IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Eric BIBOLET,
Petitioner,

v.

EMPLOYMENT DEPARTMENT
and Comcast Cable Holding, LLC,
Respondents.

Employment Appeals Board
13AB0820; A154522

Argued and submitted April 13, 2015.

Michael E. Rose argued the cause and filed the brief for petitioner.

Erin K. Galli, Assistant Attorney General, argued the cause for respondent Employment Department. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

No appearance for respondent Comcast Cable Holding, LLC.

Before Armstrong, Presiding Judge, and Hadlock, Chief Judge, and Egan, Judge.*

ARMSTRONG, P. J.

Affirmed.

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* Hadlock, C. J., *vice* Nakamoto, J. pro tempore.

ARMSTRONG, P. J.

After claimant was involved in a motor-vehicle accident at work, claimant's employer required him to submit to a drug test in accordance with employer's written drug policy for its employees. The test revealed that claimant had marijuana metabolites in his body in a concentration greater than allowed under employer's policy, leading employer to terminate claimant's employment with it. Claimant sought unemployment compensation benefits, which the Employment Department denied on the ground that claimant's failure on employer's drug test was a "disqualifying act" for purposes of determining claimant's eligibility for unemployment benefits. *See* ORS 657.176(2)(h), (9)(a)(F). The Employment Appeals Board (EAB) ultimately affirmed the department's denial. Claimant seeks judicial review of EAB's order, raising three assignments of error that, in various ways, challenge the employer's drug-testing policy as not meeting the legal requirements that would make claimant's failed drug test a disqualifying act for purposes of claimant's eligibility to receive unemployment benefits.

First, claimant contends that employer's drug policy was unreasonable because it regulated off-duty conduct. Second, he contends that employer's policy of drug testing all employees who were involved in work-related motor-vehicle accidents does not qualify as a "blanket" test under the state administrative rules that govern employer drug policies. *See* OAR 471-030-0125(3)(d) (a drug policy that includes drug testing must either require probable cause before testing or provide for "random, blanket, or periodic testing"). Finally, claimant contends that, because there was no evidence that he was impaired at work as a result of his ingestion of marijuana, the EAB erred in concluding that his failed drug test had occurred "in connection with employment," as contemplated by ORS 657.176(9)(a)(F). The department responds that claimant's first and third assignments of error are not preserved and are not subject to review as plain error. As to the second assignment, the department contends that a drug test administered to every employee involved in a work-related motor-vehicle accident qualifies as a "blanket" drug test. We agree with the department on each point. Accordingly, we affirm the EAB's order.

Before we turn to the facts, we briefly outline the applicable statutory and regulatory framework. An individual becomes temporarily ineligible for unemployment benefits if the worker commits a disqualifying act. *See* ORS 657.176(2). Conduct that causes an employee to "test[] positive for alcohol, cannabis or an unlawful drug in connection with employment" can constitute a disqualifying act.[1] ORS 657.176(2)(h), (9)(a)(F). Such a test, according to the department's rules, must be administered in accordance with a reasonable written policy. OAR 471-030-0125(2)(e) provides:

> "For purposes of ORS 657.176(9)(a)(F), an individual 'tests positive' for alcohol or an unlawful drug when the test is administered in accordance with the provisions of *an employer's reasonable written policy* or collective bargaining agreement, and at the time of the test:
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> "(A) The amount of drugs or alcohol determined to be present in the individual's system equals or exceeds the amount prescribed by such policy or agreement; or
>
> "(B) The individual has any detectable level of drugs or alcohol present in the individual's system if the policy or agreement does not specify a cut off level."

(Emphasis added.) The rule further sets out four requirements for a written policy to qualify as "reasonable":

> "For purposes of ORS 657.176(9)(a), (10), and 657.176(13)(d), a written employer policy is reasonable if:
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> "(a) *The policy prohibits the use, sale, possession, or effects of drugs or alcohol in the workplace; and*
>
> "(b) The employer follows its policy; and

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[1] While this judicial review was pending, ORS 657.176(9)(a)(F) was amended to add the word "cannabis" to the prior version of the statute, which provided that an individual commits a disqualifying act if the individual "tests positive for alcohol or an unlawful drug." ORS 657.176(9)(a)(F) (2015), *amended by* Or Laws 2017, ch 21, § 65. The amendment does not change our analysis because employer terminated claimant before Oregon law was amended in 2014 by Ballot Measure 91 to permit personal possession and use of marijuana. The parties do not dispute that, at the time that employer terminated claimant's employment, marijuana was an "unlawful drug" for purposes of ORS 657.176. *See also* OAR 471-030-0125(2)(g) (defining, by rule, "unlawful drug"). Because the 2014 and 2017 amendments do not affect our analysis, we apply the current version of the statute.

