STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
	)	
JANITORIAL PLUS, LLC.	)	OAH Case No. 2024-ABC-06399
	)	Agency Case No.: INS-WC 24-01-05
and	)	
	)	
AmTrust Financial Services, Inc	)	

Procedural History

The Director of the Oregon Department of Consumer and Business Services (Director), by and through Division of Financial Regulation, (Division), commenced the above entitled administrative proceeding to review a workers' compensation insurance final premium audit billing (billing) issued by AmTrust Financial Services, Inc. to Janitorial Plus, LLC, (employer) pursuant to Oregon Revised Statutes (ORS) 737.256(1), ORS 737.505(3), and Oregon Administrative Rules (OAR) 836-043-0200 *et. seq.*

On February 15, 2024, the Division referred employer's hearing request contesting the billing to the Office of Administrative Hearings (OAH). The issue before OAH was whether insurer's Final Premium Audit, dated December 1, 2023, was correct. By Proposed Order dated May 17, 2024, Senior Administrative Law Judge (ALJ) Alison Greene Webster Affirmed the December 1, 2023 Final Premium Audit Billing, for the audit period October 11, 2022, to October 11, 2023.

Findings of Fact, Conclusions of Law and Opinion

The Director adopts, and incorporates herein by this reference, the findings of fact, conclusions of law, and reasoning of the Proposed Order as the findings of fact, conclusions of law, and reasoning of this Final Order.

Order

AmTrust Financial Services, Inc.'s Final Premium Audit issued December 1, 2023 is AFFIRMED and the Stay of Collections issued February 20, 2024 is lifted.

Notice of Right to Judicial Review

A party has the right to judicial review of this order pursuant to ORS 183.480 and ORS 183.482. A party may request judicial review by sending a petition for judicial review to the Oregon Court of Appeals. The court must receive the petition within 60 days from the date this order was served on the party. If the order was personally delivered to a party, then the date of service is the date the party received the order. If the order was mailed to a party, then the date of service is the date the order was mailed to the party, not the date the party received the order. If a party files a petition, the party is requested to also send a copy of the petition to the Division of Financial Regulation.

Dated June 5, 2025

TK Keen
Administrator, Division of Financial Regulation
Department of Consumer and Business Services

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER & BUSINESS SERVICES
DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	**PROPOSED ORDER**
	)	
JANITORIAL PLUS, LLC	)	OAH Case No. 2024-ABC-06399
	)	Agency Case No. INS-WC 24-01-05

HISTORY OF THE CASE

On January 11, 2024, AmTrust Financial Services, Inc. (insurer) issued a Final Billing to Janitorial Plus, LLC (employer) following a December 1, 2023 Workers' Compensation Final Premium Audit of policy KWC130092 for the audit period of October 11, 2022 through October 11, 2023. On January 12, 2024, the employer filed a Petition with the Department of Consumer & Business Services Division of Financial Regulation (Department) requesting a hearing to challenge the billing and a stay of collection during the pendency of the contested case proceeding.

On February 15, 2024, the Department referred the employer's hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Alison Greene Webster to preside at hearing.

On February 20, 2024, the OAH issued an Order Granting Stay of Collection during the pendency of the contested case proceeding.

On April 2, 2024, ALJ Webster convened a prehearing conference. The insurer appeared through representatives Jade Swindell and Barry Moses. No representative from the employer called in for the conference. During the conference, the ALJ set the matter for a video hearing via Webex on May 8, 2024. Following the conference, the OAH issued notice of the hearing to all parties. Arturo Perez, representative for the employer, subsequently confirmed receipt of the notice and the employer's availability for the scheduled hearing.

ALJ Webster convened the hearing via video on May 8, 2024. Mr. Swindell and Mr. Moses appeared for the insurer. Mr. Perez appeared for the employer. Mr. Swindell testified on behalf of the insurer and Mr. Perez testified on behalf of the employer. The record closed on May 8, 2024 at the conclusion of the hearing.

