

FILED: April 23, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

PONDEROSA PROPERTIES, LLC,
Petitioner,

v.

EMPLOYMENT DEPARTMENT,
Respondent.

Office of Administrative Hearings
T71380

A150764

Argued and submitted on August 15, 2013.

Chris Hatfield argued the cause and filed the opening brief for petitioner. With him on the reply brief was Hurley Re, P. C.

Judy C. Lucas, Senior Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Duncan, Presiding Judge, and DeVore, Judge, and Schuman, Senior Judge.*

DEVORE, J.

Reversed and remanded for reconsideration.

*DeVore, J., *vice* Wollheim, J.

1 DEVORE, J.

2 Petitioner Ponderosa Properties, LLC, seeks judicial review after an
3 administrative law judge (ALJ) upheld a notice of tax assessment that the Employment
4 Department (department) issued to petitioner. The ALJ determined that 21 individuals
5 who performed work for petitioner as cleaners and maintenance workers were employees
6 of petitioner and that petitioner had failed to pay unemployment taxes on their wages.
7 Petitioner contends that the individuals were independent contractors, as defined by ORS
8 670.600(2), whose compensation was not subject to unemployment taxation. For the
9 reasons explained below, we reverse and remand to the department for reconsideration.

10 I. BACKGROUND

11 We state the facts consistently with the ALJ's unchallenged factual findings
12 and the uncontroverted evidence in the record. *McDowell v. Employment Dept.*, 348 Or
13 605, 608, 236 P3d 722 (2010); *Portland Columbia Symphony v. Employment Dept.*, 258
14 Or App 411, 413, 310 P3d 1139 (2013). Petitioner (Ponderosa) has a contract to provide
15 rental management services to Black Butte Ranch, a real estate development in central
16 Oregon with 1,250 individual homes and condominiums. All of the units within Black
17 Butte Ranch are privately owned. Ponderosa coordinated rental activity for owners who
18 wished to rent their properties to the public. Ponderosa arranged with owners to provide
19 general maintenance and cleaning services. To provide the services, Ponderosa engaged
20 house cleaners and maintenance workers. Twenty-one individuals--two maintenance
21 workers and 19 cleaners--are the subject of this dispute. The department found them to

1 be employees. Ponderosa insists that they are independent contractors.

2 Hayden Mayea and Bradford Livsey are maintenance workers. Ponderosa
3 paid Mayea a flat rate of \$65 per unit to shovel snow from a unit's walkway and
4 driveway. Ponderosa would inform Mayea on Monday at which units he could shovel,
5 and he would have to complete the work by Friday. Otherwise, Mayea could set his own
6 schedule for shoveling the units. Mayea decided which tools to use and provided them
7 himself, including a truck with a snowplow to travel to the units. Ponderosa did not
8 provide any training or require Mayea to follow any special procedures, nor did it provide
9 him with a handbook on how to perform the work. Ponderosa did not provide a uniform
10 or require a dress code. Mayea did not have a written contract with Ponderosa, nor did he
11 make any formal guarantees about work quality. Ponderosa did inspect the work to
12 ensure it was timely and satisfactorily done, and, on one occasion, did require him to
13 return and complete the work without additional payment. Mayea could hire assistants or
14 replacement workers without Ponderosa's approval.

15 Livsey also provided general maintenance services, such as setting snow
16 stakes, cleaning decks, and replacing light bulbs. He provided his own shovels, rakes,
17 blowers, and hammers. Livsey could choose assignments from a list prepared by
18 Ponderosa, and he could complete them at any time, unless the unit was occupied.
19 Ponderosa set no specific procedures for Livsey to follow, and did not give him any
20 handbooks. Livsey was not required to follow a dress code or wear a uniform, and he
21 generally set his own schedule. Ponderosa did inspect his work, and it could require him

1 to correct deficient work. Livsey had authority to hire assistants or replacements without
2 Ponderosa's consent.

