

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0316

Late Application for Review Allowed
Modified
Reduced Overpayment and Penalties

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 only 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). On October 25, 2024, EAB issued EAB Decision 2024-EAB-0705, reversing Order No. 24-UI-267082, allowing claimant's late request for hearing, and remanding the matter for further proceedings on the merits of the December 13, 2023, overpayment decision.

On February 26, 2025, ALJ Lucas conducted a hearing, and on May 5, 2025, ALJ Scott conducted a continuation of the hearing. On May 7, 2025, ALJ Scott issued Order No. 25-UI-291587, affirming the December 13, 2023, overpayment decision by concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and was liable to repay an overpayment of \$15,375 in PUA benefits and \$21,000 in FPUC benefits, and a \$10,912.50 monetary penalty. On May 27, 2025, Order No. 25-UI-291587 became final without claimant having filed an application for review with EAB. On May 30, 2025, claimant filed a late application for review of Order No. 25-UI-291587 with EAB.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is the written statement included with claimant's late application for review of Order No. 25-UI-291587, which has been marked as EAB Exhibit 1 and provided to the parties with this decision. Any party that objects to EAB taking notice of this information must send their objection to EAB in writing, saying why they object, within ten days of EAB mailing this decision. OAR 471-041-0090(2). Unless EAB receives and agrees with the objection, the exhibits will remain in the record.

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

FINDINGS OF FACT: (1) From 2001 through at least September 4, 2021, claimant worked as an independent contractor for Mary Kay, Inc. in cosmetics sales. Claimant's income from Mary Kay, Inc. consisted of profit from purchasing product wholesale at a 50 percent discount from the suggested retail price and reselling it through in-home demonstrations and online or telephone sales, as well as commissions and incentives generated by 268 "downstream" salespeople whom claimant had been directly or indirectly responsible for recruiting and supporting. *See, e.g.*, February 26, 2025, Transcript at 11-12.

(2) Beginning on or around March 15, 2020, and lasting through approximately June 2020, claimant and her downstream salespeople were unable to make in-home cosmetics sales calls due to governmental restrictions related to the COVID-19 pandemic. Claimant continued to receive commissions and incentives from downstream online or telephone sales during this time.

(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. Additionally, for weeks 14-20 through 30-20, the Department paid claimant \$600 weekly in FPUC benefits, and for weeks 53-20 through 35-21 paid her \$300 weekly 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) During each week in which claimant claimed benefits, claimant engaged in “[t]eam building and training” efforts to support her downstream salespeople which, in turn, entitled claimant to commissions based on their work. February 26, 2025, Transcript at 21, 27. Claimant was also required to periodically order wholesale inventory to maintain active status with Mary Kay, Inc. Claimant received commission payments and incentives based on the work of her downstream salespeople, paid on the 15th of the month following the month in which they were earned, as follows:

Month Earned	Amount
December 2019	\$4,368.48
January 2020	\$450.51
February 2020	\$2,393.72
March 2020	\$2,523.72
April 2020	\$4,356.06
May 2020	\$6,042.68
June 2020	\$10,909.20
July 2020	\$4,137.10
August 2020	\$8,652.39
September 2020	\$7,603.91
October 2020	\$7,171.05
November 2020	\$6,401.21
December 2020	\$6,949.02
January 2021	\$5,087.10
February 2021	\$6,763.95
March 2021	\$7,422.81
April 2021	\$9,434.06
May 2021	\$5,484.17
June 2021	\$17,906.50
July 2021	\$4,568.67
August 2021	\$4,272.15
September 2021	\$6,953.48
October 2021	\$4,758.93
November 2021	\$6,293.14

(6) In 2020 and 2021, according to annual Income Advisory forms provided to claimant by Mary Kay, Inc., claimant purchased from the company \$9,898.25 and \$16,420.10 of product, respectively, which included “wholesale inventory orders and orders placed by Customer Delivery Service, Guest Checkout and EZship.” Exhibit 11 at 4; Exhibit 8 at 7. The Income Advisory forms also listed amounts charged to claimant for “Shipping and Handling – Customer Delivery Service.” Exhibit 11 at 4; Exhibit 8 at 7.

(7) On March 15, 2021, in response to a request for proof of self-employment, claimant submitted to the Department the Income Advisory form for 2020.