ISSUES

Whether the insurer's January 11, 2024 Final Premium Audit Billing correctly included as payroll payments made to the following subcontractors: Arbolaez Clean Services, Gabinos

Professional Cleaning Services, General Cleaning Services, Janitorial Max Service, Lizgo Cleaning, Multiservices Oregon Cleaners, Nela Cleaning Specialist, Shine and Clean LLC, Y&L Cleaning Services Ygrau Janitorial Services, and Zenx Clean LLC.

EVIDENTIARY RULINGS

Exhibits A1 through A10, offered by the insurer, and Exhibits E1 through E23, offered by the employer, were admitted into the record without objection.

FINDINGS OF FACT

1. Janitorial Plus LLC is a janitorial services company wholly owned by Arturo Perez Morales. The employer's principal place of business in 1217 NE Burnside Road, Unit 503, Gresham, Oregon. (Ex. A1.) The employer provides janitorial services in both Oregon and Washington. (Test. of Perez.)

2. The employer uses employees and subcontractors to perform its janitorial services. (Test. of Perez.) At all times pertinent to this matter, the employer had a Cleaning Subcontractor Agreement (Agreement) in place with each of its subcontractors. The Agreement provided, in part, as follows:

> **III. Subcontractor Duties**. Subcontractor agrees to perform work for the Contractor on the terms and conditions set forth in this Agreement and agrees to devote all necessary time and attention. Subcontractor further agrees that in all aspects of their Duties that he/she/they shall comply with the policies, standards, and regulations of the Contractor to the best of their ability.
>
> **IV. Payment Amount**. The Contractor agrees to pay the Subcontractor the following compensation for the Duties performed under this Agreement:
>
> - 65 % of each job. Weekends % 75.
> - Some jobs will be adjusted.
>
> **V. Payment Method**. The Payment Amount shall be paid:
>
> - Every other Friday.
>
> Hereinafter known as the "Payment Method". The Payment Amount and Payment Method shall be referred to as "Compensation".
>
> **VI. Inspection of Duties**. Any Compensation shall be subject to the Contractor inspecting the completed Duties of the Subcontractor. If any of the Duties performed by the Subcontractor pursuant to this Agreement are defective or incomplete, the Contractor shall have the right to notify the Subcontractor, at which time the Subcontractor shall promptly correct such work within reasonable time.

VII. Return of Property. Upon the termination of this Agreement, all property provided by the Contractor, including, but not limited to, cleaning supplies, uniforms, equipment, and any other items, must be returned by the Subcontractor. Failure to do so may result in a delay in any final payment made by the Contractor.

VIII. Time is of the Essence. Subcontractor acknowledges that time is of the essence in regard to the performance of all Duties. If for any reason should be absent should notify the contractor as soon as possible, preferably 7 days in advance.

IX. Confidentiality. Subcontractor acknowledges and agrees that all financial and accounting records, lists of property owned by Contractor, including amounts paid, therefore, client and customer lists, and any other data and information related to the Contractor's business is confidential ("Confidential Information"). Therefore, except for disclosures required to be made to advance the business of the Contractor and information which is a matter of public record, Subcontractor shall not, during the term of this Agreement or after its termination, disclose any Confidential Information for the benefit of the Subcontractor or any other person, except with the prior written consent of the Contractor.

* * * * *

X. Taxes. Subcontractor shall pay and be solely responsible for all withholdings, including, but not limited to, Social Security, State unemployment, State and Federal income taxes, and any other obligations. In addition, Subcontractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Duties performed.

XI. Independent Contractor Status. Subcontractor acknowledges that he/she/they are an independent contractor and not an agent, partner, joint venture, nor an employee of the Contractor. Subcontractor shall have no authority to bind or otherwise obligate the Contractor in any manner nor shall the Subcontractor represent to anyone that it has a right to do so. Subcontractor further agrees that in the event the Contractor suffers any loss or damage as a result of a violation of this provision, the Subcontractor shall indemnify and hold harmless the Contractor from any such loss or damage.

