

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0705

Late Request for Hearing Allowed
Reversed & Remanded

PROCEDURAL HISTORY: On December 13, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing an overpayment of \$15,375 in Pandemic Unemployment Assistance (PUA) benefits and \$21,000 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department, and a \$10,912.50 monetary penalty. On January 2, 2024, the December 13, 2023, overpayment decision became final without claimant having filed a request for hearing. On January 12, 2024, claimant filed a late request for hearing. ALJ Kangas considered the request, and on January 23, 2024, issued Order No. 24-UI-246251, dismissing the request for hearing as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by February 6, 2024. On February 5, 2024, claimant filed a timely appellant questionnaire response. On March 19, 2024, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 24-UI-246251 was vacated and that a hearing would be scheduled to determine whether claimant's late request for hearing should be allowed and, if so, the merits of the December 13, 2023, overpayment decision.

On August 29, 2024 and continuing on September 16, 2024, ALJ Lucas conducted a hearing, and on September 23, 2024 issued Order No. 24-UI-267082, allowing claimant's late request for hearing and modifying the December 13, 2023 overpayment decision by concluding that claimant was overpaid \$6,150 in PUA benefits and \$7,200 in FPUC benefits that claimant was required to repay to the Department, and \$1,230 in PUA benefits and \$3,000 in FPUC benefits that claimant was liable to repay through deduction from future benefits, but that claimant did not willfully make a misrepresentation or fail to report a material fact to obtain benefits and therefore was not liable for a monetary penalty. On October 4, 2024, claimant filed an application for review of Order No. 24-UI-267082 with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. EAB agrees with the portion of Order No. 24-UI-267082 allowing claimant's late request for hearing. Pursuant to ORS 657.275(2), that portion of Order No. 24-UI-267082 is **adopted**. The rest of this decision addresses whether claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits and is liable to repay an overpayment of benefits or monetary penalty.

WRITTEN ARGUMENT: EAB considered claimant's argument in reaching this decision.

FINDINGS OF FACT: (1) From at least 2019 through September 4, 2021, claimant worked as an independent contractor for Mary Kay, Inc. in cosmetics sales. Claimant's income from Mary Kay, Inc. variously consisted of profit or commissions from in-home sales, a portion of commissions generated by salespeople with whom claimant was associated, and, potentially, profit or commissions from online sales.

(2) Beginning on or around March 15, 2020, claimant and her associated salespeople were unable to make in-home cosmetics sales calls due to governmental restrictions related to the COVID-19 pandemic.

(3) On May 3, 2020, claimant filed an initial application for PUA benefits. The Department determined that the claim was monetarily valid with a weekly benefit amount (WBA) of \$205. Thereafter, claimant claimed benefits for the weeks of March 22, 2020, through December 19, 2020, and December 27, 2020 through September 4, 2021 (weeks 13-20 through 51-20 and 53-20 through 35-21). These are the weeks at issue. For each week at issue, the Department paid claimant \$205 in PUA benefits, totaling \$15,375 in PUA benefits. For weeks 14-20 through 30-20, the Department paid claimant \$600 in FPUC benefits, and for weeks 53-20 through 35-21 paid her \$300 in FPUC benefits, totaling \$21,000 in FPUC benefits. Each of these payments was made on or before September 7, 2021.

(4) In her claims for the weeks of March 22, 2020, through May 2, 2020 (weeks 13-20 to 18-20), claimant initially reported \$2,000 in gross receipts and 40 hours worked in self-employment each week. The Department erroneously recorded that claimant had no self-employment income or hours worked for those weeks. Claimant did not report gross receipts, wages from employment, or hours worked on any other weekly claim.

(5) On March 15, 2021, in response to a request for proof of self-employment, claimant submitted to the Department a document generated by Mary Kay, Inc. entitled "Income Advisory 2020" which summarized claimant's financial dealings with them during 2020. Exhibit 4 at 9-10. The document included a list of "Combined US Commissions" paid to claimant, mostly on a monthly basis, totaling \$65,189.45. Exhibit 4 at 9.

(6) On December 1, 2023, the Department issued an amended Notice of Determination for PUA, concluding that claimant was ineligible to receive PUA benefits effective March 15, 2020, because she had "substantial earning[s] during Covid, which [she] failed to report." Exhibit 4 at 7. That decision became final without claimant having filed a request for hearing, and remains undisturbed.