3 The cleaners' responsibilities and relationship with Ponderosa are
4 undifferentiated, and, following the ALJ's approach, we consider their duties collectively.
5 Ponderosa engaged the cleaners to prepare the units for rent or for the benefit of the
6 owners. Ponderosa sent the cleaners a schedule for the coming month, which was based
7 on the occupancy of the units. Ponderosa identified which cleaning jobs were available
8 to each cleaner, and each was free to accept or reject the jobs. Each normal cleaning job
9 had a fixed, nonnegotiable price and took approximately two hours. Seasonal deep
10 cleanings were paid at an hourly rate negotiated between Ponderosa and the cleaner. The
11 unit owners provided some equipment and cleaning supplies, which cleaners could or, in
12 some cases, must use. Otherwise, the cleaners used their own equipment and supplies,
13 not Ponderosa's. The cleaners provided their own transportation to a unit. If a unit was
14 being vacated and re-rented the same day, cleaners had a six to eight hour window of
15 time in which to clean the unit. Ordinarily, they were given four to six days to complete
16 a job, and they could set their own schedule.

17 Ponderosa gave the cleaners information sheets, which included
18 information such as security codes, instructions from the owners, and the location of the
19 water heater. Ponderosa provided checklists for each room and unit, as well as more
20 detailed spring cleaning checklists. Owners could pick tasks or specify cleaning
21 products. Cleaners were not expected to follow these checklists, and several cleaners

1 testified that they ignored them. Ponderosa merely expected the cleanings to be done in a
2 professional manner. Cleaners were given periodic memoranda, called Staff Notes, with
3 general and seasonal information and reminders, such as protocols for submitting
4 invoices and reminders to turn off all lights in the units.

5 The cleaners submitted invoices for each job, reflecting the date of
6 completion, unit number, and set rate of pay. Ponderosa then billed the unit owner.
7 Ponderosa paid the cleaners twice per month. Because Ponderosa was responsible to
8 owners for security, it required the cleaners to provide information on any assistants or
9 replacements they hired, but Ponderosa's approval was not necessary. Ponderosa had no
10 written contract with the cleaners. Following a cleaning job, Ponderosa inspected the
11 unit, looking for omissions or damage, and could require a cleaner to correct the work
12 without additional pay. Ponderosa would leave a "calling card" in the unit to welcome
13 tenants, provide information, and solicit feedback.

14 In June and July of 2010, the department received claims for
15 unemployment insurance benefits from two cleaners. Both reported wages from
16 Ponderosa, but the department had no record from Ponderosa of wages paid to them. The
17 department issued an assessment, finding that 45 individuals were employees and that
18 Ponderosa had a taxable payroll of \$171,434.06 during the period in question. The
19 department assessed taxes and interest of \$2,752.15. Ponderosa disputed the assessment
20 and requested a hearing before an ALJ.

21 Prior to the hearing, the parties stipulated that 16 of the individuals were

1 employees and eight were independent contractors. The hearing focused on the
2 remaining 21 individuals and the meaning of the term "independent contractor." For the
3 purposes of ORS chapter 657 (unemployment insurance), an "independent contractor" is
4 a person who provides services for remuneration and who, in the provision of the
5 services:

6 "(a) Is free from direction and control over the means and manner of
7 providing the services, subject only to the right of the person for whom the
8 services are provided to specify the desired results; [and]

9 "(b) * * * is customarily engaged in an independently established
10 business[.]"

11 ORS 670.600(2).¹ Those elements are conjunctive; a person is not considered an
12 "independent contractor" unless each is met. After testimony from the department's
13 investigator, Ponderosa's principals, and several cleaners, the ALJ sustained the tax
14 assessment for all 21 individuals.² The ALJ determined that Ponderosa failed to prove
15 that any of the individuals was free from petitioner's direction and control in the
16 performance of his or her services. ORS 670.600(2)(a). Although that determination was
17 dispositive, the ALJ went on to determine that seven individuals were customarily
18 engaged in an independently established business. ORS 670.600(2)(b). Because,
19 however, none of the individuals satisfied both elements, the ALJ affirmed the
20 assessment as to all 21 individuals.

¹ The parties agree that ORS 670.600(2)(c) and (d), which pertain to licensing requirements, are not at issue in this case.

² The ALJ did modify the assessment as to the eight individuals who the parties stipulated were independent contractors.

1 On review, Ponderosa argues that the ALJ erred in concluding that
2 Ponderosa maintained "direction and control" over the disputed individuals. Ponderosa
3 asserts that the factors relied on by the ALJ do not support his determination and that the
4 ALJ failed to account for the "nature of the business" in making his decision. Ponderosa
5 also argues that the ALJ's determination concerning whether the disputed individuals
6 were "customarily engaged in an independent business" was not supported by substantial
7 evidence and that the uncontroverted evidence demonstrates that additional individuals
8 satisfied that element.

