Box 5912, Eugene, OR 97405, the  
correct mailing address for Nichols and the LLC. (Testimony of Nichols; Exhibits A-7  
through A-9)

1           16) Respondent Nichols began doing business as a sole proprietorship in  
2 March or April 2002, using the assumed business name of Steph's Cleaning Service.  
3 Her business is cleaning construction sites, the same type of business that the LLC  
4 engaged in. She uses the same mailing address as the LLC. There was no evidence  
5 presented that she employs the same persons as the LLC, that she had any of the  
6 same clients as the LLC, or that she uses the same equipment as the LLC. There was  
7 no evidence presented concerning the LLC's business property or that Nichols  
8 purchased or leased any of the LLC's business property for the continuation of the  
9 same business. (Testimony of Nichols; Exhibits X-6, A-12; Entire Record)

10           17) Nichols finally sent a copy of the \$60 money order that she used to pay  
11 Claimant in response to the Agency's Order of Determination. At the time of hearing,  
12 Nichols had still not provided a copy of the second money order she used to pay  
13 Claimant or a receipt for the cash paid to Claimant. Nichols made no attempts to obtain  
14 a copy of the second money order until a week before the hearing. (Testimony of  
15 Pargeter, Nichols; Exhibits X-1, X-6)

16           18) At the time of hearing, William Owens was engaged to marry Claimant's  
17 mother. His testimony primarily concerned the number of times and time of day he took  
18 Claimant to work and picked him up and Claimant's wage rate. His testimony was  
19 straightforward and consistent with other credible evidence in the record and was not  
20 impeached by any credible evidence. Despite his potential familial bias, the forum  
21 found him to be a credible witness and has credited Owens's testimony in its entirety.  
22 (Testimony of Owens)

23           19) Anna Francis is Claimant's mother and was a telephone witness. Her  
24 testimony was limited to statements concerning the number of times she drove Claimant  
25 to work and picked him up, the location of the job site, and how long he worked for the

1 LLC. Like Owens, her testimony was straightforward and consistent with other credible  
2 evidence in the record and was not impeached by any credible evidence. Despite her  
3 potential familial bias, the forum found her to be a credible witness and has credited her  
4 testimony in its entirety. (Testimony of Francis)

5 20) Shane Van Horn is Nichols's brother. He testified that he saw two money  
6 orders Nichols gave to Leticia Vargas or Anthony Vargas to give to Claimant, including  
7 one made out to \$138, but had no direct knowledge that Claimant ever received either  
8 money order. He also testified that he had been convicted of two felonies in the past 15  
9 years, including burglary in 1994. These convictions reflect adversely on his credibility.  
10 Because Van Horn did not observe Claimant receive the money orders in question and  
11 Nichols failed to provide a copy of the alleged \$138 money order showing it was actually  
12 made out to Claimant, the forum has not relied on his testimony except where it was  
13 corroborated by other credible evidence in the record. (Testimony of Van Horn)

14 21) Rhonda Lane is Van Horn's "domestic partner" and had been for four  
15 years at the time of hearing. She testified that she watched Nichols fill out a \$60 and  
16 \$138 money orders to Claimant in Lane's living room and hand them to Anthony  
17 Vargas. In 2000, she was convicted of conspiracy to commit identity theft and  
18 conspiracy to commit fraudulent use of a credit card. These convictions reflect  
19 adversely on her credibility. Because she did not observe Claimant receive the money  
20 orders in question and Nichols failed to provide a copy of the alleged \$138 money order  
21 showing it was actually made out to Claimant, the forum has not relied on her testimony  
22 except where it was corroborated by other credible evidence in the record. (Testimony  
23 of Lane)

24 22) Claimant was a credible witness. His testimony, though brief, was  
25 consistent with the documentary evidence he submitted in support of his wage claim,

1 and was not contradicted by any credible evidence. The forum has credited his  
2 testimony in its entirety regarding the dates and hours that he worked. Because  
3 Claimant could not recall whether the second money order Nichols provided him was in  
4 the amount of \$30 or \$38, the forum has credited the LLC with having paid him \$38, the  
5 larger amount. (Testimony of Claimant)