(8) On her federal income tax return for 2020, claimant reported having inventory at the start of the year with a cost of \$9,275, inventory purchases during the year “less cost of items withdrawn for personal use” of \$18,898, and having inventory at the end of the year with a cost of \$7,022. Exhibit 8 at 3. On her

federal income tax return for 2021, claimant reported having inventory at the start of the year with a cost of \$7,022, inventory purchases “less cost of items withdrawn for personal use” of \$26,420, and having inventory at the end of the year with a cost of \$9,200. Exhibit 8 at 5. The returns also listed “Gross receipts or sales” for 2020 and 2021 in the amounts of \$85,151 and \$133,140, respectively; and “Total expenses,” not including the cost of goods sold, in the amounts of \$90,009 and \$106,519, respectively.

(9) Claimant represented in each weekly claim for PUA benefits either that her “place of employment closed or curtailed operations as a direct result of the COVID-19 public health emergency” or that she was “an independent contractor and experienced a significant reduction of services because of the COVID-19 public health emergency.” Exhibit 11 at 31-35. Except with respect to her weekly claims for the weeks of March 22, 2020, through May 2, 2020 (weeks 13-20 through 18-20), discussed above, claimant represented in each weekly claim that she did not “perform any work related to [her] normal self-employment during the week.” Exhibit 11 at 31-35. If not for these representations, the Department would not have paid claimant PUA or FPUC benefits for any of the weeks claimed.

(10) 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.

(11) 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 decision assessed the overpayment 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.

(12) On May 7, 2025, Order No. 25-UI-291587 was mailed to claimant’s address on file with OAH. Order No. 25-UI-291587 stated, “You may appeal this decision by filing the attached form Application for Review with the Employment Appeals Board within 20 days of the date that this decision is mailed.” Order No. 25-UI-291587 at 9. Order No. 25-UI-291587 also stated on its Certificate of Mailing, “Any appeal from this Order must be filed on or before May 27, 2025, to be timely.”

(13) At the time Order No. 25-UI-291587 was issued, claimant was represented by an attorney. After claimant and her attorney received Order No. 25-UI-291587, they agreed that the attorney would file an application for review on claimant’s behalf. Due to a calendaring error, claimant’s attorney failed to file the application for review by the May 27, 2025, deadline. On May 30, 2025, claimant’s attorney discovered this error, and filed a late application for review the same day.

CONCLUSIONS AND REASONS: Claimant’s late application for review is allowed. Claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and is liable to repay an overpayment of \$14,145 in PUA benefits and \$18,000 in FPUC benefits, and a \$9,643.50 monetary penalty.

Late Application for Review. An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a “reasonable time” upon a showing of “good cause.” ORS 657.875; OAR 471-041-0070(2). “Good cause” means that factors or circumstances beyond the applicant’s reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented the timely filing ended. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

The application for review of Order No. 25-UI-291587 was due by May 27, 2025. Because claimant’s application for review was filed on May 30, 2025, it was late. Claimant reasonably relied on her attorney to file the application for review by the deadline. According to that attorney’s written statement, the appeal deadline was incorrectly entered in his calendar, which he realized on May 30, 2025, after the deadline had passed. EAB Exhibit 1 at 1. This was a circumstance beyond claimant’s reasonable control that prevented timely filing, and therefore good cause exists to extend the filing deadline. This circumstance ended on May 30, 2025, when claimant’s attorney discovered the error, and as the late application for review was filed the same day, it was filed within a “reasonable time.” Accordingly, claimant’s late application for review is allowed.

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. Because that determination has become final and remains undisturbed, claimant was, as a matter of law, 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, 2023.¹ 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.

For reasons discussed in greater detail below, the overpayment for the weeks of May 3, 2020, through September 4, 2021 (weeks 19-20 through 35-21) was caused by willful misrepresentation, and ORS 657.267(4) did not limit the Department’s authority to amend the original payment decisions regarding those weeks. However, the overpayment for the weeks of March 22, 2020, through May 2, 2020 (weeks 13-20 through 18-20) was not caused by willful misrepresentation, and therefore the Department was not authorized to amend the original payment decisions regarding those weeks. Accordingly, claimant is not liable to repay the \$1,230 in PUA benefits and \$3,000 in FPUC benefits she was overpaid for weeks 13-20 through 18-20.

