

**FILED: August 15, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

DARLA J. WHITSETT,  
dba Junction Laundromat Car & RV Wash,  
Petitioner,

v.

EMPLOYMENT DEPARTMENT,  
Respondent.

Office of Administrative Hearings  
T71223

A148769

Submitted on May 04, 2012.

Darla J. Whitsett filed the brief *pro se*.

No appearance for respondent.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

SCHUMAN, P. J.

Affirmed.

1 SCHUMAN, P. J.

2 At issue in this judicial review of an Employment Department order is  
3 whether an individual who performed handyman tasks for petitioner was an employee,  
4 thereby exposing petitioner to a tax assessment, or an independent contractor, in which  
5 case petitioner was not obligated to pay the tax. ORS 670.600. The Department  
6 concluded that the individual was an employee and assessed petitioner a tax of \$76.  
7 Petitioner renews her contention that the individual was an independent contractor. We  
8 affirm.

9 Petitioner operated a laundromat and, between 2008 and 2010, she  
10 intermittently paid Ducharme, a handyman, to repair the washers and dryers and to  
11 perform other tasks such as fixing doors and light fixtures. Ducharme had keys to the  
12 laundromat but did not work specific days or hours. He occasionally opened and closed  
13 the laundromat when petitioner and her husband were unavailable, but he did not charge  
14 them for doing so. He worked only when he received a telephone call from petitioner or  
15 her husband, and he worked out of his kitchen when he needed to do any work at home.  
16 He had no written agreement or fixed-price contract with petitioner; rather, he verbally  
17 reported the hours he worked to petitioner or her husband to receive payment of \$25 per  
18 hour. Though Ducharme had installed and repaired washing machines for another  
19 laundromat in 2005, he did not repair washers, dryers, doors, or light fixtures for anyone  
20 other than petitioner during the period at issue, nor did he engage in any advertising,  
21 solicitation, or marketing efforts to obtain new contracts to provide similar services to

1 anyone. He occasionally purchased parts he needed to perform his work, for which  
2 petitioner reimbursed him. Ducharme did not have a Construction Contractors Board  
3 license or an electrician's license.

4 On one occasion, Ducharme needed assistance from his brother, an  
5 electrician, to repair wiring on a washing machine. After the work was done, petitioner  
6 paid Ducharme's brother directly. Petitioner would have paid anyone Ducharme hired to  
7 do the work or assist him in doing the work.

8 The Department issued a Notice of Determination finding that petitioner  
9 was an employer subject to Oregon Employment Department law as of February 18,  
10 2008. Petitioner requested a hearing before an Administrative Law Judge (ALJ), and the  
11 ALJ upheld the Department's Notice of Determination, concluding that (1) petitioner was  
12 an "employer" as defined in ORS 657.025, (2) the services for remuneration upon which  
13 the determination was based constituted taxable employment under ORS 657.030 through  
14 ORS 657.094, and (3) the payments made were wages subject to employment taxation  
15 under ORS 657.105 through ORS 657.140. On judicial review, petitioner contends, as  
16 she did at the hearing, that Ducharme was an independent contractor, not an employee.

17 For purposes of ORS chapter 657 (unemployment insurance), "independent  
18 contractor" means a person "who provides services for remuneration and who, in the  
19 provision of the services":

20 "(a) Is free from direction and control over the means and manner of  
21 providing the services, subject only to the right of the person for whom the  
22 services are provided to specify the desired results;

1                   (b) \* \* \* [I]s customarily engaged in an independently established  
2 business;

3                   (c) Is licensed under ORS chapter 671 or 701 if the person provides  
4 services for which a license is required under ORS chapter 671 or 701; and

5                   (d) Is responsible for obtaining other licenses or certificates  
6 necessary to provide the services."

7 ORS 670.600(2). The statutory criteria are conjunctive; a person is not considered an  
8 "independent contractor" unless each is met. Under ORS 657.683(4), the employer  
9 challenging an assessment has the burden to establish the relevant criteria. Further, for  
10 purposes of ORS 670.600(2)(b), a person is considered to be "customarily engaged in an  
11 independently established business" if any three of the following requirements are met:

12                   (a) The person maintains a business location:

13                   (A) That is separate from the business or work location of the  
14 person for whom the services are provided; or

15                   (B) That is in a portion of the person's residence and that portion is  
16 used primarily for the business.

17                   (b) The person bears the risk of loss related to the business or the  
18 provision of services as shown by factors such as:

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

20                   (B) The person is required to correct defective work;

21                   (C) The person warrants the services provided; or

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

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

1                   (d) The person makes a significant investment in the business,  
2 through means such as:

3                   (A) Purchasing tools or equipment necessary to provide the  
4 services;

5                   (B) Paying for the premises or facilities where the services are  
6 provided; or

7                   (C) Paying for licenses, certificates or specialized training required  
8 to provide the services.

9                   (e) The person has the authority to hire other persons to provide or  
10 to assist in providing the services and has the authority to fire those  
11 persons."

12 ORS 670.600(3).

13                   Petitioner's only legal argument, other than re-arguing the facts, is that  
14 Ducharme was exempt from the contractor licensing requirement. Petitioner did not  
15 make that argument below. However, even if petitioner is correct that Ducharme did not  
16 need a license, the outcome is unchanged because, even if we were to consider petitioner  
17 entitled to every plausible inference from the record, Ducharme meets at most only two  
18 of the requirements in ORS 670.600(3) to be considered as "customarily engaged in an  
19 independently established business": the responsible for "risk of loss" requirement  
20 (petitioner testified that Ducharme would correct defective work) and the "authority to  
21 hire other persons" requirement (Ducharme once hired his brother). Ducharme did not  
22 maintain a business location; he worked only occasionally from his kitchen and answered  
23 work calls on his personal telephone. Though Ducharme repaired washing machines and  
24 dryers for another laundromat in 2005, according to his own testimony, he did not  
25 provide those services to anyone other than petitioner during 2008 to 2010. Additionally,

1 Ducharme testified that he did not engage in any advertising or marketing efforts to offer  
2 services to other persons during the relevant time period. He did not have a business  
3 card, a business telephone, or a business name. Ducharme used his own small tools for  
4 his work and, if he purchased any parts, petitioner reimbursed him. He also testified that  
5 he did not have any licenses required for construction contracting or electrician work.  
6 Therefore, Ducharme did not make any significant investment in his business.

7           Because petitioner did not establish that Ducharme satisfied three of the  
8 five factors set forth in ORS 670.600(3), petitioner failed to demonstrate that Ducharme  
9 customarily engaged in an independently established business. Therefore, the services  
10 for remuneration upon which the determination is based were performed by an employee,  
11 not an independent contractor, and constitute taxable employment.

12           Affirmed.