6 23) Nichols testified that she gave two money orders to Anthony Vargas to  
7 give to Claimant, one for \$60 and the other for \$138. She provided a copy of the \$60  
8 money order, but only a stub for the purported \$138 money order. Vargas, the only  
9 potential witness to the amount of the money orders and actual receipt of the purported  
10 \$138 money order by Claimant, was listed by Nichols as a witness on Respondents'  
11 case summary. However, Nichols did not call him as a witness, stating that he was  
12 unavailable. Likewise, Nichols did not provide a copy of the alleged \$138 money order,  
13 claiming her inability to obtain a copy. However, she apparently had no trouble  
14 obtaining a copy of the \$60 money order. In addition, she testified that her "original"  
15 time records showed Claimant worked six days, yet the "original" record she provided at  
16 the hearing only showed Claimant working five days and included two entries that were  
17 missing from the exhibit representing her "original" time records for Claimant that she  
18 provided in her case summary. Nichols's failure to provide a copy of the \$138 money  
19 order or call Vargas as a witness, combined with her inconsistent time records, caused  
20 the forum to disbelieve her testimony concerning the amount she paid Claimant and the  
21 number of hours that Claimant worked. Accordingly, the forum has believed Claimant  
22 whenever his testimony conflicted with Nichols's testimony. In addition, the forum has  
23 not believed Nichols's testimony that she created her handwritten record of Claimant's  
24 dates and hours of work contemporaneous with Claimant's employment. (Testimony of  
25 Nichols)



1 not provided a copy of the second money order she used to pay Claimant or a receipt  
2 for the cash paid to Claimant.

3 8) Respondent Nichols did not lease or purchase the LLC's business  
4 property for the continuance of the LLC's business.

5 9) Respondent Nichols is a successor to the LLC's business.

### 6 **CONCLUSIONS OF LAW**

7 1) During all times material herein, Steph's Cleaning Service L.L.C. ("the  
8 LLC"), was an employer and Claimant was an employee subject to the provisions of  
9 ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material herein, the  
10 LLC employed Claimant. Stephanie Nichols is a successor employer to the LLC.

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

13 3) ORS 652.140(2) provides:

14 "When an employee who does not have a contract for a definite  
15 period quits employment, all wages earned and unpaid at the time of  
16 quitting become due and payable immediately if the employee has given  
17 to the employer not less than 48 hours' notice, excluding Saturdays,  
18 Sundays and holidays, of intention to quit employment. If notice is not  
given to the employer, the wages shall be due and payable within five  
days, excluding Saturdays, Sundays and holidays, after the employee has  
quit, or at the next regularly scheduled payday after the employee has  
quit, whichever event first occurs."

19 Claimant quit his employment on October 24, 2001, without giving prior notice. The  
20 LLC violated ORS 652.140(2) by failing to pay Claimant immediately all wages earned  
21 and unpaid when Claimant quit his employment on October 31, 2001. Those wages  
22 amount to \$228. Stephanie Nichols and the LLC are liable for those unpaid wages.

23 4) *Former* ORS 652.150 provided:

24 "If an employer willfully fails to pay any wages or compensation of  
25 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

1 at the same hourly rate for eight hours per day until paid or until action  
2 therefor is commenced; provided, that in no case shall such wages or  
3 compensation continue for more than 30 days from the due date; and  
4 provided further, the employer may avoid liability for the penalty by  
5 showing financial inability to pay the wages or compensation at the time  
6 they accrued.”

7 The LLC is liable for \$1,920 in civil penalties under *former* ORS 652.150 for willfully  
8 failing to pay all wages or compensation to Claimant when due as provided in ORS  
9 652.140(2).

10 5) ORS 653.045(1) provides:

11 “(1) Every employer required by ORS 653.025 or by any rule, order or  
12 permit issued under ORS 653.030 to pay a minimum wage to any of the  
13 employer’s employees shall make and keep available to the  
14 Commissioner of the Bureau of Labor and Industries for not less than two  
15 years, a record or records containing:

16 “(a) The name, address and occupation of each of the employer’s  
17 employees.