Willful Misrepresentation in Weeks 13-20 through 18-20. 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.”² 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).

In each of claimant’s weekly claims for benefits for weeks 13-20 through 18-20, she reported that she had worked 40 hours in self-employment and had gross earnings of \$2,000.³ Exhibit 4 at 14. As these

¹ Claimant did not claim benefits for the week of December 20, 2020 through December 26, 2020 (week 52-20) and all references hereafter to claimant’s weekly claims from May 3, 2020 through September 4, 2021 (weeks 19-20 through 35-21) are exclusive of week 52-20.

² The Department did not seek a penalty disqualification under ORS 675.215, presumably because the claim involved only federal benefits.

³ At hearing, claimant denied working in self-employment or receiving any earnings during these weeks, and testified that she “probably misunderstood the question” in explaining her representations to the contrary on the claim form. February 26, 2025 Transcript at 71. However, the record does not show that claimant had provided any information other than that originally provided in the weekly claims as of the time those claims were paid.

reported earnings exceeded claimant's WBA of \$205, the Department should not have paid benefits to claimant.⁴ See ORS 657.155(1)(e) ("An *unemployed* individual shall be eligible to receive benefits with respect to any week . . ."); ORS 657.100(1) ("An individual is deemed "unemployed" in any week during which the individual performs no services and with respect to which no remuneration for services performed is paid or payable to the individual, or in any week of less than full-time work if the remuneration paid or payable to the individual for services performed during the week is less than the individual's weekly benefit amount."). Because claimant, with respect to these weeks, initially provided information that accurately represented she was not eligible to receive benefits, she did not willfully make a false statement or misrepresentation or fail to report a material fact to obtain benefits. Furthermore, because the overpayment for these weeks was not caused by willful misrepresentation or fraud, the Department lacked the authority under ORS 657.267(4) to amend the decisions allowing benefits to decisions denying benefits more than a year later, as previously discussed, and claimant is not liable to repay the \$1,230 in PUA benefits and \$3,000 in FPUC benefits she was overpaid for those weeks.

Willful Misrepresentation in Weeks 19-20 through 51-20 and 53-20 through 35-21. The parties did not dispute that in each weekly claim for weeks 19-20 through 35-21, claimant represented that she did not "perform any work related to [her] normal self-employment during the week," represented that she received no reportable gross income from self-employment, and represented either that her "place of employment closed or curtailed operations as a direct result of the COVID-19 public health emergency" or that she was "an independent contractor and experienced a significant reduction of services because of the COVID-19 public health emergency," or both. Exhibit 11 at 31-35. The parties also did not dispute that claimant received income from her activities as an independent contractor with Mary Kay, Inc. during 2020 and 2021 as shown on the respective Income Advisory forms and federal tax return schedules for those years.

At hearing, claimant attributed all income she received during the weeks at issue to commissions and incentives derived from the work of downstream salespeople, and denied making any sales of her own. See, e.g., September 16, 2024, Transcript at 17. Claimant maintained that her representations in the weekly claims were made with respect to an inability to engage in her own sales as a direct result of COVID-19, as well as her beliefs that the payments based on the work of downstream salespeople were not reportable as gross receipts because they constituted "passive" rather than earned income and, alternately, that deductible expenses exceeded any amounts received. Claimant's July 2, 2025, Written Argument at 3. However, the Department contended that claimant's representations that she was not performing work related to her normal self-employment, that she had no reportable gross income from self-employment, and that her self-employment was directly impacted by COVID-19, were materially false, made with the knowledge they were false, and caused claimant to be overpaid benefits.

A. Performance of Work in Self-Employment. The information in the record describing the operations of Mary Kay, Inc. suggests that each salesperson purchased product from the company at wholesale, amounting to approximately half the suggested retail price, and the salesperson then sold the product directly to customers, keeping any profit. The amount of wholesale product purchased was reported yearly on the Income Advisory form, but as Mary Kay, Inc. was not privy to the disposition of

⁴ The record suggests that these erroneous payments were made because the Department's computer system failed to accurately record the information claimant provided on the claim form.

the product after purchase by the salesperson, it was incumbent on each salesperson to report on their tax return the gross receipts from the sale of the product and any resulting profit or loss, in addition to the downstream commissions and incentives they received which were reported on the Income Advisory form. Claimant testified that her downstream consisted of 268 salespeople and managers, and that she received a commission of four percent of their wholesale purchases. February 26, 2025, Transcript at 16, 86.