9 We review for substantial evidence, substantial reason, and errors of law.
10 ORS 657.684; ORS 183.482(8); *Freeman v. Employment Dept.*, 195 Or App 417, 421, 98
11 P3d 402 (2004). We note that the "ultimate determination--whether a particular person is
12 an employee or independent contractor--is a question of law." *AGAT Transport, Inc. v.*
13 *Employment Dept.*, 256 Or App 294, 300-01, 305 P3d 122 (2013) (citing *Schaff v. Ray's*
14 *Land & Sea Food Co., Inc.*, 334 Or 94, 101 n 3, 45 P3d 936 (2002)); *see also Avanti*
15 *Press, v. Employment Dept. Tax Section*, 248 Or App 450, 459, 274 P3d 190 (2012).
16 Under ORS 657.683(4), the employer has the burden of proving that the individuals met
17 both elements. For the reasons that follow, we conclude that the ALJ erred in concluding
18 that Ponderosa maintained "direction and control" over the individuals. We also
19 conclude that the ALJ's determination that certain individuals were not customarily
20 engaged in an independent business is not supported by substantial evidence or
21 substantial reason.

1 II. DIRECTION AND CONTROL

2 A. *In General*

3 We begin with the first element in the definition of an independent
4 contractor. The "direction and control" element asks whether a person receiving
5 remuneration for services is "free from direction and control over the means and manner
6 of providing the services, subject only to the right of the person for whom the services are
7 provided to specify the desired results." ORS 670.600(2)(a). That issue presents a legal
8 question and not a pure question of fact. *AGAT Transport, Inc.*, 256 Or App at 301; *see*
9 *Avanti Press*, 248 Or App at 459, 466-71 (addressing "direction and control" test as legal
10 question). The question focuses on the "means and manner" by which the person
11 provides the services, terms that have been defined by administrative rule. "Means" is
12 defined as "resources used or needed in performing services." OAR 471-031-
13 0181(3)(a)(A). To be free from direction or control over the "means" of providing
14 services,

15 "an independent contractor must determine which resources to use in order
16 to perform the work, and how to use those resources. Depending upon the
17 nature of the business, examples * * * include such things as tools or
18 equipment, labor, devices, plans, materials, licenses, property, work
19 location, and assets, among other things."

20 *Id.* The "manner" of providing a service is "the method by which services are
21 performed." OAR 471-031-0181(3)(a)(B). To be free from direction and control over
22 the manner of performing services, the independent contractor "must determine how to
23 perform the work. Depending upon the nature of the business, examples * * * include

1 such things as work schedules, and work processes and procedures, among other things."

2 *Id.*

3 These terms do not speak in absolutes, and they do not contemplate black
4 and white situations. Rather, ORS 670.600(2)(a) "was intended to codify the 'right to
5 control' case law that had developed over the years--particularly, in workers'
6 compensation cases." *Avanti Press*, 248 Or App at 460 (citing *S-W Floor Cover Shop v.*
7 *Natl. Council on Comp. Ins.*, 318 Or 614, 630, 872 P2d 1 (1994)). The "right to control"
8 test involves evaluating multiple factors to determine whether an employment
9 relationship exists, *S-W Floor Cover Shop*, 318 Or at 622, which suggests that the "[r]ight
10 to control is a matter of degree." *Pam's Carpet Service v. Employment Div.*, 46 Or App
11 675, 681, 613 P2d 52 (1980). In *Avanti Press*, we observed:

12 "Even in the purest of independent contractor situations--say, services
13 rendered by an attorney, doctor or accountant--the client could give some
14 instructions about where the services were to be performed.' In other
15 words, the right to control test, which the legislature codified in ORS
16 670.600, has never required that an 'independent contractor' be free from *all*
17 direction and control."