18 “(b) The actual hours worked each week and each pay period by each  
19 employee.

20 “(c) Such other information as the commissioner prescribes by the  
21 commissioner’s rules if necessary or appropriate for the enforcement of  
22 ORS 653.010 to 653.261 or of the rules and orders issued thereunder.”

23 OAR 839-020-0080(1) provides:

24 (1) Every employer regulated under ORS 653.010 to 653.261 must  
25 maintain and preserve payroll or other records containing the following  
information and data with respect to each employee to whom the law  
applies:

“(a) Name in full, as used for Social Security recordkeeping purposes, and  
on the same record, the employee's identifying symbol or number if such  
is used in place of name on any time, work, or payroll records;

“(b) Home address, including zip code;

“(c) Date of birth, if under 19;

“(d) Sex and occupation in which employed. (Sex may be indicated by use  
of the prefixes Mr., Mrs., Miss, or Ms.);

“(e) Time of day and day of week on which the employee's workweek  
begins. If the employee is part of a work force or employed in or by an  
establishment all of whose workers have a workweek beginning at the  
same time on the same day, a single notation of the time of the day and

1 beginning day of the workweek for the whole work force or establishment  
2 will suffice;

3 “(f) Regular hourly rate of pay for any workweek in which overtime  
4 compensation is due, and an explanation of the basis of pay by indicating  
5 the monetary amount paid on a per hour, per day, per week, per piece,  
6 commission on sales, or other basis, and the amount and nature of each  
7 payment which, pursuant to ORS 653.261(1) is excluded from the "regular  
8 rate of pay". (These records may be in the form of vouchers or other  
9 payment data.);

10 “(g) Hours worked each workday and total hours worked each workweek  
11 (for purposes of this section, a "workday" is any fixed period of 24  
12 consecutive hours and a "workweek" is any fixed and regularly recurring  
13 period of seven consecutive workdays);

14 “(h) Total daily or weekly straight-time earnings or wages due for hours  
15 worked during the workday or workweek, exclusive of premium overtime  
16 compensation;

17 “(i) Total premium pay for overtime hours. This amount excludes the  
18 straight-time earnings for overtime hours recorded under subsection (h) of  
19 this section;

20 “(j) Total additions to or deductions from wages paid each pay period  
21 including employee purchase orders or wage assignments. Also, in  
22 individual employee records, the dates, amounts, and nature of the items  
23 which make up the total additions and deductions;

24 “(k) Total wages paid each pay period;

25 “(l) Date of payment and the pay period covered by payment.”

The LLC violated ORS 653.045(1) and OAR 839-020-0080 by failing to make and keep  
available a record of the actual hours worked each workday and total hours worked  
each workweek by Claimant Francis and the total wages paid to Claimant Francis.

6) ORS 653.045(2) provides:

“Each employer shall keep the records required by subsection (1) of this  
section open for inspection or transcription by the commissioner or the  
commissioner’s designee at any reasonable time.”

OAR 839-020-0083 provides:

“(1) All records required to be preserved and maintained by these rules  
shall be preserved and maintained for a period of at least two years.

“(2) All employers shall keep such records in a safe and accessible place.

1 “(3) All records required to be preserved and maintained by these rules  
2 shall be made available for inspections and transcription by the  
Commissioner or duly authorized representative of the Commissioner.”

3 The LLC violated ORS 653.045(2) and OAR 839-020-0083(3) by failing to make  
4 available for inspection by the commissioner’s designee records showing the wages  
5 paid to Claimant Francis.

6 7) ORS 653.256 provides, in pertinent part:

7 “(1) In addition to any other penalty provided by law, the Commissioner  
8 of the Bureau of Labor and Industries may assess a civil penalty not to  
9 exceed \$1,000 against any person who willfully violates \* \* \* ORS 653.045  
\* \* \* or any rule adopted pursuant thereto. \* \* \*”

10 OAR 839-020-1010 provides, in pertinent part:

11 “(1) The commissioner may assess a civil penalty for any of the  
12 following willful violations:

13 “\* \* \* \* \*

14 “(d) Failure to make required payroll and other records in violation of  
15 ORS 653.045 and OAR 839-020-0080;

16 “(e) Failure to keep available required payroll and other records in  
17 violation of ORS 653.045 and OAR 839-020-0080.”