The Income Advisory forms for 2020 and 2021 stated that claimant was paid \$65,189.45 and \$85,893.98, respectively, in downstream commissions exclusive of any other incentives, and totals of \$74,928.58 and \$122,720.39 in combined commissions and incentives. Exhibit 11 at 3; Exhibit 8 at 7. The forms further stated that claimant purchased \$9,898.25 and \$16,420.10 in wholesale product during 2020 and 2021, respectively. Exhibit 11 at 4; Exhibit 8 at 7.

Claimant's tax returns for 2020 listed the cost of inventory held at the start of year as \$9,275, purchases less cost of items withdrawn for personal use as \$18,898, and cost of inventory held at the end of the year as \$7,022, with "Gross receipts or sales" of \$85,151. Exhibit 8 at 2-3. Adding the start of year inventory to purchases during the year and subtracting the value of inventory at the end of the year suggests that claimant sold \$21,151 in wholesale product during 2020. Subtracting the \$74,928.58 in total commissions and incentives received in 2020, as reported on the Income Advisory, from the \$85,151 in gross receipts reported on claimant's tax return suggests that claimant had gross receipts or sales of \$10,223 that year that were not from downstream commissions or incentives.

Claimant's tax returns for 2021 listed the cost of inventory held at the start of year as \$7,022, purchases less cost of items withdrawn for personal use as \$26,420, and cost of inventory held at the end of the year as \$9,200, with "Gross receipts or sales" of \$133,140. Exhibit 8 at 4-5. Adding the start of year inventory to purchases during the year, and subtracting the value of inventory at the end of the year, suggests that claimant sold \$24,242 in wholesale product during 2021. Subtracting the \$122,720.39 in total commissions and incentives received in 2021, as reported on the Income Advisory, from the \$133,140 in gross receipts reported on claimant's tax return suggests that claimant had gross receipts or sales of \$10,420 that year that were not from downstream commissions or incentives.

In sum, these documents support the inference that in 2020 and 2021, claimant had or acquired more than \$20,000 in wholesale inventory each year that she did not have by the end of the respective year, and received more than \$10,000 in payments each year that were not attributable to downstream commissions or incentives. For each month from May 2020 through September 2021, claimant received thousands of dollars in commissions constituting just four percent of the cost of wholesale orders placed by her downstream salespeople during those months, which suggests that substantial sales of Mary Kay, Inc. products occurred during that period. In light of these sales, and the information in claimant's financial records, it is reasonable to infer that claimant was, more likely than not, personally making sales throughout weeks 19-20 through 35-21, despite her testimony to the contrary.

Regarding claimant's income from downstream commissions and incentives, claimant contended that this did not constitute gross receipts from self-employment because it was not derived from her personal sales or labor. Many, or perhaps all, of the 268 members of claimant's downstream may have been recruited by claimant, or by those recruits, and so on, prior to the COVID-19 pandemic and PUA claim. However, claimant testified that she was entitled to continued downstream commission and incentive

payments not only based on having recruited others in the past, but for ongoing work she performed “team building and training,” which she explained involved “sending out information, booklets, information on how to maneuver. It may have looked like, you know, motivational training.” February 26, 2025, Transcript at 21. Claimant was asked if those “were things that [she] did throughout the pandemic,” and she replied, “Yes. And still stayed in contact with my team.” February 26, 2025, Transcript at 21.

Claimant’s self-employment had only two components: personally selling product, and recruiting and supporting others in her downstream to earn commissions from their work. By claimant’s own admission, she was regularly engaging in activities to support her downstream throughout the weeks at issue, and as discussed above, the record suggests that claimant was also personally making sales. It is reasonable to infer that claimant knew that through either making her own sales or engaging in “team building and training” activities, she was performing work related to her normal self-employment during weeks 19-20 through 35-21. Furthermore, it is more likely than not that when claimant answered “No” to the question, “Did you perform any work related to your normal self-employment during this week?” in each weekly claim for weeks 19-20 through 35-21, she did so willfully to obtain benefits, knowing that the answer was false. Accordingly, the overpayment for these weeks resulted, at least in part, from a willful misrepresentation to obtain benefits.