XII. Non-Competition. Subcontractor should not compete, try to do any business with any client of the contractor. Failure in this section subcontractor should pay 3 times the value of the account lost, plus all court fees described at section XVII. This is valid for 24 months after the end of this contract.

XIII. Procedures-Products. Subcontractor should follow Contractor work's procedures and philosophy. Subcontractor should use products recommended or approved by the contractor.

XIV. Safety. Subcontractor shall, at his/her/their own expense, be solely responsible for protecting its employees, sub-subcontractors, material suppliers, and all other persons from risk of death, injury or bodily harm arising from or in any way related to the Duties or the site where it is being performed ("Work Site"). In addition, Subcontractor agrees to act in accordance with the rules and regulations administered by federal law and OSHA. Subcontractor shall be solely responsible and liable for any penalties, fines, or fees incurred.

* * * * *

XIX. Governing Law. This Agreement shall be governed by and shall be construed in accordance with the laws in the State of Oregon.

(Ex. E22 at 1-4.)

3. From October 11, 2022 through October 11, 2023, the employer had workers compensation insurance through AmTrust Financial, policy number KWC1300092. During the policy period, the employer had signed Agreements with 13 subcontractors to perform janitorial services. All of the subcontractors were registered businesses in Oregon and Washington. All subcontractors had their own liability insurance policies. JC Cleaning for You and Vera Cleaning LLC carried their own workers compensation insurance policies. The remaining 11 subcontractors[1] did not carry their own workers compensation policies. (Test. of Swindell; test. of Perez; Ex. A1.)

4. In late 2023, at the end of the policy period, the insurer initiated an audit of the employer's account. The employer reported payments totaling $969,985 to the 11 subcontractors, as follows:

Subcontractor	**Total Compensation**
Arbolaez Clean Services	22,697
Gabinos Professional Cleaning Services	98,807
General Cleaning Services	177,987
Janitorial Max Service	32,603
Lizgo Cleaning	266,530
Multiservices Oregon Cleaners	148,423
Nela Cleaning Specialist	37,767
Shine and Clean LLC	3,715
Y&L Cleaning Services	113,961
Ygrau Janitorial Services	86,912

[1] The 11 subcontractors are as follows: (1) Arbolaez Clean Services; (2) Gabinos Professional Cleaning Services; (3) General Cleaning Services; (4) Janitorial Max Service; (5) Lizgo Cleaning; (6) Multiservices Oregon Cleaners; (7) Nela Cleaning Specialist; (8) Shine and Clean LLC; (9) Y&L Cleaning Services; (10) Ygrau Janitorial Services; and (11) Zenx Clean LLC.

Zenx Clean LLC	20,585

The employer also reported payments to subcontractor JC Cleaning for you in the amount of $6,754 and to subcontractor Vera Cleaning LLC in the amount of $2,520. (Test. of Swindell; Ex. A1.)

5. In the audit, completed December 1, 2023, the insurer determined that the payments the employer made to the subcontractors who did not carry their own workers' compensation coverage should have been included as payroll and exposure under the employer's policy. (Ex. A1 at 6.) Thereafter, on January 11, 2024, the insurer issued a Final Billing to the employer in the amount of $23,413. (Ex. A3.)

6. The employer contested the Final Billing, asserting that these 11 subcontractors were independent contractors and not workers covered under the employer's policy. In its review of the audit, the insurer requested that the employer submit an "AmTrust Workers' Compensation Employment Status Form" completed by each subcontractor in issue. The employment status form asks for the following information:

> 1. Do you (the subcontractor) perform the same services for others, or primarily for the insured?
>
> 2. Do you (the subcontractor) furnish or provide your own supplies, equipment, or tools used to perform the job?
>
> 3. Are you (the subcontractor) paid on an hourly, daily, commission or piecework basis?
>
> 4. Please provide your business license number:
>
> 5. Do you (the subcontractor) perform the job completely without assistance, if not, are you paying anyone to work with you?
>
> 6. Do you (the subcontractor) have financial bonding or liability insurance for work performed?
>
> 7. Are you (the subcontractor) reimbursed for any expenses incurred while performing the job?