18 248 Or App at 461 (emphasis in original; citation omitted). In *Ponderosa Inn, Inc. v.*
19 *Emp. Div.*, 63 Or App 183, 190, 663 P2d 1291, *rev den*, 296 Or 120 (1983), the court
20 explained that to tell a painter what and where to paint was not the kind of control to
21 which the statute refers. "Obviously a contract will specify what is to be painted and,
22 even if impliedly, will ordinarily require that the work be done in an acceptable manner.
23 That does not necessarily mean that there is an employment relationship." *Id.*

24 Recognizing that some oversight may exist in an independent contractor relationship, the

1 question becomes whether that oversight relates to the desired results, or, instead, to the
2 means and manner of performing the services. *AGAT Transport, Inc.*, 256 Or App at
3 303. "In making the distinction between those two types of control, it is important to
4 focus on the type of service performed, and consider whether it is *that* service--not the
5 end result--over which the individual providing services is free from direction and
6 control." *Id.* (emphasis in original). Here, we must consider the services provided by the
7 individuals and determine whether they are free from direction and control over the
8 means and manner of providing those services. Doing so reveals that the ALJ misapplied
9 the direction and control test to Mayea, Livsey, and the cleaners.

10 B. *Maintenance Workers*

11 As to Mayea and Livsey, the ALJ acknowledged that certain factors
12 demonstrated their freedom from direction and control in providing services: They
13 provided and selected all of the necessary tools and equipment; they had discretion in the
14 timing of performance; they were not required to wear a uniform or follow a dress code;
15 and they could hire assistants or replacements without Ponderosa's approval. The ALJ
16 also found:

17 "In other, more significant respects, however, [Ponderosa] maintained
18 significant control over the means and manner of providing services. For
19 both Mayea and Livsey, [Ponderosa] set the rate of pay each would receive
20 for assigned work, and determined what job assignments were available to
21 each. [Ponderosa] reviewed their work, and retained the authority to
22 require them to complete work to its satisfaction before paying for their
23 services."

24 Due to those facts, the ALJ concluded that Mayea and Livsey were not free from

1 Ponderosa's direction and control and, consequently, failed to satisfy ORS 670.600(2)(a).
2 Ponderosa contends that the facts on which the ALJ relied "do not support his finding that
3 Ponderosa controlled the means and manner that Mayea and Livsey provide[] services."
4 The department responds that the ALJ's findings were sufficient. We agree with
5 Ponderosa.

6 Although the direction and control test often requires "nuanced (if not
7 imperfect) line-drawing" between control over the means and manner of performance and
8 control over the results of performance, *Portland Columbia Symphony*, 258 Or App at
9 423, we conclude that Ponderosa's direction and control are aimed at the desired results.
10 We examine the facts that the ALJ noted, each in turn. Ponderosa's setting the rate of pay
11 for each job and determining which job assignments were available to each individual are
12 not indicative of control over Mayea's snow-shoveling or Livsey's maintenance projects;
13 rather, they are aimed at achieving a desired result--a completed assignment at the
14 required time and at a fixed price. Ponderosa's inspection of their work and potentially
15 requiring them to correct their work before payment are again directed at ensuring that
16 the desired results have been achieved. *See Ponderosa Inn, Inc.*, 63 Or App at 190.
17 Indeed, correction of defective work is a factor indicative of being customarily engaged
18 in an independent business, ORS 670.600(3)(b)(B), and should not militate *against* an
19 individual being an independent contractor for this element.³ This case is similar to

³ The consideration of such facts for purposes of the independent business issue is discussed below. ___ Or App at ___ (slip op at 15).

1 *Portland Columbia Symphony*, in which we explained that "the constraints identified by
2 the ALJ are not indicative of the type of direction and control in an employment
3 relationship but, rather, flow from the very nature of the result that petitioner desires."
4 258 Or App at 423. The same is true here. Accordingly, the ALJ erred in his
5 determination that Ponderosa exercised direction and control over the means and manner
6 by which Mayea or Livsey performed services.

7 C. *Cleaners*

8 As to the cleaners, the ALJ's findings were mixed. The ALJ recognized
9 certain ways that they enjoyed freedom from Ponderosa's direction and control. They
10 worked independently on each assignment without direct supervision, and they could
11 accept or reject any of the work opportunities offered. They generally provided their own
12 tools and supplies for the work and could use them in whatever manner they chose. The
13 ALJ rejected the department's argument that the information sheets, checklists, sample
14 invoices, and staff notes constituted direction and control. The ALJ found that those
15 materials reflect Ponderosa's specification of the desired results of the contracted work.
16 Similarly, the ALJ reasoned that the calling cards were intended for communication with
17 tenants, and the cards did not direct and control the means and manner of the cleaners'
18 services. The ALJ found, however, that Ponderosa maintained significant direction and
19 control over the cleaners based on the following facts:

20 "[Ponderosa] set the rate of pay for each clean, and the rates were not
21 negotiable. [Ponderosa] prepared a monthly list of cleans, and decided
22 which cleans were offered to each cleaner. Perhaps most significantly, the

1 cleaners were not authorized to negotiate directly with unit owners for
2 cleaning jobs."