B. Reporting No Gross Receipts. Claimant was additionally asked in each weekly claim for benefits for weeks 19-20 through 35-21 to report “GROSS Payment Received, whether services were performed during the week or not,” and claimant reported “0.” Exhibit 11 at 31 (emphasis in original). Under the Department’s guidance, for the purposes of reporting earnings from self-employment on the PUA weekly certification, “gross income” is gross pay received during the week less one-fourth of the prior month’s cost of goods sold (COGS). COGS include 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.”

Claimant’s tax returns for 2020 and 2021 contain separate sections for determining COGS for federal income tax purposes, and other deductions such as rent and utilities that were included in Oregon’s definition of COGS. *See* Exhibit 8 at 2-6. Combined, the costs and expenses likely falling within Oregon’s definition of COGS amounted to \$127,047 for 2020 and \$135,851 for 2021, according to the tax returns.⁵ Claimant testified that all commissions and incentives were paid on the fifteenth of each month. February 26, 2025, Transcript at 10. Therefore, to the extent any payment exceeded one-fourth of the prior month’s COGS, it was reportable in the claim for the week during which it was received.

However, while claimant understood generally that she was performing work related to her normal self-employment each week, as discussed above, the record does not show by a preponderance of the evidence that claimant understood that the commission and incentive payments were ultimately attributable to her labor in recruiting members of her downstream over the previous twenty years, as well as ongoing “team building and training” efforts. Claimant was therefore unaware that these receipts were reportable on weekly claims as gross income, to the extent that they exceeded allowable COGS deductions. That claimant willingly provided the Department in March 2021 with her 2020 Income

⁵ 2020 federal COGS of \$37,038 + expenses of \$90,009 = \$127,047; 2021 federal COGS of \$29,332 + expenses of \$106,519 = \$135,851.

Advisory form listing these payments, yet continued to report no gross receipts on her weekly claims, supports the sincerity of claimant's belief that the payments were not reportable. This belief, though mistaken, was reasonable given the indirect connection between claimant's labor and her entitlement to the payments. The Department has therefore not shown that claimant's failure to report downstream commission and incentive income on any weekly claim was done willfully to obtain benefits.

Furthermore, regarding sales claimant made personally during 2020 and 2021, including throughout weeks 19-20 through 35-21, as discussed above, the Department failed to meet its burden to show that claimant received payment for these products during any specific week, and therefore that she willfully made a false statement on any individual weekly claim by representing that she had no gross receipts, after allowable COGS deductions, based on personal sales that week.

C. COVID-19 Effects on Self-Employment. 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.⁶ 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. The term "covered individual" does not include an individual "who has the ability to telework with pay." 15 U.S.C. § 9021(a)(3)(B).

The initial determinations that claimant was eligible for PUA benefits and the resulting payment of benefits for weeks 19-20 through 35-21 were based on claimant's representations in her claims for those weeks that her "place of employment closed or curtailed operations as a direct result of the COVID-19 public health emergency" or that she was "an independent contractor and experienced a significant reduction of services because of the COVID-19 public health emergency," or both. Exhibit 11 at 31-35. It is reasonable to infer that claimant's ability to make in-home sales was curtailed as a direct result of the COVID-19 pandemic during the initial months of her claim, and her weekly certifications during that

⁶ 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).

period regarding the applicability of item (jj) were accurate to that extent. However, the record shows that, more likely than not, claimant's ability to personally make sales and generate revenue from self-employment overall during weeks 19-20 through 35-21 was not directly impacted by the COVID-19 public health emergency.