18 “\* \* \* \* \*

19 “(2) The civil penalties for any one violation will not exceed \$1000. The  
20 actual amount of the civil penalty will depend on all the facts and  
21 circumstances referred to in OAR 839-020-1020.”

22 OAR 839-020-1020 provides:

23 “(1) The commissioner may consider the following mitigating and  
24 aggravating circumstances when determining the amount of any civil  
25 penalty to be assessed and cite those the commissioner finds to be  
appropriate:

“(a) The history of the employer in taking all necessary measures to  
prevent or correct violations of statutes or rules;

“(b) Prior violations, if any, of statutes or rules;

“(c) The magnitude and seriousness of the violation;

“(d) Whether the employer knew or should have known of the violation;

“(e) The opportunity and degree of difficulty to comply;

1 “(f) Whether the employers' action or inaction has resulted in the loss of  
2 a substantive right of an employee.

3 “(2) It shall be the responsibility of the employer to provide the  
4 commissioner any mitigating evidence concerning the amount of the civil  
5 penalty to be assessed.

6 “(3) Notwithstanding any other section of this rule, the commissioner  
7 shall consider all mitigating circumstances presented by the employer for  
8 the purpose of reducing the amount of the civil penalty to be assessed.

9 The Commissioner has exercised his discretion appropriately by imposing a \$2,000 in  
10 civil penalties for the LLC's violations of ORS 653.045(1), OAR 839-020-0080(1), ORS  
11 653.045(2), and OAR 839-020-0083(3).

12 8) Under the facts and circumstances of this record, and according to the law  
13 applicable to this matter, the Commissioner of the Bureau of Labor and Industries has  
14 the authority to order Stephanie Nichols and the LLC to pay Claimant his earned,  
15 unpaid, due and payable wages, plus interest on that sum until paid, and to order the  
16 LLC to pay the penalty wages, plus interest on that sum until paid. ORS 652.332.

17 9) Under the facts and circumstances of this record, and according to the law  
18 applicable to this matter, the Commissioner of the Bureau of Labor and Industries has  
19 the authority to impose civil penalties for the violations found herein. ORS 653.256.

## 20 OPINION

### 21 WAGE CLAIM OF JOSEPH FRANCIS

22 In order to prevail, the Agency must prove: 1) that the LLC employed Claimant;  
23 2) any pay rate upon which the LLC and the Claimant agreed; 3) that Claimant  
24 performed work for which he was not properly compensated; and 4) the amount and  
25 extent of work Claimant performed for the LLC. *In the Matter of Barbara Coleman*, 19  
BOLI 230, 263, 264 (2000).

#### 26 A. Claimant Was Employed By Respondent Steph's Cleaning Service L.L.C.

Undisputed testimony by Stephanie Nichols established that the LLC was  
Claimant's employer.

1 **B. Claimant's Agreed Rate Of Pay**

2 Nichols asserted in the answer she filed on behalf of the LLC that she agreed to  
3 pay Claimant \$8.50 per hour. In contrast, Claimant wrote on his contemporaneous  
4 timecard and testified that Nichols agreed to pay him \$8 per hour. The forum has  
5 determined that Claimant was a more credible witness than Nichols. Based on that  
6 credibility assessment, the forum concludes that Nichols agreed to pay Claimant \$8 per  
7 hour, the wage rate cited by the Agency in its Order of Determination.