(Ex. A2.)

7. The employer submitted a completed employment status form for each of the 11 subcontractors in issue. (Ex. A6 at 1 through 11.) Each subcontractor provided a business license number and liability insurance information. In addition, each subcontractor answered the remaining questions as follows:

- They work primarily for the insured;

- They provide their own supplies and equipment;
- They get paid on a piecework basis;
- They perform the job without assistance; and
- They are not reimbursed for expenses incurred while performing the job.

(*Id*.)

8. The insurer declined to adjust the Final Billing, asserting because that the subcontractors were performing work related to the insured's business operations, were subject to the employer's direction and control, were individuals performing the job without assistance, and working primarily for the employer, the subcontractors could not be deemed independent contractors under Oregon law. (Exs. A3 and A4; test. of Swindell.) The insurer explained to Mr. Perez that as the workers' compensation carrier for the janitorial business, AmTrust "will be required to pay if any insured worker is injured while working for your business. Therefore, the [sub]contractors will need to provide proof of their own coverage to be excluded on the audit." (Ex. 5.)

CONCLUSIONS OF LAW

The insurer's January 11, 2024 Final Premium Audit Billing correctly included as payroll payments made to the following subcontractors: Arbolaez Clean Services, Gabinos Professional Cleaning Services, General Cleaning Services, Janitorial Max Service, Lizgo Cleaning, Multiservices Oregon Cleaners, Nela Cleaning Specialist, Shine and Clean LLC, Y&L Cleaning Services Ygrau Janitorial Services, and Zenx Clean LLC.

OPINION

The employer challenges the January 11, 2024 billing, arguing that the insurer erred in including the employer's payments to the 11 subcontractors identified above in the employer's subject payroll in the December 1, 2023 premium audit. The employer contends that these subcontractors are independent contractors and are therefore exempt from the employer's subject payroll for purposes of the employer's workers' compensation insurance premium.

The employer has the burden to establish that the insurer's premium audit billing is incorrect. *Salem Decorating v. NCCI,* 116 Or App 166 (1992) *rev den* 315 Or 643 (1993); ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"). To sustain this burden, the employer must prove its contentions by a preponderance of the evidence. *Dixon v. Board of Nursing,* 291 Or App 207, 213 (2018) (in administrative actions, burden of proof is by a preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.,* 303 Or 390 (1987).

Applicable Law

Under Oregon's workers' compensation law, "worker" is defined in ORS 656.005(28) as follows:

> (a) "Worker" means any person, *other than an independent contractor*, who engages to furnish services for a remuneration[.]
>
> * * * * *
>
> (c) For the purposes of this chapter, "subject worker" means a worker who is subject to this chapter as provided in ORS 656.027.[2]

ORS 656.005(29) provides: "'Independent contractor' has the meaning given that term in ORS 670.600."

> ORS 670.600, in turn, defines "independent contractor" as follows:
>
> (1) As used in this section:
>
> (a) "Individual" means a natural person.
>
> (b) "Person" has the meaning given that term in ORS 174.100.
>
> (c) "Services" means labor or services.
>
> (2) As used in ORS chapters 316, 656, 657, 671 and 701, "independent contractor" means a person who provides services for remuneration and who, in the provision of the services:
>
> (a) Is free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results;[3]
>
> (b) Except as provided in subsection (4) of this section, is customarily engaged in an independently established business;
>
> * * * * *[4]
>
> (3) For purposes of subsection (2)(b) of this section, *a person is considered to be customarily engaged in an independently established business if any three of the following requirements are met*:

---

[2] ORS 656.027 states "All workers are subject to this chapter except those nonsubject workers described in the following subsections." The statute includes 27 subsections that describe nonsubject workers, none of which are pertinent here.

[3] The "direction and control" test is set out in OAR 471-031-0181.

[4] ORS 670.600(2)(c) and (d), which pertain to licensing requirements, are not at issue in this case.