> "(c) The policy has been published and communicated to the individual or provided to the individual in writing; and
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> "(d) When the policy provides for drug or alcohol testing, the employer has:
>
> "(A) Probable cause for requiring the individual to submit to the test; or
>
> "(B) *The policy provides for random, blanket or periodic testing.*"

OAR 471-030-0125(3) (emphases added).

Finally, the rules provide two relevant definitions. First, the rules define "in connection with employment," as used in ORS 657.176(9)(a)(F), as a positive drug test that "affects or has a reasonable likelihood of affecting the employee's work or the employer's interest and/or workplace." OAR 471-030-0125(2)(h). Second, the rules define "blanket test" as "a test for drugs and/or alcohol applied uniformly to a specified group or class of employees." OAR 471-030-0125 (5)(c).

With that in mind, we turn to the facts, which, for purposes of our review, are undisputed. Employer has a written drug policy, which provided:

> "[Employer] prohibits the use, possession, sale, purchase, manufacture, distribution, dispensation or transfer of drugs that are illegal under federal, state or local laws by any employee *while both on-duty and off-duty.* This policy also prohibits an employee from working under the influence of illegal drugs to any extent. Illegal drugs include, but are not limited to, controlled substances such as marijuana, cocaine and heroin.
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> "*****
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> "In order to ensure compliance with this Policy, [employer] may require employees *** to undergo drug and/or alcohol testing under the following circumstances (when permitted by applicable law): *** Post-vehicular accident."

(Emphasis added.) The policy also included screening levels for the drug tests, which provided the basis for employer to terminate an affected employee's employment.

Claimant was driving employer's truck at work when another driver backed into the employer's truck in a parking lot. Employer required claimant to take a drug test after the accident, based on its policy of administering drug tests to employees who are involved in work-related vehicular accidents, regardless of fault. The test revealed marijuana metabolites in a concentration greater than allowed by employer's policy on drug use; accordingly, employer terminated claimant's employment. There is no evidence in the record that claimant was impaired by marijuana at the time of the accident.

Claimant applied for unemployment benefits, but the department denied claimant's application on the ground that his failure on the employer-administered drug test was a disqualifying act. *See* ORS 657.176(2)(h), (9)(a)(F). Claimant appealed the denial to an administrative law judge (ALJ). Before the ALJ, claimant's arguments focused on whether he had, in fact, smoked marijuana himself or whether his proximity to people at a party who were smoking marijuana explained his positive drug test. Claimant submitted no written argument to the ALJ and made no opening or closing statements. His sole legal arguments focused on the admissibility of certain evidence, and the admission of that evidence has not been challenged by claimant on judicial review. The ALJ concluded—based on an argument not advanced by claimant—that claimant was entitled to unemployment benefits because the drug test administered to claimant was not a "blanket" drug test, as defined in OAR 471-030-0125(5)(c). The ALJ reasoned:

> "A colorable argument could be made that a post-vehicular [accident] drug test is one given to 'a specified group or class of employees,' that is, all employees involved in motor vehicle accidents. The ALJ is unaware of any statute or rule or case law that would allow for such an interpretation and, in the absence of any such legal authority, the ALJ declines under the facts of this particular case to interpret the term 'blanket' drug test in such a broad or novel fashion."

In essence, the ALJ concluded that a drug test administered to every employee who is involved in a work-related vehicular accident was not a test applied to "a specified group or

class of employees," and, thus, the test did not constitute a "blanket test." Accordingly, the ALJ held that claimant's failure on the test was not a disqualifying act, and claimant was entitled to unemployment benefits.

Employer appealed to the EAB. Neither claimant nor the department submitted written briefing before the EAB, although they had the opportunity to do that. *See* OAR 471-041-0080(1) (allowing parties to submit written arguments to the EAB). The EAB reversed the ALJ, concluding that employer's policy of drug testing all employees involved in work-related vehicular accidents did qualify as a "blanket" drug test under OAR 471-030-0125(3), and, accordingly, claimant was disqualified under ORS 657.176(9)(a)(F) from receiving unemployment benefits. Claimant seeks judicial review of the EAB's order.