8 **C. Claimant Performed Work For Which He Was Not Properly Compensated**

9 Claimant testified credibly that he was only paid \$108 for the work he performed  
10 for the LLC. Nichols testified that she paid Claimant \$228 in the form of \$30 in cash,  
11 and two money orders in the amounts of \$60 and \$138, respectively. However, Nichols  
12 produced no receipts for the cash. Nichols produced a copy of the \$60 money order,  
13 but produced neither a copy of the \$138 money order nor the testimony of Anthony  
14 Vargas, the only other witness who could have provided testimony concerning that  
15 money order and whether or not it was given to Claimant. The forum draws two  
16 alternative adverse inferences from Nichols's failure to provide a copy of the \$138  
17 money order or to call Vargas, who was listed as a witness in Respondents' case  
18 summary.<sup>1</sup> The first is that the LLC never purchased a \$138 money order for Claimant.  
19 The second is that the alleged \$138 money order, even if purchased, was not received  
20 by Claimant. In Nichols's answer, she admitted that Claimant worked 26 hours for the  
21 LLC. 26 hours multiplied by \$8 per hour equals \$208. Based on Claimant's credible  
22 testimony of the amount he was paid and Respondent's admission of the number of  
23 hours Claimant worked, the forum concludes that Claimant performed work for which he  
24 was not properly compensated.

25 \_\_\_\_\_  
<sup>1</sup> See, e.g., *In the Matter of Toni Kuchar*, 23 BOLI 265, 275 (2002).

1 **D. The Amount And Extent Of Work Performed By Claimant**

2 Respondent did not keep contemporaneous records of Claimant's work hours.  
3 Claimant, on the other hand, kept a daily record of his hours on a timecard provided by  
4 Nichols. Although Nichols claimed she did not give the Meili Construction Co. timecard  
5 to Claimant, she offered no evidence concerning how Claimant might have obtained the  
6 timecard, had Nichols not given it to him. Vargas was the Claimant's only co-worker  
7 and presumably could have testified as to the actual hours worked by Claimant, but  
8 Respondents did not call him as a witness, despite listing him as a witness on their case  
9 summary. Consequently, the forum relies on Claimant's credible records and testimony  
10 to conclude that Claimant worked 42 hours, earning \$336.

11 **RESPONDENT STEPHANIE NICHOLS IS A SUCCESSOR TO STEPH'S CLEANING**  
12 **SERVICE LLC AND IS INDIVIDUALLY LIABLE FOR THE UNPAID WAGES**

13 The Agency alleged that Respondent Nichols was personally liable for the unpaid  
14 wages as a successor to the LLC under ORS 652.310(2). The test used by the forum  
15 involves a determination of whether Nichols conducts essentially the same business  
16 that the LLC did. The forum looks at six elements: the name or identity of the business;  
17 its location; the lapse of time between the previous operation and the new operation; the  
18 same or substantially the same work force employed; the same product is manufactured  
19 or the same service is offered; and, the same machinery, equipment, or methods of  
20 production are used. Not every element needs to be present for an employer to be a  
21 successor; the facts must be considered together. *In the Matter of Catalogfinder, Inc.*,  
22 18 BOLI 242, 256 (1999). The Agency bears the burden of proof of establishing  
23 successorship.

24 **A. Name Or Identity Of The Business.**

25 The name of the LLC was Steph's Cleaning Service LLC. The LLC had two  
members, Nichols and her grandmother. Nichols was the managing member, and there

1 was no evidence that her grandmother actually did any work. Nichols, a sole proprietor  
2 and the alleged successor, does business as Steph's Cleaning Service and uses the  
3 same mailing address as the LLC. This element indicates successorship.

4 **B. Location Of The Business.**

5 The principal place of business for the LLC, as indicated by the LLC's registration  
6 with the Corporations Division, was 2926 Lincoln, Eugene, Oregon. There was no  
7 evidence presented as to the location of Respondent Nichols's principal place of  
8 business. However, both the LLC and Nichols use the same mailing address, PO Box  
9 5912, Eugene, OR 97405. The only evidence presented regarding the nature of the  
10 cleanup business conducted by the LLC and Respondent Nichols was that it is  
11 conducted at construction job sites. Accordingly, Respondent Nichols's use of the same  
12 mailing address as the LLC takes on a heightened significance and is indicative of  
13 successorship.