(a) The person maintains a business location:

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

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

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

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

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

(C) The person warrants the services provided; or

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

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

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

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

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

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

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

(4) Subsection (2)(b) of this section does not apply if the person files a Schedule F as part of an income tax return and the person provides farm labor or farm services that are reportable on Schedule C of an income tax return.

(5) For purposes of determining whether an individual provides services as an independent contractor:

(a) The creation or use of a business entity, such as a corporation or a limited liability company, by an individual for the purpose of providing services does not, by itself, establish that the individual provides services as an independent contractor.

(b) When the individual provides services through a business entity, such as a corporation or a limited liability company, the provisions in subsection (2), (3) or (4) of this section may be satisfied by the individual or the business entity.

Emphasis added.

Independent Contractor Analysis

There is no dispute that, during the policy period at issue – October 11, 2022 to October 11, 2023 – the 11 subcontractors in issue performed services for the employer for renumeration. A person who performs services for renumeration qualifies as a "worker" under Oregon workers' compensation law unless the person meets the definition of an independent contractor under ORS 670.100. At issue in this case is whether the 11 subcontractors qualify as independent contractors under ORS 670.100, exempting them from the definition of "worker" under ORS 656.005(28).

As noted above, the employer bears the burden of proving that these 11 subcontractors meet the requirements of ORS 670.600(2), including that they are free from the employer's direction and control (as that test is defined in OAR 471-031-0181(3)) and are "customarily engaged in an independently established business" as described in ORS 670.100(2)(b) and (3). Both of these criteria must be satisfied for the subcontractors to meet the independent contractor test. *ACN Opportunity, LLC v. Employment Department*, 362 Or 824, 827 (2018) (all requirements of ORS 670.600(2) must be met to establish independent contractor status with burden on alleged employer). In this case, I assume, without deciding, that the 11 subcontractors in issue are free from the employer's direction and control over the means and manner of providing cleaning services. I focus instead upon the latter requirement, whether the employer proved that these subcontractors were "customarily engaged in an independently established business."

Pursuant to ORS 670.600(3), to be "customarily engaged in an independently established business" the person must meet three of the following five criteria:

(a) Maintain a business location, which can include a home office;
(b) Bear a risk of loss;
(c) Have or solicit multiple clients within a 12-month period;
(d) Make a significant investment in the business; and/or
(e) Have the authority to hire and fire others to assist in providing the services

For the reasons that follow, the employer has failed to demonstrate by a preponderance of the evidence that the 11 subcontractors at issue meet the requisite three independently established business criteria.[5]

a. *Business location*

ORS 670.600(3)(a) requires that the person "maintain[] a business location" separate from the business or work location of the person awarding the contract or within their own home. In *ACN,* the Oregon Supreme Court held that, in the context of the independent contractor statute, the word "maintains" means something beyond simply "having" a business location. Rather, "maintains" includes such things as "paying rent to use the business location, physically preserving the business location in a state of repair or using and holding out the location to the public as the location of the business." 362 Or at 838.

In this case, the employer presented no evidence that any of the 11 subcontractors maintained a business location separate from where they go to perform janitorial services for the employer. That the subcontractors list an address different from the employer's address on their respective certificates of liability insurance and/or business registrations does not, in and of itself, establish that they maintain a separate business location. Furthermore, the employer also presented no evidence that any subcontractor uses a portion of their residence primarily for their business. Accordingly, the employer failed to show that these subcontractors maintain a business location separate from the employer as required by ORS 670.600(3)(a)(A) or (B).

b. *Risk of loss*

ORS 670.600(3)(b) requires that the person "bear[] the risk of loss related to the * * * provision of services" as shown by certain factors. In this case, the evidence establishes that the subcontractors bear this risk. The subcontractors work for the employer on a fixed-price contract, as Paragraph IV of the Agreement sets the payment amount for each job. Exhibit E22 at 1. The subcontractors are obligated to correct defective work. Paragraph IV of the Agreement gives the employer the right to inspect the completed work and requires the subcontractor to promptly correct defective or incomplete work. *Id.* In addition, the evidence demonstrates that the subcontractors purchased liability insurance and/or performance bonds in connection with their provision of janitorial services. Therefore, the employer has shown that the subcontractors meet the requirement of ORS 670.600(3)(b).

c. *Multiple clients*

ORS 670.600(3)(c) requires that the person provide contracted services for two or more different persons within a 12-month period or routinely solicit for new contracts to provide similar services. As set out in the findings above, in response to the question "Do you (the subcontractor) perform the same services for others, or primarily for the insured?" all 11 subcontractors reported that they work mainly or primarily for the insured. *See* Exhibit A6.