We begin with claimant's first and third assignments of error on review, which, as noted, the department contends we should not reach because they are unpreserved and do not qualify for plain-error review. ORAP 5.45(1) provides that "[n]o matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court." That rule applies to judicial review of agency action. *See, e.g.*, *Marella v. Employment Dept.*, 223 Or App 121, 126, 194 P3d 849 (2008), *rev den*, 346 Or 65 (2009) ("An issue must first be raised to the EAB before we will consider it on review."). "In order to preserve an argument for judicial review, the party asserting the error must provide the agency with an explanation of his or her objection that is specific enough to ensure that the agency is able to consider the point and avoid committing error." *Entrepreneurs Foundation v. Employment Dept.*, 267 Or App 425, 428, 340 P3d 768 (2014) (alterations and internal quotation marks omitted). "The requirement that a party must have objected before the agency to errors [that] he [raises] on judicial review is one facet of the general doctrine that a party must exhaust his administrative remedies." *Marella*, 223 Or App at 126 (quoting *Marbet v. Portland Gen. Elect.*, 277 Or 447, 456, 561 P2d 154 (1977)); *see also Ayres v. Board of Parole*, 194 Or App 429, 435-36, 97 P3d 1 (2004) ("[T]he party must present the particular challenges it intends to raise on judicial review first to the

administrative body whose review must be exhausted."). Preservation requirements ensure fairness to the parties, assist in the opportunity to develop a full record for review, and promote judicial efficiency. *See Entrepreneurs Foundation*, 267 Or App at 429.

As noted, in his first assignment of error, claimant contends that employer's policy was unreasonable because it regulated off-duty drug use; in his third assignment, he asserts that his violation of employer's policy was not a disqualifying act because the statutory requirement that the drug test be "in connection with employment" required employer to show that claimant was impaired on the job. *See* ORS 657.176(9)(a)(F); OAR 471-030-0125(2)(h). It is undisputed that claimant did not raise those arguments to the ALJ or to the EAB, and, therefore, he did not preserve them. Claimant contends, however, that the preservation requirement does not apply here because the EAB reversed the ALJ's order that granted him benefits; in other words, because he was the *respondent* before the EAB, he was not required to raise with the EAB the arguments that he has raised in his first and third assignments of error to preserve them.

We reject claimant's argument. We concluded in *Goin v. Employment Dept.*, 203 Or App 758, 126 P3d 734 (2006), that a claimant had not preserved an assignment of error that the claimant had raised in circumstances equivalent to the circumstances of this case. There, the Employment Department had awarded unemployment compensation benefits to the claimant. *Id.* at 761. The employer requested a hearing before an ALJ, who agreed with the department and upheld the department's award of benefits. *Id*. The employer then appealed to the EAB, which reversed the earlier determinations and denied the claimant benefits. *Id.* at 762. The claimant sought judicial review of the EAB's decision. Albeit with minimal discussion, we rejected one of the claimant's legal arguments because she had not previously raised the argument with the EAB and, thus, had failed to preserve it. *Id.* at 763. Hence, being a respondent before the EAB does not necessarily excuse an appellant in our court from the preservation requirements imposed by ORAP 5.45(1). Our holding in *Goin* is consistent with the principle that a party must first present to the reviewing

agency—and, thus, exhaust administrative review—the arguments that the party seeks to advance on judicial review.

Claimant contends that our holding in *Fred Meyer Stores v. Godfrey*, 218 Or App 496, 180 P3d 98 (2008), excuses the requirement that he preserve his claim of error in the circumstances presented here. We disagree. *Fred Meyer* is a workers' compensation case in which an employer had raised before an ALJ two arguments against an award of compensation to the claimant. *Id.* at 498-99. The ALJ agreed with the employer on one argument and declined to reach the second. *Id.* at 499. The claimant appealed that determination to the Workers' Compensation Board, where the employer advanced only the first argument and not the second. The board agreed with the employer on that argument and denied the claimant compensation. *Id.* at 500. The claimant sought judicial review of the denial, and we concluded that the board had erred. *Id.* On remand, the board, citing *its* preservation rules, declined to allow the employer to resurrect on remand the second argument that the employer had raised in the original proceeding, and it awarded the claimant compensation. *Id.* The employer appealed to us, contending that the board had abused its discretion by not permitting it to raise its second argument on remand because the employer had been the respondent when the case was originally before the board and before us. Framing the employer's argument in a footnote, we cited *Brewer v. Dept. of Fish and Wildlife*, 167 Or App 173, 181, 2 P3d 418 (2000), *rev den*, 334 Or 693 (2002) , for the proposition that our appellate preservation rules do not apply to a "respondent arguing in favor of sustaining [a] trial court ruling." *Fred Meyer*, 218 Or App at 500 n 2. We ultimately rejected the employer's argument and concluded that we should afford the board deference in establishing and enforcing *its* preservation rules and that the board had not abused its discretion by applying its rules rather than ours. *Id.* at 504.