(7) On December 13, 2023, the Department issued the December 13, 2023, overpayment decision, concluding that claimant was not entitled to the PUA or FPUC benefits she was paid for the weeks at issue. The overpayment was based in part on the December 1, 2023, PUA determination, and in part on

claimant having received remuneration exceeding her WBA for weeks 13-20 through 48-20. The December 13, 2023, overpayment decision further concluded that claimant was required to repay a total of \$36,375 in overpaid benefits plus a monetary penalty, and that she had “demonstrated a willful intent to deceive by providing false information to obtain benefits.” Exhibit 4 at 3.

CONCLUSIONS AND REASONS: Order No. 24-UI-267082 is set aside and the matter remanded for further development of the record.

Overpayment. Overpayment of PUA benefits is governed by 15 U.S.C. § 9021(d)(4), which provides that, absent a waiver of recovery by the State, States must require individuals to repay PUA benefits to which they are not entitled. Further, per U.S. Dep’t of Labor, Unemployment Program Information Letter (“UIPL”) No. 16-20 Change 4 at I-26, “the State agency must recover the amount of PUA to which an individual was not entitled in accordance with the same procedures as apply to recovery of overpayments of regular [unemployment insurance] paid by the State.”

Regarding the procedures that apply to recovery of overpayments of regular unemployment insurance, ORS 657.310(1)(a) and (c) provide that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657 during the five-year period following the date the decision establishing the erroneous payment becomes final. ORS 657.310(1)(a) applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual’s knowledge or intent. *Id.* ORS 657.315(1) provides, in relevant part, that an individual who has been overpaid benefits because of an error not caused by the individual’s false statement, misrepresentation of a material fact or failure to disclose a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding the individual is not eligible for the benefits, is liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final.

On December 1, 2023, the Department issued the December 1, 2023, PUA determination concluding that claimant was ineligible to receive PUA benefits effective March 15, 2020. That determination became final without claimant having filed a request for hearing. The order under review concluded that the period of ineligibility resulting from that determination was March 22, 2020, through November 28, 2020 (weeks 13-20 through 48-20). Order No. 24-UI-267082 at 12. The record does not support this conclusion.

At hearing, the ALJ asked the Department’s representative whether the period of ineligibility resulting from the December 1, 2023, PUA determination applied to “all of the weeks at issue.” August 29, 2024, Transcript at 23. The representative first answered, “Yes,” then suggested that “it would have applied from week ending March 28, 2020, through November 28, 2020; however, we did not – were not able to obtain any additional records for her tax transcripts to find out if she had. . . additional income. . . that was not on that schedule for Mary Kay.” August 29, 2024, Transcript at 23. The representative added that the Department “attempted to obtain additional information from the Claimant and [it] was not provided. That may have affected. . . the remaining weeks.” August 29, 2024, Transcript at 25. The representative further suggested that an ineligibility period end date of November 28, 2020, was not

included in the PUA determination because “it was inferred that if [claimant]. . . failed to report the previous earnings [for weeks 18-20 through 48-20] that she would fail. . . to report any additional earnings also.” August 29, 2024, Transcript at 26. When the ALJ asked the representative whether the December 1, 2023, PUA determination had been “overturned. . . withdrawn, or cancelled, or anything like that,” the representative testified that it had not. August 29, 2024, Transcript at 25.

While the representative’s testimony suggested reasons for and against imposing a shorter period of ineligibility based on his review of the evidence, the PUA determination itself contained no ineligibility period end date and therefore applied from March 15, 2020, through the September 4, 2021 end of the PUA program. Because that determination has become final and remains undisturbed, as a matter of law, claimant was ineligible to receive PUA benefits for all of the weeks at issue. Claimant was therefore not entitled to the \$15,375 in PUA benefits she received, and was overpaid that amount.