3 The ALJ concluded that Ponderosa failed to establish that the 19 cleaners satisfied ORS
4 670.600(2)(a). As before, Ponderosa contends that those facts are not logically connected
5 to direction and control over means and manner and that those facts fail to account for the
6 nature of Ponderosa's business. The department responds that the facts are sufficient and
7 adds that control over the "manner" of performing services includes "work schedules."
8 OAR 471-031-0181(3)(a)(B).

9 We agree with Ponderosa. The nonnegotiable rates of pay and the prepared
10 list of cleaning jobs are not indicative of direction and control over the means and manner
11 of providing this type of service--cleaning a unit. Rather, those facts are indicative of the
12 results Ponderosa seeks from hiring a cleaner--that the rental unit will be clean when the
13 tenant arrives and at a reasonable and predictable price. Likewise, Ponderosa's "work
14 schedules" did not indicate control. Ponderosa gave the cleaners four or five days to
15 complete the work before a deadline and would require the work to be completed in a
16 single day only when the occupancy of a unit required it. That schedule was determined
17 by the rental schedule, which flows from the nature of the business, and not petitioner's
18 desire to direct or control how the cleaners performed their services.

19 For those reasons, we conclude that the ALJ erred in his application of ORS
20 670.600(2)(a) to the 19 cleaners, Mayea, and Livsey. The facts found by the ALJ, along
21 with the undisputed evidence in the record, establish that those 21 individuals were "free
22 from direction and control over the means and manner of providing the services, subject

1 only to the right of [Ponderosa] to specify the desired results." ORS 670.600(2)(a).

2 III. INDEPENDENTLY ESTABLISHED BUSINESS

3 A. *In General*

4 We turn now to the second element needed to show that an individual is an
5 independent contractor for the purposes of unemployment insurance: Ponderosa must
6 show that each service provider is engaged in an "independently established business"
7 within the meaning of ORS 670.600(2)(b). Omitting the details to follow later, ORS
8 670.600(3) provides that

9 "a person is considered to be customarily engaged in an independently
10 established business if any *three* of the following [*five*] requirements are
11 met:

12 "(a) The person maintains a business location:

13 "* * * * *

14 "(b) The person bears the risk of loss related to the business or the
15 provision of services * * *:

16 "* * * * *

17 "(c) The person provides contracted services for two or more
18 different persons within a 12-month period, or the person routinely engages
19 in business advertising, solicitation or other marketing efforts reasonably
20 calculated to obtain new contracts to provide similar services.

21 "(d) The person makes a significant investment in the business * * *:

22 "* * * * *

23 "(e) The person has the authority to hire other persons to provide or
24 to assist in providing the services and has the authority to fire those
25 persons."

26 (Emphasis added.)

1 Although the parties in some cases have designated certain individuals as
2 representatives of a group, the parties here did not do that. *See, e.g., Portland Columbia*
3 *Symphony*, 258 Or App at 416 (using four musicians as representatives of the orchestra).
4 The parties, however, did concur in prehearing stipulations. First, the ALJ acknowledged
5 the parties' stipulation that two of the cleaners satisfied three of the criteria in ORS
6 670.600(3).⁴ Next, based on evidence presented by Ponderosa, the ALJ determined that
7 five other cleaners satisfied three criteria in ORS 670.600(3).⁵ The ALJ also determined
8 that one other cleaner satisfied three criteria, but he inadvertently omitted her from the
9 ultimate findings on this element.⁶ Nonetheless, as noted above, the ALJ determined that
10 those eight individuals were not independent contractors, because none was free from
11 Ponderosa's direction and control. In light of our holding to the contrary, those eight
12 cleaners must be recognized as independent contractors. Accordingly, the status of 13
13 individuals remains in dispute at this point.

14 Ponderosa contends that "[a]ll of the persons at issue satisfied the
15 requirements of (3)(b) [(risk of loss)], [3(c) (contracted services to others),] and 3(e)
16 [(ability to hire others)], which means ORS 670.600(3) is satisfied." Neither party
17 disputes the ALJ's determination that all of the service providers satisfied the criterion in

⁴ Those cleaners are Julie Allen and Dawn Thatch.