Fred Meyer is not helpful to claimant. It stands for the principle that an agency can apply its own preservation rules and not ours. That principle is not relevant to our decision on whether claimant had to preserve his arguments by raising them with the EAB.

Brewer, which we cited in *Fred Meyer*, is likewise of no help to claimant. In *Brewer*, the appellant contended that we should not consider an argument advanced by the respondent because the respondent had not made the argument below. 167 Or App at 180. We rejected that contention, noting that the appellant was confusing two related doctrines, "unpreserved arguments in support of reversal of a ruling and alternative ground[s] for affirmance of a ruling." *Id.* at 180-81. We concluded that ORAP 5.45 requires appellants and cross-appellants to preserve their assignments of error, but neither ORAP 5.55 nor ORAP 5.57, the rules governing a respondent's arguments, imposes a preservation requirement for arguments advanced to sustain a trial court ruling. That conclusion does not help claimant here. Claimant here is the appellant, and ORAP 5.45 required him to preserve before the EAB the claims of error that he has raised with us. The rules that apply to respondents, ORAP 5.55 and 5.57, do not relieve claimant of that requirement now, even though he was the respondent before the EAB.

Claimant had multiple opportunities to present the arguments that he now seeks to advance on judicial review; he could have raised the arguments either with the ALJ or the EAB. Also, under EAB rules, he could have sought reconsideration with the EAB, after it issued its decision, to "correct an error of material fact or law." OAR 471-041-0145(1). We take no position on whether a claimant would exhaust, and thus preserve, an argument by raising the argument only to the ALJ or by raising it for the first time on reconsideration before the EAB. However, by not presenting to the ALJ or EAB his arguments on his first and third assignments of error, and by raising those arguments for the first time before us on judicial review, claimant has not exhausted his administrative remedies and, thus, has failed to preserve the arguments in his first and third assignments.

However, claimant has asked us to engage in plain-error review of those assignments. Under ORAP 5.45(1), we have discretion to review an unpreserved error as plain error if three criteria are satisfied:

> "(1) the error is one of law; (2) the error is apparent, that is the legal point is obvious, not reasonably in dispute and

> (3) the error appears on the face of the record, in that we need not go outside of the record or choose between competing inferences to find it."

State v. Belen, 277 Or App 47, 52, 369 P3d 438 (2016) (alterations and internal quotation marks omitted). Claimant contends that all three criteria are satisfied and, thus, his first and third assignments of error are eligible for plain-error review. The department contends, however, that the second requirement for plain-error review is not satisfied because the points of law are reasonably in dispute on both assignments, and, consequently, we cannot engage in that review.

Because the legal point is not obvious in either instance, we agree with the department that the errors are not plain. As to the first assignment of error, claimant contends that the policy is unreasonable because, by its terms, the policy regulates off-duty conduct and does not require employer to show that the affected employee was impaired by drugs at work. Thus, claimant contends that a drug test conducted under the policy is not a disqualifying act for purposes of unemployment benefits. The department disagrees and argues, among other things, that is not beyond dispute that a policy that prohibits off-duty drug use is an unreasonable policy. As the department notes, OAR 471-030-0125(2)(e) provides that, if an employer does not state in its policy the cutoff level for the detection of drugs on a test, an employee is disqualified from unemployment benefits for having *any* detectable level of drugs on the test. Thus, the rules arguably contemplate that, regardless of actual impairment or whether the employee used drugs while on or off duty, a positive drug test can disqualify an employee from receiving unemployment benefits even though the test may not establish impairment. Hence, we agree with the department that it is not beyond dispute that a drug policy that regulates off-duty drug use is an unreasonable policy under the administrative rules.[2]

[2] Claimant also relies on *Glide Lumber Prod. Co. v. Emp. Div. (Smith)*, 86 Or App 669, 741 P2d 907 (1987), and *Sun Veneer v. Employment Div.,* 105 Or App 198, 804 P2d 1174 (1991), for the proposition that marijuana tests cannot detect how much time has elapsed since a person has ingested marijuana, and, thus, absent a showing of actual impairment, a failure on a drug test based on