[5] Because the 11 subcontractors provided essentially the same responses and information on their respective employment status forms and all 11 are subject to the same Agreement with the employer, they are treated collectively in the analysis below.

While the subcontractors' response leaves open the *possibility* that one or more of the subcontractors provided contract services for another janitorial service during the 12-month policy period and/or the *possibility* that one or more of the subcontractors solicited other clients during that time, it does not establish, more likely than not, that any of these subcontractors performed such services for another janitorial service company or that they routinely advertised or marketed their cleaning services to other janitorial companies. There is no affirmative evidence in the record indicating that any of the 11 subcontractors provided similar services for other companies or solicited other clients during the policy period. In the absence of such evidence, the employer has not established that the 11 subcontractors at issue meet the requirements of ORS 670.600(3)(c) in this case.

d. *Business investment*

ORS 670.600(3)(d) requires that the subcontractor make a "significant investment" in their business, such as purchasing tools or equipment, paying for the premises or facilities where services are provided, or paying for required licenses, certificates, or specialized training. ORS 670.600(3)(d)(A), (B) and (C). In response to questions 2 and 7 on the employment status form, each subcontractor indicated that they provide their own supplies, equipment, or tools to perform the services and they are not reimbursed for any expenses incurred while performing the services. Exhibit A6. In response to questions 4 and 6 on the form, the subcontractors provided their business license number and bond number or liability insurance policy. *Id.* This evidence tends to show that the subcontractors' invest in their own janitorial service business. However, Paragraph VII of the Agreement between the employer and subcontractor contemplates the employer providing supplies, equipment, or tools to the subcontractor and requires that the subcontractor return these items to the employer upon termination of the Agreement.[6] Exhibit E22 at 2.

While the evidence indicates the subcontractors provide their own supplies and cleaning products and obtain their own business licenses and liability insurance, no evidence was presented regarding the cost of these items. No evidence was presented to clarify which supplies and equipment are furnished by the subcontractor versus those provided by the employer. In the absence of such evidence, it cannot be determined whether any or all of these subcontractors made a "significant[7] investment" in their respective businesses. *Cf. Portland Columbia*

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[6] Exhibit E22 at 2, Paragraph VII, Return of Property. "Upon the termination of this Agreement, all property provided by the Contractor, including, but not limited to, cleaning supplies, uniforms, equipment, and any other items, must be returned by the Subcontractor."

[7] *Webster's Third New Int'l Dictionary* 2116 (unabridged ed 2002) defines "significant" in pertinent part as:

> 1: having meaning; esp: full of import: SUGGESTIVE, EXPRESSIVE <the painter's task to pick out the ~ details —Herbert Read> <~ anecdote>
>
> * * * * *
>
> 3a: having or likely to have influence or effect: deserving to be considered: IMPORTANT, WEIGHTY, NOTABLE <even though the individual results may seem small, the total of them is ~ —F.D. Roosevelt>

Symphony v. Employment Department, 284 Or App 256 (2017), where the court held that professional musicians who spend thousands of dollars to purchase their musical instruments and hundreds more annually to maintain them made a "significant investment" in their independently established business. Consequently, on this record, the employer has not shown that its subcontractors satisfy the significant investment criterion under ORS 670.600(3)(d).

e. *Authority to hire and fire others*

ORS 670.600(3)(e) requires that the person have the authority to hire other persons to provide or to assist them in providing the services and the authority to fire those persons. In response to question 5 on the employment status form, each subcontractor indicated that they perform the job without assistance. *See* Exhibit A6. No subcontractor reported hiring their own employees or sub-subcontractors to assist with their janitorial duties. However, Paragraph XIV of the Agreement contemplates that the subcontractor will have employees or sub-subcontractors, as it makes the subcontractor responsible for their safety.[8] Given the terms of the Agreement, it is reasonable to infer that the subcontractors have the authority to hire and fire others to assist them in the services provided. The employer has sufficiently shown that the subcontractors in issue meet the requirements of ORS 670.600(3)(e).