With respect to the overpayment of FPUC benefits for weeks 14-20 through 30-20 and 53-20 through 35-21, under the provisions of the CARES Act, 15 U.S.C. § 9023, claimant also received \$21,000 in FPUC benefits to which she was not entitled. FPUC is a federal benefits program that provided eligible individuals with \$600 per week, in addition to their weekly benefit amount, during the period of March 29, 2020, through July 25, 2020 (weeks 14-20 through 30-20), and \$300 per week during the period of December 27, 2020, through September 4, 2021 (weeks 53-20 through 35-21). *See* UIPL No. 15-20 (April 4, 2020) at 6. Individuals were eligible to receive the full \$600 or \$300 FPUC benefit if they were eligible to receive at least one dollar of regular unemployment insurance or PUA benefits for the claimed week. UIPL No. 15-20 at I-5. Because claimant was not eligible for at least one dollar of PUA benefits for any of the weeks at issue, she also was ineligible to receive FPUC benefits for those weeks. *See* UIPL No. 15-20 at I-7 (“If an individual is deemed ineligible for regular compensation in a week and the denial creates an overpayment for the entire weekly benefit amount, the FPUC payment for the week will also be denied. And the FPUC overpayment must also be created.”). Claimant was therefore overpaid \$21,000 in FPUC benefits.

Authority to amend decisions allowing payment. ORS 657.267 provides:

(1) ***An authorized representative shall promptly examine each claim*** for waiting week credit or for benefits ***and, on the basis of the facts available, make a decision to allow or deny the claim.*** Information furnished by the claimant, the employer or the employer’s agents on forms provided by the Employment Department pursuant to the authorized representative’s examination must be accompanied by a signed statement that such information is true and correct to the best of the individual’s knowledge. ***Notice of the decision need not be given to the claimant if the claim is allowed*** but, if the claim is denied, written notice must be given to the claimant. If the claim is denied, the written notice must include a statement of the reasons for denial, and if the claim is denied under any provision of ORS 657.176, the notice must also set forth the specific material facts obtained from the employer and the employer’s agents that are used by the authorized representative to support the reasons of the denial. The written notice must state the reasons for the decision.

(2) If the claim is denied under any provision of ORS 657.176, written notice of the decision must be given to the employing unit, or to the agent of the employing unit, that, in the opinion of

the Director of the Employment Department, is most directly involved with the facts and circumstances relating to the disqualification.

(3) Notice of a decision that was wholly or partially based on information filed with the director in writing within 10 days after the notice provided for in ORS 657.265 must be given to any employing unit or agent of the employing unit that filed the information.

(4) If a decision to allow payment made pursuant to this section does not require notice, that decision may be amended by an authorized representative. The amendment must be made by written notice informing the recipient of the right of appeal pursuant to ORS 657.269. ***The amendment must be issued within one year of the original decision to allow payment, except in cases of alleged willful misrepresentation or fraud.*** A decision requiring notice, made pursuant to this section, may be amended unless it has become a final decision under ORS 657.269.

(Bold, italic emphasis added.)

The Department made its original decisions under ORS 657.267(1) to allow payment of benefits for the weeks at issue by paying each of these claims between May 3, 2020, and September 7, 2021, and amended those decisions to a denial of benefits on December 13, 2023. The order under review concluded that claimant was overpaid PUA and FPUC benefits for some of the weeks at issue. Order No. 24-UI-267082 at 32. As previously explained, the record shows that claimant was overpaid benefits for *all* of the weeks at issue. Further, the order under review concluded that claimant did not willfully make a misrepresentation or fail to report a material fact to obtain benefits, but that the Department had authority to amend the original decisions allowing payment of those benefits to a decision denying benefits more than one year later because “the Department alleged willful misrepresentation or fraud.” Order No. 24-UI-267082 at 27. While the order correctly found that the December 13, 2023, overpayment decision alleged willful misrepresentation, it erred in concluding that such an allegation alone renders the one-year limitation in ORS 657.267(4) inapplicable when that allegation is reversed on appeal.

Pursuant to ORS 657.267(4), except in “cases of alleged willful misrepresentation or fraud,” the Department had one year to amend the original decisions allowing benefits. Here, the last payment of benefits for the weeks at issue occurred on September 7, 2021, more than two years before the December 13, 2023, overpayment decision was issued. Therefore, the Department’s authority to make that amendment and, in turn, claimant’s liability to repay the resulting overpayment, is dependent on whether the “willful misrepresentation or fraud” exception to the one-year limitation applies.

It can reasonably be inferred that the purpose of ORS 657.267(4) is to preclude the assessment of overpayments caused by claimant or Department error when the Department fails to discover the error or assess the overpayment within a year after the benefits are paid. It can further be inferred that the exception to this one-year limitation was intended to apply only when the overpayment was caused not by error but through willful misrepresentation to obtain benefits. The statute therefore authorizes the Department to assess an overpayment more than a year after it occurred when willful misrepresentation is also alleged. If the determination of willful misrepresentation to obtain benefits is reversed on appeal, however, the *allegation* ceases to exist and the exception to the one-year limitation no longer applies. In

such situations, the Department lacks authority to assess an overpayment, despite the overpayment having been assessed with an allegation of willful misrepresentation.