⁵ Those cleaners are Eileen Evan, Roger Renner, Ruth Rincon, Emilee Stoery, and Marie Libel.

⁶ The parties stipulated that Sharon Sparrow satisfied ORS 670.600(3)(b) and (3)(c). The ALJ found she had authority to hire and fire assistants without Ponderosa's approval, thus satisfying ORS 670.600(3)(e).

1 ORS 670.600(3)(e), which concerns the authority of all the workers to hire and fire
2 assistants. And Ponderosa does not challenge the ALJ's determinations pertaining to
3 ORS 670.600(3)(a) or (d), as to particular individuals who had an independent business
4 location or a significant investment in their business. Consequently, we confine our
5 review to the ALJ's determinations concerning ORS 670.600(3)(b) and (c), which we
6 review for substantial evidence and substantial reason. ORS 657.684; ORS 183.482(8)(c)
7 ("Substantial evidence exists to support a finding of fact when the record, viewed as a
8 whole, would permit a reasonable person to make that finding."); *Salosha, Inc. v. Lane*
9 *County*, 201 Or App 138, 143, 117 P3d 1047 (2005) ("Where a petitioner argues that an
10 order is not supported by substantial evidence, a court will also review the order for
11 substantial reason to ensure that the order articulates the reasoning that leads from the
12 facts found to the conclusions drawn.").

13 B. *Risk of Loss*

14 The "risk of loss" criterion, ORS 670.600(3)(b), concerns which party bears
15 the risk of loss in the provision of services. That statute provides:

16 "The person bears the risk of loss related to the business or the
17 provision of services as shown by factors such as:

18 "(A) The person enters into fixed-price contracts;

19 "(B) The person is required to fix defective work;

20 "(C) The person warrants the services provided; or

21 "(D) The person negotiates indemnification agreements or purchases
22 liability insurance, performance bonds or errors and omissions insurance."

23 *Id.* The factors listed are illustrative; they are not an exclusive list of things that could

1 show risk of loss. And the factors are disjunctive. An individual is not required to satisfy
2 all of them as if they were four elements.

3 The thrust of Ponderosa's argument on "risk of loss" is that the ALJ
4 misunderstood the parties' prehearing stipulations. Those stipulations were memorialized
5 in a letter sent to the ALJ prior to the hearing. With respect to "risk of loss," the letter
6 states:

7 "The parties agree that [Eileen Evan, Krystal Fairbanks, Roger
8 Renner, and Sharon Sparrow] satisfied ORS 670.600(3)(b)(D) by bearing a
9 'financial out-of-pocket' Risk of Loss (due to having bought insurance)[.]"

10 (Underscoring in original.) The parties further stipulated that, excluding those
11 individuals testifying as witnesses or those covered by stipulations, *none of the*
12 *individuals "negotiate[d] indemnification agreements or purchase[d] liability insurance,*
13 *performance bonds or errors and omissions insurance."* (Emphasis added.) In his final
14 order, the ALJ inaccurately recited the parties' stipulations on the "risk of loss" criterion
15 as follows:

16 "(5) Four of the service providers bore a risk of loss in providing
17 services, satisfying the requirement of ORS 670.600(3)(b)[.]

18 "(6) Except as otherwise stipulated by the parties or determined by
19 the ALJ, *none of the service providers identified in the Department's audit*
20 *satisfied the requirement of ORS 670.600(3)(b).* "

21 (Emphasis added.) Later in the final order, the ALJ found, "The parties stipulated that
22 Eileen Evan, Krystal Fairbanks, Roger Renner, and Sharon Sparrow bore a risk of loss in
23 providing services, satisfying the requirement of ORS 670.600(3)(b)." Then the ALJ
24 found, "The parties stipulated that none of the remaining cleaners * * * satisfied the

1 requirement of ORS 670.600(3)(b)."

2 Predictably, Ponderosa contends that those findings are not supported by
3 substantial evidence because they are based on an inaccurate understanding of the parties'
4 prehearing stipulations. We agree. The ALJ mistook the parties' stipulations on whether
5 other individuals purchased insurance pursuant to ORS 670.600(3)(b)(D)--one factor in
6 the "risk of loss" criterion--as stipulations as to those others on the entire criterion. On
7 review, it is evident that the stipulations applied to one *factor* for demonstrating risk of
8 loss, not the entire *criterion*.