14 **C. Lapse In Time Between The LLC's Operation And Nichols's Sole**  
15 **Proprietorship.**

16 Evidence in the record indicates that the LLC involuntarily dissolved sometime in  
17 2002 and that Nichols began operating as a sole proprietorship in March or April 2000.  
18 This means that that Nichols began operating her sole proprietorship a maximum of  
19 three to four months after the LLC ceased to exist, indicating successorship.

20 **D. Employment Of The Same Or Substantially The Same Work Force.**

21 Except for the employment of Nichols herself, no evidence was presented to  
22 show whether Nichols employed any of the same persons that the LLC employed, and  
23 the forum concludes that this element is not indicative of successorship.

24 **E. Manufacture Of The Same Product Or Offering The Same Service.**

25 Testimony by Nichols established that the LLC and Nichols engage in the same  
business, cleaning construction sites. This indicates successorship.

1 **F. Use Of The Same Machinery, Equipment, Or Methods Of Production.**

2 No evidence was presented to show what machinery or equipment, or methods  
3 of production were used by the LLC in cleaning construction sites, other than evidence  
4 that Claimant cleaned windows by himself. Without more evidence, this element is not  
5 indicative of successorship.

6 **G. Conclusion.**

7 Four of the six elements – identity, location of the business, lapse in time, and  
8 same service – indicate successorship. These four elements, considered together,  
9 establish that Respondent Nichols conducts essentially the same business as the LLC  
10 and is a successor employer, as defined by ORS 652.310(2), to the LLC. Accordingly,  
11 Respondent Nichols is individually liable as a successor employer for wages owed to  
12 Claimant Francis.

13 **RESPONDENT NICHOLS WAS NOT A PURCHASER OR LESSEE OF THE LLC'S**  
14 **BUSINESS PROPERTY FOR THE CONTINUATION OF THE SAME BUSINESS**

15 The second theory upon which Nichols can be held personally liable for the  
16 LLC's unpaid wages is to show that Nichols was a "lessee or purchaser of the [LLC's]  
17 business property for the continuance of the same business." ORS 652.310(1). No  
18 evidence was presented concerning the business property used by the LLC in the  
19 conduct of its business or the business property used by Nichols in the conduct of her  
20 sole proprietorship. Without this evidence, Nichols can not be held liable as a "lessee or  
21 purchaser" for Claimant Francis's unpaid wages.

22 **PENALTY WAGES**

23 An award of penalty wages turns on the issue of willfulness. Willfulness does not  
24 imply or require blame, malice, wrong, perversion, or moral delinquency, but only  
25 requires that that which is done or omitted is intentionally done with knowledge of what

1 is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western*  
2 *Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

3 Respondent, as an employer, had a duty to know the amount of wages due to his  
4 employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack*  
5 *Coke*, 3 BOLI 238 (1983). Because Nichols herself worked at the Meili Construction  
6 Co. job site with Claimant, the forum concludes that she was aware of Claimant's hours  
7 of work. There was no evidence that Nichols, as the LLC's managing member, acted  
8 other than voluntarily or as a free agent in not paying Claimant for all the work he  
9 performed.

10 Claimant is entitled to \$1,920 in penalty wages, computed at \$8 per hour x 8  
11 hours per day x 30 days = \$1,920.

12 The LLC is liable for these penalty wages. Respondent Nichols, as a successor  
13 employer, is not individually liable for these penalty wages. *In the Matter of Anita's*  
14 *Flowers & Boutique*, 6 BOLI 258, 269 (1987).

15 **RESPONDENT STEPH'S CLEANING SERVICE LLC VIOLATED ORS 653.045(1)**  
16 **AND OAR 839-020-0080(1).**

17 The Agency alleged in its Notice of Intent that Respondents failed to maintain  
18 and preserve records regarding the employment of Claimant Joseph Francis in October  
19 2001, in violation of ORS 653.045(1) and OAR 839-020-0080(1). The forum has  
20 determined that the LLC failed to make a record of "the actual hours worked each week"  
21 by Francis or the "[T]otal wages paid each pay period" to Francis. This constitutes a  
22 single violation of the statute and administrative rule, for which the Commissioner may  
23 assess a civil penalty of up to \$1,000. However, a civil penalty may not be assessed  
24 against Nichols individually, as the definition of "employer" that applies to ORS 653.045  
25 is "any person who employs another person," and does not incorporate the concept of  
successor liability. *In the Matter of Sabas Gonzalez*, 19 BOLI 1, 15 (1999).