Conclusion

The evidence establishes that the 11 subcontractors at issue meet two of the five criteria set out in ORS 670.600(3) for an "independently established business" in that they bear the risk of loss related to the provision of services under ORS 670.600(3)(b) and have authority to hire and fire others to assist them in their work under ORS 670.600(3)(e). However, as previously discussed, to be "customarily engaged in an independently established business," the subcontractors must meet three of the five criteria. ORS 670.600(3)(e).

Because the evidence fails to demonstrate that these subcontractors maintain a separate business location, that they had multiple clients during the 12-month policy period, and/or that they made a significant investment in their business, these subcontractors are not "customarily engaged in an independently established business" for purposes of ORS 670.600(2)(b). Consequently, even if these subcontractors are free from the employer's control over their means and manner of providing services under ORS 670.600(2)(a), they do not meet the independent business test of ORS 670.600(2)(b). And, because a person is not considered an independent contractor unless both elements are met, these 11 subcontractors do not qualify as independent contractors under Oregon law. *ACN,* 362 Or at 827; *see also Ponderosa Props, LLC v. Employment Dep't,* 263 Or App 419 (2014) (the elements of ORS 670.600(2) are conjunctive; a person is not considered an "independent contractor" unless each is met.)

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[8] *See* Exhibit E22 at 3, Paragraph XIV. Safety. Under the Agreement, the subcontractor is "solely responsible for protecting its employees, sub-subcontractors, material suppliers, and all other persons from risk of death, injury or bodily harm arising from or in any way related to the Duties or the site where it is being performed ("Work Site")."

These subcontractors are subject workers under ORS Chapter 656 who must be included in the employer's workers' compensation coverage and accounted for in the premium audit billing. The employer has not established that the insurer's premium audit billing is incorrect.

ORDER

I propose the Department issue the following order:

AmTrust's January 11, 2024 Final Premium Audit Billing for the audit period of October 11, 2022 to October 11, 2023 is AFFIRMED. Janitorial Plus LLC is liable for the adjusted premium.

The Order Granting Stay of Collection, issued February 20, 2024, will be lifted with the issuance of the Final Order.

Alison Greene Webster
Senior Administrative Law Judge
Office of Administrative Hearings

EXCEPTIONS TO PROPOSED ORDER

Pursuant to ORS 183.460, the parties are entitled to file written exceptions to this Proposed Order and to present written argument concerning those exceptions to the Director. Written exceptions must be received by the **Division of Financial Regulation** within 30 days following the date of service of this Proposed Order. You may send exceptions via email to gail.m.gage@oregon.gov, or via mail to:

Gail M. Gage
Compliance Specialist 3
Division of Financial Regulation
PO Box 14480
Salem, OR 97309-0405

SERVICEMEMBERS' CIVIL RELIEF ACT

Unless otherwise stated in this order, the Office of Administrative Hearings (OAH) has no reason to believe that a party to this proceeding is subject to the Servicemembers' Civil Relief Act (SCRA). If a party to this proceeding is a servicemember who did not appear for the hearing, within the servicemember's period of service, or 90 days after their termination of service, that party should immediately contact the agency to address any rights they may have under the SCRA.

CERTIFICATE OF MAILING

On May 17, 2024, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2024-ABC-06399**.**

By: Electronic Mail

Arturo Perez Morales
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1217 NE Burnside Rd, 503 F
Gresham OR 97030
Email: info@janitorial-plus.com

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