9 Ordinarily, when an ALJ fails to apply factors like those set out in ORS
10 670.600(3)(b), it is necessary to remand for reconsideration--including, possibly, further
11 factfinding--under a correct understanding of the law. In this case, though, the parties'
12 remaining stipulations obviate that need. The parties stipulated as follows:

13 "[Ponderosa] paid all of the service providers a fixed-price amount
14 for each work assignment. Appellant set the fixed-price to be paid for each
15 work assignment.

16 "The service providers were expected to correct any defective work
17 before being paid."

18 (Paragraph numbering omitted.) The fixed-price assignments demonstrate that the
19 cleaners bore significant risk. Regardless of the condition of the unit or the time
20 necessary to complete the task, they would be paid only the fixed rate. *See Portland*
21 *Columbia Symphony*, 258 Or App at 426-27 (explaining that fixed-price contracts
22 demonstrated risk of loss by musicians). The same is true of Mayea and Livsey. The risk
23 that they all bore is underscored by the requirement to fix defective work. Thus, in light

1 of the stipulated facts, the ALJ erred in concluding that the individuals did not bear the
2 risk of loss related to their provision of services.⁷

3 When that criterion is included, at least three additional cleaners--Tracy
4 Curtis, Tammy Gill, and Kym Hartford--meet three of the five criteria so as to be
5 "customarily engaged in an independently established business[.]" ORS 670.600(2)(b).
6 Consequently, those three additional cleaners are independent contractors within the
7 meaning of ORS 670.600(2), leaving only 10 of the 21 individuals still in dispute. Those
8 remaining 10 have been shown to satisfy two criteria (risk of loss and ability to hire),
9 such that proof of one more criterion would make any one of the 10 an independent
10 contractor.

11 C. *Contracted Services for Two or More Different Persons*

12 Ponderosa challenges the ALJ's determination concerning the criterion
13 described in ORS 670.600(3)(c). That criterion requires that an individual routinely
14 advertises or that an individual "provides contracted services for two or more different
15 persons within a 12-month period[.]"⁸ The parties stipulated that five individuals
16 satisfied this criterion; however, Ponderosa contends that the uncontroverted evidence

⁷ We appreciate that fixed-price contracts and the obligation to fix defective work are two among a nonexclusive list of factors set forth in ORS 670.600(3)(b). On this record, the presence of those two factors establish "risk of loss" as a matter of law.

⁸ Ponderosa does not contend that any of the service providers engaged in marketing activities or advertised for their services.

1 demonstrates that all of the individuals satisfied this criterion.⁹ At the hearing, six
2 cleaners and a principal owner of Ponderosa testified about services to multiple
3 customers. Charlene Sundstrom explained that she cleaned the homes of "several private
4 clients" without a written contract and for an hourly wage. Mary Jo Blanchette, a
5 cleaner, testified that she worked for "ten private people," as well as Sisters Vacation
6 Rentals on a contract basis. Emilee Stoery, another cleaner, testified that she had worked
7 for "private clients" during the relevant time period at an hourly rate and without a formal
8 contract. Roger Renner, Alexander Rincon, and Tracy Curtis provided similar statements
9 regarding their work history.¹⁰ The department did not offer any contrary evidence.

10 In his final order, the ALJ determined that ORS 670.600(3)(c) was not
11 satisfied, reasoning that

12 "Sundstrom and Rincon testified that they provided services to other
13 individuals during the period in issue, but *there is no evidence that the*
14 *services were performed as independent contractors.* Furthermore,
15 [Ponderosa] provided no persuasive evidence that any of the other cleaners
16 provided services to two or more individuals *as independent contractors*
17 [during the period in issue]."

18 (Emphases added.) Ponderosa contends that the ALJ's determination is inconsistent with
19 the uncontroverted testimony and that the ALJ provided no explanation for his rejection
20 of the testimony of all the witnesses. The department insists that the ALJ was entitled to
21 be unpersuaded.

⁹ Specifically, the parties stipulated that five cleaners satisfied the requirement of ORS 670.600(3)(c) and that one cleaner did not.

¹⁰ A number of other cleaners provided information on this criterion by answering questionnaires, which were entered into the record.