As explained in greater detail below, further development of the record is necessary to determine whether claimant was overpaid benefits for any of the weeks at issue due to willfully making a misrepresentation to obtain benefits. Accordingly, on remand, the Department's authority to assess the overpayment as to any of the weeks at issue must be determined based on whether the benefits for that week were, more likely than not, overpaid due to willful misrepresentation.

Misrepresentation. ORS 657.310(2) provides, in relevant part, “[A]n individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2). ORS 657.215 provides, in relevant part, “An individual is disqualified for benefits for a period not to exceed 52 weeks whenever the Director of the Employment Department finds that the individual has willfully made a false statement or misrepresentation, or willfully failed to report a material fact, to obtain any benefits under this chapter.” Where the Department has paid benefits, it has the burden to prove benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

The order under review concluded that claimant was overpaid for the weeks of March 22, 2020, through May 2, 2020 (weeks 13-20 through 18-20) due to Department error. Order No. 24-UI-267082 at 25. The record supports this conclusion. The order further concluded that claimant was overpaid for the weeks of May 3, 2020, through November 28, 2020 (weeks 19-20 through 48-20) due to claimant providing incorrect information, that claimant was not overpaid for the remaining weeks at issue, and that claimant did not willfully make a misrepresentation or fail to report a material fact as to any week at issue. *See* Order No. 24-UI-267082 at 32-33. The record as developed does not support these conclusions, and further development of the record is needed.

As previously stated, claimant was overpaid benefits for all of the weeks at issue, at least in part because she was ineligible to receive PUA benefits for those weeks as a result of the December 1, 2023, PUA determination. Additionally, the Department asserted that claimant was overpaid for weeks 13-20 through 48-20 on the basis of self-employment income that exceeded her WBA. *See* Exhibit 1 at 3-4.

As to the December 1, 2023, PUA determination causing claimant to be ineligible for benefits as a matter of law, that determination concluded that claimant was ineligible for PUA benefits because she had “substantial earning[s] during Covid, which [she] failed to report.” Exhibit 4 at 7. This suggests two possible bases for PUA ineligibility. One basis is that claimant's continued “substantial” self-employment earnings demonstrated that she was not a “covered individual” under the CARES Act because she was not unemployed for an enumerated COVID-19-related reason and she did not experience a significant diminution of her customary and usual services because of the COVID-19 public health emergency. The other basis is that the amount of self-employment income received reduced claimant's PUA benefit amount to zero, therefore rendering her ineligible for unemployment insurance benefits under any program. The latter possibility involves the same analysis required of the Department's separate assertion that claimant was overpaid for weeks 13-20 through 48-20 on the basis of self-employment income that exceeded her WBA.

Potential misrepresentation regarding status as a “covered individual.” To be eligible for PUA benefits, an individual must be a “covered individual” as that term is defined by the CARES Act, as amended. 15 U.S.C. § 9021(b). In pertinent part, a “covered individual” is an individual who (1) “is not eligible for regular compensation or extended benefits . . . or pandemic emergency unemployment compensation” and (2) self-certifies that they are either “otherwise able to work and available to work within the meaning of applicable State law, except the individual is unemployed, partially unemployed, or unable or unavailable to work because” of one of eleven reasons related to the COVID-19 pandemic, or “is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment” and is rendered unemployed because of one of the eleven listed reasons.¹ 15 U.S.C. § 9021(a)(3)(A)(i)-(ii). One of eleven enumerated COVID-19-related reasons is that “the individual’s place of employment is closed as a direct result of the COVID-19 public health emergency.” 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(jj). Another enumerated reason is that “the individual meets any additional criteria established by the [United States] Secretary [of Labor] for unemployment assistance under this section.” 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(kk). A circumstance approved via the Secretary’s item (kk) authority is for “self-employed individuals who experienced a significant diminution of services because of the COVID-19 public health emergency.” UIPL No. 16-20, Change 2 at 2. Federal guidance provides that a determination about whether actions are a “direct result” should be based on 20 C.F.R. 625.5(c), which states in relevant part that “a self-employed individual’s unemployment is a direct result of the [pandemic] where the unemployment is an immediate result of the [pandemic] itself, and not the result of a longer chain of events precipitated or exacerbated by the [pandemic].” UIPL No. 16-20 at I-7.