The Department asserted that claimant retained the ability throughout the pandemic to make online or telephone sales. One contemporary news article submitted by the Department, dated April 10, 2020, stated that a Mary Kay, Inc. salesperson told the publisher that her "team's product sales have only improved amid the pandemic, and that buyers are still clamoring for Mary Kay's best-selling [products]." Exhibit 11 at 27. The article continued, "Although competing retailers may be hindered by the closure of brick-and-mortar factories and stores, [the interviewee] said Mary Kay is considered an 'essential' business whose production facilities are allowed to stay open despite lockdown measures." Exhibit 11 at 27-28. An abstract submitted by the Department of another article published in July 2021, which was based on an interview of Mary Kay, Inc.'s chief marketing officer, stated in relevant part, "Mary Kay was a direct sales company whose Independent Beauty Consultants purchased its beauty and cosmetics products at wholesale and sold them to end-consumers at retail. As the coronavirus pandemic spread in 2020, Mary Kay worked to equip its Consultants with digital tools and strategies to help them run their business remotely." Exhibit 11 at 16. The Department also presented an undated screenshot purporting to be of claimant's website, which stated in relevant part, "Just tell me if you'd like a one-on-one consultation, a party with friends, a virtual party, makeup tips, skin care advice or free samples. You can always try before you buy. If you prefer to shop online only or order by e-mail or phone, the choice is yours," and listed "Delivery Options" including "Home Delivery," "Mail," "Pick Up," and "Work Delivery." Exhibit 11 at 11.

Additionally, that claimant received commissions from downstream sales supports the Department's assertion that claimant had the ability to make online or telephone sales herself throughout the weeks at issue. For the months of May 2020 through September 2021, claimant received commission payments of at least \$4,000 per month, constituting four percent of the wholesale cost of product purchased by claimant's 268 downstream salespeople that month.⁷ This suggests that those salespeople were purchasing at least \$100,000 in wholesale product per month, with a retail value of at least \$200,000. Claimant testified that she had the ability to monitor the wholesale purchases of her downstream salespeople, suggesting that she knew of this sales activity. February 26, 2025, Transcript at 81-82. Moreover, as discussed above, claimant's tax returns and Income Advisory forms suggest that in 2020 and 2021, claimant received more than \$10,000 in payments each year that were not attributable to downstream commissions or incentives, and had or acquired more than \$20,000 in wholesale inventory each year that she did not have by the end of the respective year. Regarding claimant's overall revenue from self-employment activity, of the 24 months for which activity was reported on the Income Advisory forms, a significant decrease in activity was demonstrated only for the months of January 2020 through March 2020. *See* Exhibit 11 at 3-4; Exhibit 8 at 6-7.

In rebuttal, claimant testified that she made no sales during any of the weeks at issue. February 26, 2025, Transcript at 4. However, claimant testified that Mary Kay, Inc. imposed no restrictions on in-person selling beyond complying with local laws. February 26, 2025, Transcript at 23-25. Claimant was asked,

⁷ Though the monthly payments listed in the Income Advisory forms may have included incentives, bonuses and prizes, it is reasonable to infer based on the ratio of commission to incentives that each payment included, at minimum, approximately this amount of commission.

“Could you have made online sales?” to which she replied, “I can’t tell you. I did not. I can’t tell you what other people were doing at the time.” February 26, 2025, Transcript at 22. When asked why claimant did not “use online sales,” she replied, “It was not available to me at that time.” February 26, 2025, Transcript at 22. Claimant later explained, “There is a website through Mary Kay that. . . calls can come into. I did not make any sales from that because I was mandated to stay in the house. You have to go out and mail products.” February 26, 2025, Transcript at 66-67. However, claimant was asked if “a medical professional ever [told] you that you couldn’t work throughout COVID because of any medical issues or any reasons why you were not able to work your regular business,” and claimant cited only general advice from the federal Centers for Disease Control and Prevention (CDC).⁸ May 5, 2025, Transcript at 34. Further, both Income Advisory forms stated that claimant’s wholesale purchase totals included “wholesale inventory orders and orders placed by Customer Delivery Service, Guest Checkout and EZship.” Exhibit 11 at 4; Exhibit 8 at 7. The forms also listed charges for “Shipping and Handling – Customer Delivery Service.” Exhibit 11 at 4; Exhibit 8 at 7.