1 **AMOUNT OF CIVIL PENALTY**

2 The Notice of Intent asks that a civil penalty of \$1000 be assessed against  
3 Respondents. OAR 839-020-1020 states the mitigating and aggravating circumstances  
4 that the Commissioner shall consider when determining an amount of civil penalties. It  
5 is the employer's responsibility to provide any mitigating evidence. The Commissioner  
6 must consider any mitigating circumstances presented.

7 In this case, there are several aggravating factors. First, Nichols, as the LLC's  
8 manager, knew or should have known of the violation, in that employers are presumed  
9 to know the laws they are required to follow and Nichols was acting as an agent for the  
10 LLC. *In the Matter of John Mathioudakis*, 12 BOLI 11, 20-21 (1993). Second, Nichols,  
11 who worked on the job site, could have easily written down Francis's daily hours  
12 worked. She could have just as easily made copies of the money orders she used to  
13 pay Francis and obtained a receipt for the cash that she paid him. Third, the violation  
14 was serious, in that it affected BOLI's ability to determine the actual amount of wages  
15 owed to Francis. The magnitude of the violation was not great, in that the violation only  
16 impacted one employee. Finally, the LLC's failure to make these records resulted in the  
17 loss of a substantive right to Francis in the form of \$228 in unpaid wages. Respondent  
18 presented no mitigating circumstances. Under these facts, the \$1,000 civil penalty  
19 sought by the Agency is appropriate.

20 **RESPONDENT STEPH'S CLEANING SERVICE LLC VIOLATED ORS 653.045(2)**  
21 **AND OAR 839-020-0083(3).**

22 The Agency alleged in its Notice of Intent that the Agency requested and  
23 Respondents failed to make available the records showing amounts paid to Claimant  
24 Joseph Francis in October 2001, in violation of ORS 653.045(2) and OAR 839-020-  
25 0083. ORS 653.045(2) requires employers to keep records required by ORS  
653.045(1) "open for inspection by the commissioner or commissioner's designee at

1 any reasonable time.” OAR 839-020-0083(3) interprets the statute to require that these  
2 records “shall be made available for inspections.”

3 ORS 653.045(1)(c) requires that every employer must keep a record of “such  
4 other information as the commissioner prescribes by the commissioner’s rules if  
5 necessary or appropriate for the enforcement of ORS 653.010 to 653.261 or of the rules  
6 and orders issued thereunder.” OAR 839-020-0080(1) contains the “other information”  
7 prescribed by the commissioner. Among its requirements are that employers must keep  
8 records of the “[T]otal wages paid each pay period.” OAR 839-020-0080(1)(k).

9 On March 22, 2002, Pargeter, an Agency compliance specialist, asked Nichols to  
10 provide her with documents showing the wages that Claimant was paid. Nichols, acting  
11 on behalf of the LLC, eventually provided a copy of a \$60 money order she used to pay  
12 Claimant. However, Nichols has never provided a receipt showing the cash the LLC  
13 used to pay Claimant or a copy of the second money order the LLC paid him with. This  
14 failure constitutes a single violation of ORS 653.045(2) and OAR 839-020-0083(3), for  
15 which the Commissioner may assess a civil penalty of up to \$1,000. Again,  
16 Respondent Nichols is not individually liable for this civil penalty.

### 17 **AMOUNT OF CIVIL PENALTY**

18 The Notice of Intent proposed to assess a civil penalty of \$1,000. In this case,  
19 there are several aggravating factors. First, Nichols, as the LLC’s manager, knew or  
20 should have known of the violation, in that employers are presumed to know the laws  
21 they are required to follow and Nichols was acting as an agent for the LLC. *Id.* Second,  
22 Nichols could have easily obtained a receipt from Claimant Francis for the cash  
23 payment to him and presumably could have obtained a copy of the second money order  
24  
25

1 to provide to Pargeter, had she made an attempt to do so.<sup>2</sup> Third, the violation was  
2 serious and of significant magnitude, in that it resulted in BOLI having to conduct a  
3 hearing to determine that wages were owed to Francis and the actual amount of wages  
4 owed. Finally, the LLC's failure to make these records resulted in the loss of a  
5 substantive right to Francis in the form of \$228 in unpaid wages. Respondent  
6 presented no mitigating circumstances. Under these facts, the \$1,000 civil penalty  
7 sought by the Agency is appropriate.