Further development of the record is needed to determine whether claimant made a willful misrepresentation or failed to report a material fact to obtain benefits. While claimant’s ineligibility for PUA benefits has been established as a matter of law and will not change as a result of this appeal, an analysis of the circumstances which led the Department to initially conclude that claimant was eligible for PUA benefits is necessary to a determination of whether willful misrepresentation caused the overpayment of benefits.

Claimant was asked to report “gross earnings from self-employment” and the number of hours worked on her initial application for PUA benefits and on each subsequent weekly claim. *See, e.g.*, Exhibit 7 at 14. The record shows that claimant had three potential sources of gross earnings from self-employment from her independent contractor work for Mary Kay, Inc.: 1) profit or commissions from online sales; 2) profit or commissions from in-home sales; and 3) a portion of commissions generated by salespeople with whom claimant was associated. Claimant’s testimony indicated that she received some of these proceeds in forms other than monetary payments, such as the use of a car and “prizes” such as jewelry. September 16, 2024, Transcript at 16. A statement issued by Mary Kay, Inc. summarizing their financial dealings with claimant during 2020 contained a section entitled “Combined US Commissions,” which appears to list a total of twelve monetary payments made to claimant from March through December 2020, totaling \$60,370. Exhibit 4 at 9. The statement separately lists non-monetary compensation including “miscellaneous prizes” and “Auto/Insurance payments made on your behalf.” Exhibit 4 at 10.

¹ A third requirement, that the person submit documentary proof of self-employment within a specified time frame, is not at issue here. *See* 15 U.S.C. § 9021(a)(3)(A)(iii).

Claimant testified that beginning in March 2020 she was no longer able to sell cosmetics to customers through in-home demonstrations due to COVID-19-related governmental restrictions. September 16, 2024, Transcript at 17. Claimant was asked if “any of [her] clients were willing to meet with [her] up through [September 4, 2021],” to which claimant replied, “They were still reluctant.” September 16, 2024, Transcript at 26. Claimant also denied “conduct[ing] any business from home, by email or marketing” during this period. September 16, 2024, Transcript at 25. Claimant testified that she generally considered the term “commissions” to refer to her entitlement to commissions earned through the activity of other salespeople with whom she was associated and the term “earnings” to refer to profit from sales she personally made. September 16, 2024, Transcript at 21-22. Claimant further testified that she received the commission payments listed on the statement but that the statement “clearly indicated that I did not have earnings coming in from the sale of my product which I purchased at a wholesale cost from Mary Kay.” September 16, 2024, Transcript at 20-22.

As the record is presently developed, claimant’s testimony is insufficient to rebut the inference reasonably made from the financial statement that claimant received unreported gross earnings from self-employment as set forth on that statement. Claimant implied in her testimony that she had not personally made any sales during the weeks at issue because her places of business for such work—customer’s homes—were essentially closed to salespeople due to the COVID-19 pandemic. Claimant further denied conducting business from home during the pandemic, which would exclude the possibility of online sales. Claimant’s testimony that the listed commission payments were completely derived from her share of other salespeople’s commission is consistent with these denials. However, that other salespeople with whom claimant was associated were apparently able to sell cosmetics during at least some of the weeks at issue, at a volume such that claimant’s share alone of the commissions generated from March through November 2020 exceeded \$60,000, undermines claimant’s assertion that her “place of business” was closed as a direct result of the COVID-19 public health emergency during all of the weeks at issue, as she represented to the Department. Further development of the record is therefore warranted to determine whether claimant misrepresented that she had not personally made any sales during all of the weeks at issue; or, in the alternative, that she personally made no sales but misrepresented that the reason she made no sales was the closure of customer’s homes due to their concerns over COVID-19, when claimant knew that her associated salespeople were making a substantial number of in-home sales. Such misrepresentations would also be material in the event claimant was paid PUA benefits due to a claimed “significant diminution of services” under enumerated reason (kk), as such diminution must have been a direct result of the COVID-19 public health emergency.