We turn to the third assignment of error, in which claimant contends that the record does not contain substantial evidence to establish that his positive drug test was "in connection with his employment," as contemplated by ORS 657.176(9)(a)(F). As we understand it, his argument is that it is beyond dispute that "in connection with employment" requires a factual showing of impairment, and, because there was no evidence in the record that claimant was impaired by marijuana at the time of the motor-vehicle accident, the EAB plainly erred when it determined that the drug test was "in connection with employment." Claimant highlights the definition of "connection with employment" which, under the rules, is a drug test that "affects or has a reasonable likelihood of affecting the employee's work or the employer's interest and/or workplace." OAR 471-030-0125(2)(h). He contends that that definition requires a showing of impairment at work. In his view, because a drug test cannot establish when an individual ingested marijuana and whether the individual was impaired by marijuana, and only impairment due to the ingestion of drugs has a reasonable likelihood of affecting an employee's work or an employer's interests or workplace, the drug test that he failed is not one that meets the requirement of a drug test that was in connection with employment. Thus, he argues that he did not commit a disqualifying act under ORS 657.176(9)(a)(F) because there was no showing of impairment.

The department responds that, for purposes of ORS 657.176(9)(a)(F), "in connection with employment" does

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the presence of marijuana metabolites cannot constitute a disqualifying act for purposes of unemployment benefits. However, both cases involved a prior version of the statute from the one at issue here. The prior version required a showing of "misconduct connected with work." ORS 657.176(2)(a) (1991). We concluded that, under that version of the statute, a failed drug test, standing alone, was not a disqualifying act. Rather, the employer had to show that the drug use disclosed by a test had had an actual effect in the workplace to establish misconduct connected with work. *See Glide Lumber*, 86 Or App at 675; *Sun Veneer*, 105 Or App at 207-08. The statute has been amended since those cases were decided. *See* Or Laws 1995, ch 178, § 1; Or Laws 2003, ch 792, § 2. The current statute does not require *misconduct* connected with work. Rather, it requires only a *positive drug test* connected with employment. *See* ORS 657.176(9)(a)(F). Because the statute and related rules have been substantially amended since *Glide Lumber* and *Sun Veneer* were decided, the reasoning from them is neither controlling nor helpful. *See, e.g.*, OAR 471-030-0125 (rules governing drug and alcohol polices first promulgated in 2003).

not necessarily require a showing of impairment. Rather, it contends that the definitional rule makes clear that a drug test can be connected with employment if it affects the employer's interest or workplace. Accordingly, it argues that drug testing after a work-related vehicular accident in a company vehicle has a reasonable likelihood of affecting the employer's interests, and, thus, is connected with employment.

We conclude that the department's understanding of the rule is at least plausible. The definition does not impose a requirement that an employer establish impairment; rather it requires that the drug use have a reasonable likelihood of affecting the employer's interests. A policy that requires drug testing after work-related motor-vehicle accidents may have a reasonable likelihood of affecting the employer's interests. There is nothing in the rule that, at least obviously, prevents an employer from designing a drug-policy regime that takes a strict approach to marijuana metabolites found in an employee's drug test. An employer might try to guard against any drug use and impairment in the workplace—and incidentally limit off-duty drug use—by administering a drug test that would reveal the presence of any marijuana metabolites and would thereby better ensure against the use of drugs at work. Such a policy would allow an employer to minimize drug use in the workplace by terminating an employee's employment for a failed drug test without having to prove actual impairment. Thus, it is at least plausible that such a strict policy would be sufficiently related to an employer's interest to be "in connection with employment" for purposes of ORS 657.176(9)(a)(F) and OAR 471-030-0125(2)(h). In sum, it is not beyond dispute that, for a drug test to be connected with employment, it must establish an on-the-job use or impairment. The legal point is not obvious, and, accordingly, we do not engage in plain-error review of claimant's third assignment of error.

We turn to claimant's second assignment of error, in which he contends that the EAB misapplied the law because the term "blanket test" in OAR 471-030-0125(3)(d)(B) does not apply to drug tests that are conducted without regard to evidence of drug use or impairment. The department responds that the text of the department's definitional

rule is dispositive, because a test that applies to every employee who has been involved in a work-related motor-vehicle accident qualifies as a "blanket test." We agree with the department.

We review EAB's conclusions for legal error and substantial reason. *See* ORS 183.482(8); *Goin*, 203 Or App at 763. As noted, by rule, a "blanket test" is one that is "applied uniformly to a specified group or class of employees." OAR 471-030-0125(5)(c). That definitional rule imposes two requirements: that the test be applied uniformly and that it be administered to a specified group or class of employees. The test administered to claimant under employer's policy satisfies those requirements. It specifies the class of employees who are subject to the test, *viz.*, employees who have had a work-related motor-vehicle accident, and it applies to all employees who meet that criterion. Thus, the policy provides for a blanket test.

In summary, the EAB did not err in concluding that the drug test that claimant failed under employer's written drug policy disqualified him from receiving unemployment benefits.

Affirmed.