8 **ORDER**

9 NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the  
10 unpaid wages, the Commissioner of the Bureau of Labor and Industries hereby orders  
11 Respondent Steph's Cleaning Service L.L.C. and Respondent Stephanie Nichols to  
12 deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE  
13 Oregon Street, Portland, Oregon 97232-2162, the following:

- 14 (1) A certified check payable to the Bureau of Labor and Industries in  
15 trust for Claimant Joseph Francis in the amount of TWO HUNDRED  
16 TWENTY EIGHT DOLLARS (\$228), less appropriate lawful deductions,  
17 representing \$228 in gross earned, unpaid, due and payable wages, plus  
interest at the legal rate on the sum of \$228 from November 1, 2001, until  
paid.

18 NOW, THEREFORE, as authorized by ORS 652.332 and ORS 653.256, and as  
19 payment of the penalty wages, and civil penalties assessed as a result of its violations  
20 of ORS 652.140(2), ORS 653.045(1) and (2), and OAR 839-020-0080(1) and OAR 839-  
21 020-0083(3), the Commissioner of the Bureau of Labor and Industries hereby orders  
22 Respondent Steph's Cleaning Service L.L.C. to deliver to the Fiscal Services Office of  
23 the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-  
24 2162, the following:

25 \_\_\_\_\_

<sup>2</sup> See Finding of Fact 9 – The Merits.

1 (2) ONE THOUSAND NINE HUNDRED AND TWENTY DOLLARS  
2 (\$1,920), less appropriate lawful deductions, representing \$1,920 in  
3 penalty wages, plus interest at the legal rate on the sum of \$1,920 from  
4 December 1, 2001, until paid.

5 (3) A certified check payable to the Bureau of Labor and Industries in  
6 the amount of TWO THOUSAND DOLLARS (\$2,000), plus any interest  
7 that accrues at the legal rate on that amount from a date ten days after  
8 issuance of the Final Order and the date Respondent Steph's Cleaning  
9 Service L.L.C. complies with the Final Order.

10 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

11 \_\_\_\_\_  
12 Jack Roberts, Commissioner  
13 Bureau of Labor and Industries  
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**JUDICIAL REVIEW NOTICE**

Pursuant to ORS 183.482, you are entitled to judicial review of this Final Order. To obtain judicial review, you must file a Petition for Judicial Review with the Court of Appeals in Salem, Oregon, within sixty (60) days of the service of this Order.

If you file a Petition for Judicial Review, YOU MUST ALSO SERVE A COPY OF THE PETITION ON the BUREAU OF LABOR AND INDUSTRIES and THE DEPARTMENT OF JUSTICE - APPELLATE DIVISION

AT THE FOLLOWING ADDRESSES:

**BUREAU OF LABOR AND INDUSTRIES  
HEARINGS UNIT  
1025 STATE OFFICE BUILDING  
800 NE OREGON STREET #32  
PORTLAND, OREGON 97232-2162**

**DEPARTMENT OF JUSTICE  
APPELLATE DIVISION  
400 JUSTICE BUILDING  
SALEM, OREGON 97310**

If you file a Petition for Judicial Review and if you wish to stay the enforcement of this final order pending judicial review, **you must file a request with the Bureau of Labor and Industries**, at the address above. Your request must contain the information described in ORS 183.482(3) and OAR 137-003-0090 to OAR 137-003-0092.

CERTIFIED TO BE A TRUE AND  
CORRECT COPY OF THE ORIGINAL  
AND OF A WHOLE THEREOF.

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FOWHD/STEPHANIE NICHOLS.DOC