On remand, inquiry should include clarifying what enumerated COVID-19 reason claimant asserted as the basis for her eligibility in each weekly claim; for each week at issue, whether claimant received a payment from Mary Kay, Inc. and the date and method of each payment received, the period during which the sales or activity giving rise to the payment occurred, and whether the payment was owed to claimant due to claimant’s personal sales, the sales of associated salespeople, or some other reason; how many associated salespeople claimant derived commission income from, and the specifics of that arrangement. Such inquiry should also include whether claimant has or had access to financial statements from Mary Kay, Inc. covering all of the weeks at issue, including those in 2021; and, if claimant represented that she was eligible for PUA benefits based on a “significant diminution of services,” whether her self-employment income during the weeks at issue differed from that before the COVID-19 pandemic. During any period for which claimant asserted that she was unable to make sales

calls or experienced significant diminution of services due to COVID-19 restrictions, inquiry should be made into whether she received commissions for that period based on the sales of other salespeople and, if so, why claimant asserted that her place of employment was closed or her services diminished as a result of COVID-19 while others made significant numbers of sales. Inquiry should also be made as to whether claimant or her associated salespeople had the ability to make or profit from sales through means other than in-home demonstrations, such as by phone or website, and whether a website existed during the weeks at issue such that sales placed through it would entitle claimant to a share of the profit or commission.

Additionally, to the extent that the evidence on remand shows that claimant was overpaid benefits for any of the weeks at issue because she made a false statement or failed to disclose a material fact, additional inquiry should be made to determine whether this was done willfully to obtain benefits. Such inquiry should include why claimant initially reported receiving \$2,000 in gross self-employment income and 40 hours worked on each weekly claim for weeks 13-20 through 18-20; what the specific source of this income was (i.e., from sales she personally made, commissions from the sales of others, etc.); why the amount reported was the same each week when her income apparently varied significantly; why claimant failed to report income or hours worked after week 18-20 (particularly if she received income from the same source or performed similar work activities in subsequent weeks); whether she sought clarification from the Department about what income and work hours had to be reported; whether she was concerned that submitting the financial statement in March 2021 might lead the Department to conclude that she had been failing to report self-employment income; and why did she fail to provide a copy of her 2020 and 2021 tax transcripts as requested by the Department via email on November 15, 2023?

Potential misrepresentation in failing to report self-employment income. 20 C.F.R. 265.6(f) provides:

(1) The weekly amount of DUA payable to an unemployed worker or unemployed self-employed individual for a week of partial or part-total unemployment shall be the [WBA], reduced (but not below zero) by the amount of wages that the individual earned in that week as determined by applying to such wages the earnings allowance for partial or part-total employment prescribed by the applicable State law.

(2) The weekly amount of DUA payable to an unemployed self-employed individual for a week of unemployment shall be the [WBA], reduced (but not below zero) by the full amount of any income received during the week for the performance of services in self-employment, regardless of whether or not any services were performed during the week, by applying the earnings allowance as set forth in paragraph (f)(1) of this section. Notwithstanding the definition of “wages” for a self-employed individual under § 625.2(u), the term “any income” for purposes of this paragraph (f)(2) means gross income.

Federal guidance provides that the provisions set out in 20 C.F.R. 625.6(f) apply to the PUA program with respect to reportable income to the same extent and in the same manner as in the case of DUA, and that a self-employed individual must report gross income when filing a continued claim. UIPL No. 16-20, Change 2 at I-7. Because the term is undefined in the regulation, state law will determine the

definition of “gross income” for purposes of a self-employed individual. UIPL No. 16-20, Change 2 at I-7.

Under state law, for the purposes of reporting earnings on the PUA weekly certification from self-employment, “gross income” is gross pay received during the week less $\frac{1}{4}$ of the prior month’s cost of goods sold (COGS). COGS includes the business portion of rent, utilities, products or materials, and supplies. The Department does not define “products,” “materials,” or “supplies.” August 5, 2020, Memorandum from Lisa Schriever, Deputy Division Director, entitled “[PUA] Gross Income for Self-Employed Claimants.”

The record as presently developed suggests that claimant failed to report that she received gross income from self-employment for some of the weeks at issue, which was a fact material to the determination of her entitlement to PUA benefits, and failure to report this income was a cause of benefits being overpaid for such weeks. The order under review concluded that claimant had reportable self-employment income that exceeded her WBA each week from week 13-20 through 49-20, and no reportable self-employment income for the remainder of the weeks at issue. *See* Order No. 24-UI-267082 at 6-11. The record as presently developed does not support this conclusion, and further development of the record in this regard is needed.