In weighing this evidence, it is more likely than not that claimant was making sales during weeks 19-20 through 35-21, and to the extent she failed to make online or telephone sales, or experienced a diminution in overall sales or receipts during these weeks, it was not directly attributable to the COVID-19 public health emergency. A preponderance of the evidence shows that Mary Kay, Inc. gave their salespeople, including claimant, the ability to make sales online and by telephone throughout the pandemic, and claimant knew that her downstream salespeople were engaged in sales activity during weeks 19-20 through 35-21. Further, information provided on the Income Advisory forms suggested, contrary to claimant’s testimony, that programs existed during these weeks whereby Mary Kay, Inc. could fulfill orders placed with their salespeople by shipping product directly to the customer, and that some of claimant’s sales were made through these programs. Moreover, even if direct shipping was not available, as claimant asserted, her stated reason for not making online or telephone sales of being unwilling to leave her house to re-ship products was not directly related to the COVID-19 pandemic. The record does not show that claimant received any specific medical advice, beyond that made to the general public, that would have prevented her from shipping product as necessary. Additionally, claimant’s overall self-employment income was relatively stable from May 2020 through September 2021, and a decrease in activity during this period compared to before the COVID-19 pandemic was not shown through the documentary evidence. Therefore, claimant’s representations in her weekly claims that her “place of employment closed or curtailed operations” and she “experienced a significant reduction of services” as a direct result of COVID-19 were, more likely than not, false, and claimant knew they were false when she made them. Accordingly, claimant was overpaid benefits for weeks 19-20 through 35-21 because she willfully made misrepresentations to obtain benefits on each weekly claim.

Monetary Penalty. OAR 471-030-0052 (January 11, 2018), provides, in relevant part:

* * *

⁸ Claimant also testified to being advised to self-quarantine by her personal physician after a potential exposure to COVID-19 in March 2020, which preceded weeks 19-20 through 35-21 by several weeks, and thereafter to follow public health guidelines. February 26, 2025 Transcript at 56-57.

(7) The department will review the number of occurrences of misrepresentation when applying the penalty as described in ORS 657.310(2). An occurrence shall be counted each time an individual willfully makes a false statement or representation, or willfully fails to report a material fact to obtain benefits. The department shall use the date the individual failed to report a material fact or willfully made a false statement as the date of the occurrence. For an individual subject to disqualification by administrative action under 657.215, the penalty will be:

(a) For the first or second occurrence within 5 years of the occurrence for which a penalty is being assessed, 15 percent of the total amount of benefits the individual received but to which the individual was not entitled.

(b) For the third or fourth occurrence within 5 years of the occurrence for which a penalty is being assessed, 20 percent of the total amount of benefits the individual received but to which the individual was not entitled.

(c) For the fifth or sixth occurrence within 5 years of the occurrence for which a penalty is being assessed, 25 percent of the total amount of benefits the individual received but to which the individual was not entitled.

(d) For the seventh or greater occurrence within 5 years of the occurrence for which a penalty is being assessed, 30 percent of the total amount of benefits the individual received but to which the individual was not entitled.

(e) In cases of forgery or identity theft, 30 percent of the amount of benefits the individual received but to which the individual was not entitled.

* * *

As discussed above, claimant willfully made false statements to obtain benefits in each weekly claim for the weeks of May 3, 2020, through September 4, 2021 (weeks 19-20 through 35-21). Therefore, because there were at least seven occurrences of willful false statements within a five-year period, OAR 471-030-0052(7)(d) requires that a penalty of 30 percent of the overpaid benefits for those weeks be assessed. For weeks 19-20 through 35-21, claimant was overpaid \$32,145 in combined PUA and FPUC benefits. Accordingly, a 30 percent monetary penalty of \$9,643.50 is assessed.

In summary, the Department was not authorized to amend the original decisions allowing claimant benefits for weeks 13-20 through 18-20 to a decision denying benefits, and claimant is not liable to repay benefits she was overpaid for those weeks. Claimant willfully made a false statement to obtain benefits in each of her claims for weeks 19-20 through 51-20 and 53-20 through 35-21, causing her to be overpaid \$14,145 in PUA benefits and \$18,000 in FPUC benefits for those weeks, which she is liable to repay to the Department, in addition to a \$9,643.50 monetary penalty.

DECISION: Claimant's late application for review is allowed. Order No. 25-UI-291587 is modified, as outlined above.

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

DATE of Service: July 15, 2025

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals **within 30 days of the date of service stated above**. *See* ORS 657.282. For forms and information, visit <https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx> and choose the appropriate form under “File a Petition for Judicial Review.” You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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