1 We conclude that the ALJ misapplied ORS 670.600(3)(c) by interposing
2 unnecessary requirements in its analysis. Although the ALJ declared that there was no
3 evidence that the cleaners provided services to others "as independent contractors," there
4 was nothing in these facts to suggest that any cleaner was engaged any differently with
5 the other owners or management agencies. No one was shown to be, for example, a
6 salaried custodian for a nearby school district. Because no such facts were presented,
7 neither we nor the ALJ need consider whether services as a typical employee of someone
8 else would still help to prove the service-to-others criterion. We need not decide
9 whether, in order to show service to others, Ponderosa must prove the elements and
10 criteria required to establish that each individual was an independent contractor as to
11 *other* owners or management agencies. It suffices here that Ponderosa showed that a
12 cleaner or maintenance worker provided contracted services "for two or more different
13 persons."

14 Given the unchallenged testimony, the ALJ's determination may have been
15 based on an understanding that a formal or written contract was required to show that a
16 person provided "contracted services for two or more different persons." The statute,
17 however, demands no such formality when showing a cleaner or maintenance worker
18 provided service to Ponderosa's clientele and to another management agency or property
19 owner. Contracts may be oral or written, one-time arrangements or long-time
20 commitments. *See, e.g., Lane v. Floyd*, 213 Or App 215, 218, 159 P3d 1240 (2007), *rev*
21 *den*, 344 Or 43 (2008) (oral independent contractor agreement). Sundstrom, for example,

1 worked for others and set her own pay. That she lacked written contracts does not mean
2 that Ponderosa failed to prove she provided contracted service to two different customers.
3 Because the testimony of these six or seven witnesses was uncontradicted and the ALJ
4 made no comment doubting their credibility, we must conclude that the ALJ erred in
5 determining that Ponderosa failed to present, as he said, "persuasive evidence" that at
6 least some of the disputed individuals provided contracted service to others. The ALJ's
7 determination, given the unchallenged evidence, lacks substantial reason. Consequently,
8 we must remand with instructions for the ALJ to make new findings pertaining to ORS
9 670.600(3)(c), and reconsider its determination concerning whether that criterion was
10 satisfied as to the disputed individuals. On remand, the ALJ may employ the parties'
11 prehearing stipulation that the ALJ "can take the consensus [witness testimony on this
12 criterion] and apply it to [Karen Ellingson, Hayden Mayea, Darcy Day Ling-Scott, and
13 Bradford Livsey]." The so-called witness consensus as to those four individuals, plus
14 witnesses Sundstrom and Blanchette, may provide the needed third criterion for six of the
15 remaining disputed 10 individuals. As to four individuals who did not testify and to
16 whom the stipulation did not apply (Charles Burdick, Linda Burdick, Kimberly Clark,
17 and Krystal Fairbanks) or as to others, the ALJ may reopen the record in his discretion in
18 order to clarify or complete the evidence as to this criterion on the disputed individuals.
19 New findings and an appropriate conclusion should follow as to the 10 remaining
20 individuals.

21 In sum, we hold that none of the 21 individuals was under Ponderosa's

1 "direction and control." Ponderosa did satisfy ORS 670.600(2)(a) as to them. Because
2 two cleaners (Dawn Thatch and Julie Allen) were stipulated to have satisfied ORS
3 670.600(3), they should be treated as independent contractors. The five cleaners that the
4 the ALJ determined had "independently established businesses" (Eileen Evan, Roger
5 Renner, Ruth Rincon, Emilee Stoery, and Marie Libel) and the inadvertently omitted
6 cleaner (Sharon Sparrow) shall likewise be considered independent contractors. We
7 further conclude that all of the individuals satisfied ORS 670.600(3)(b), as they did bear a
8 risk of loss in providing their services. As a result, three more individuals have satisfied
9 three of the five criteria in ORS 670.600(3) (Tracy Curtis, Tammy Gill, and Kym
10 Hartford) so as to be recognized as independent contractors. Thus, the classification of
11 11 individuals is resolved in this opinion. Ten remain unresolved. As to those 10
12 individuals, the record establishes their risk of loss and ability to hire, satisfying two
13 criteria, when any three of five potential criteria would prove an "independently
14 established business." As to one of the other criteria, we remand to the ALJ to make new
15 findings under ORS 670.600(3)(c) concerning whether the individuals provided
16 contracted services to two or more owners or management agencies. Reconsideration of
17 that criterion will resolve the classification of the remaining individuals.

18 Reversed and remanded for reconsideration.