The Department asserted in the December 13, 2023, overpayment decision’s Schedule of Adjustments that claimant received self-employment income reportable for weeks 13-20 through 48-20, and the income amount asserted was based on prorating the payments listed on the financial statement under “Combined US Commissions” and allocating them over the benefit weeks of the corresponding “Commission Month.” *See* Exhibit 1 at 3-4; Exhibit 4 at 9; August 19, 2024, Transcript at 32. The order under review made identical findings with regard to weeks 13-20 through 44-20, and arrived at differing amounts for the allocations involving weeks 45-20 through 49-20. Exhibit 1 at 3-4; Order No. 24-UI-267082 at 6-9. Prorating the self-employment income in this way is inconsistent with the provisions of the PUA program.

OAR 471-030-0017(4) (June 23, 2021)² provides, in relevant part, “For purposes of ORS 657.100 and 657.150(6) remuneration or an applicable prorate share thereof shall. . . [i]n the case of products, allocated to the week in which the product was sold,” and, “If the dates of sale or service are not clearly established, allocation shall be made upon a reasonable estimate provided by the individual. If the individual cannot or will not provide a reasonable estimate, the remuneration shall be allocated equally over the period during which services were rendered or products were sold.” OAR 471-030-0017(4)(b) and (d).

Proration and allocation of self-employment sales commissions to benefit weeks under the rule would be appropriate here, were this a regular UI claim. The rule would be applicable because the record as presently developed only suggests the month, rather than the week, in which the sales and payments occurred, and in regular UI claims remuneration is deductible from benefits, or renders claimants ineligible to receive benefits, during the week *earned* regardless of whether payment is *received* during that week. *See* ORS 657.100; ORS 657.100(6). However, such proration or allocation is inapplicable to

² A prior version of OAR 471-030-0017 was in effect from January 11, 2018 through June 20, 2021, and is applicable to the weeks at issue during that period. However, the provisions relevant here did not vary in substance between the two versions.

PUA claims which, pursuant to 20 C.F.R. 265.6(f)(2), require reduction in benefits of “any income *received* during the week for the performance of services in self-employment, regardless of whether or not any services were performed during the week[.]” (emphasis added)

Because the financial statement suggests that claimant received 12 commission payments from March 2020 through December 2020, there would be no more than 12 benefit weeks in 2020 for which self-employment income was reportable on a weekly claim. Further, unless a preponderance of the evidence shows that the March 2020 and December 2020 payments occurred during weeks at issue, as opposed to benefit weeks during those months that were not claimed, no earnings would be reportable for benefit weeks during those months. Similarly, unless a preponderance of the evidence shows that the two payments received each month in October and November 2020 occurred during different weeks of the respective months, the income would be reportable only in one week of each month. If the record on remand does not show which week or weeks of a month income was received, but that it was received during a claimed week during that month, the income should be considered reportable during any single claimed week of that month. Further development of the record in this regard is needed.

On remand, inquiry should be made as to all payments claimant received from Mary Kay, Inc. from March 2020 through September 2021, the date and method of payment, and whether the payments were made as a result of work done by claimant at any point in time to determine whether the payment constituted self-employment income. For example, if a payment was for commission owed to claimant based on sales made by another salesperson, inquiry should be made as to what services claimant performed at any time preceding the payment, such as recruiting, training, or assisting one or more other salespeople, to be eligible for a share of the commission. Additionally, inquiry should be made as to the “cost of goods sold” as defined by the Department and deductible from self-employment income, so as to determine the reportable portion of that income. In determining the effect of reportable self-employment income on claimant’s benefit amount for each week at issue, the statutory exclusion from earnings in effect during that week should also be considered. *See* ORS 657.160(6).

Further, if the record on remand shows that claimant failed to report self-employment income for a week at issue and that the failure caused, at least in part, the overpayment of benefits due to a reduction in WBA, additional inquiry should be made to determine whether the failure was willful and with the purpose of obtaining benefits, so as to determine the applicability of ORS 657.267(4).

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord* Dennis v. Employment Division, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant was overpaid benefits as a result of making a willful misrepresentation to obtain benefits, and therefore whether the time limitation in ORS 657.267(4) applies, Order No. 24-UI-267082 is reversed, and this matter is remanded.

DECISION: Order No. 24-UI-267082 is set aside, and this matter remanded for further proceedings consistent with this order.

D. Hettle and A. Steger-Bentz;
S. Serres, not participating.

DATE of Service: October 25, 2024

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 24-UI-267082 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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