IN THE SUPREME COURT OF FLORIDA

Case No. SC-04-591

MARK TETZLAFF
Petitioner,

vs.

FLORIDA UNEMPLOYMENT APPEALS COMM'N
Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

Mark Tetzlaff	)	Supreme Ct. No. SC-04-591
Petitioner,	)	
	)	
-vs-	)	5th DCA Case No. 5D03-250
	)	Case No. 02-09990
Florida Unemployment	)	(Alan O. Forst, Chairman)
Appeals Comm'n,	)	
Respondent.	)	
_____/		

PRELIMINARY STATEMENT

The following designations apply: Florida Unemployment Appeals Commission ("UAC"); Agency for Workforce Innovation ("AWI"). The record: Conformed copy of the Fifth District Court of Appeals' January 23, 2004 decision ("Fla. 5th Dist. Dec., Jan. 23, 2004"); conformed copy of the Fifth District Court of Appeals' March 1, 2004 order ("Fla. 5th Dist. Dec., March. 1, 2004").

CERTIFICATE OF INTERESTED PERSONS

Mike Jorgensen	Petitioner's appellate counsel
John D. Maher	Respondent's appellate counsel
Mark Tetzlaff	Petitioner
Fla. Unemp. Appeals Comm'n	Respondent
Alan O. Forst	Chairman, Fla. Unemp. Appeals Com.
Hon. David A. Monaco	5th District Court of Appeals
Hon. Emerson R. Thompson, Jr.	Appellate Panel
Hon. William D. Palmer	

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STATEMENT OF THE CASE AND FACTS

1. The AWI and UAC Administrative Decisions

The Petitioner appeals the Fifth District Court of Appeal's decision ("5th Dist. Ct. App.") affirming the final order entered by the UAC Appeals Referee to deny him unemployment benefits for the time period between March 24, 2002 and August 10, 2002. The Appeals Referee concluded that the Petitioner had failed to meet his burden of meeting the eligibility requirements of §§ 443.091(1)(a) and (b) of the Florida Statutes and of R. 3.013 and R. 3.015 of the Florida Administrative Code.

On January 10, 2002, the Petitioner's employer terminated him, allegedly for cause. Record at 6. The Petitioner filed a timely request for unemployment benefits with the AWI on January 27, 2002. Idem (hereinafter "Id."). The Petitioner became eligible to claim benefits on February 7, 2002, and began reporting telephonically on a bi-weekly basis as instructed by the AWI on February 13, 2002. Id.

On February 21, 2002, the Petitioner received notice that he was ineligible to claim benefits because the AWI had concluded that the Petitioner's employer had cause to discharge him. Record at 13. The Petitioner appealed the AWI's decision by filing a petition with the UAC on March 4, 2002. Record at 6. The Petitioner continued to claim benefits as instructed until March 24, 2002, when he could no longer access the AWI's telephonic reporting system. Id.

The Petitioner immediately contacted the AWI about the reporting "lock out." Id. An AWI employee allegedly told the Petitioner "not to worry" about reporting since it was not uncommon for a reporting lock out to occur while an appeal was pending. Id. The Petitioner alleges that an AWI employee assured the Petitioner that he could claim benefits for the missed reporting periods by filing paper claim forms with the AWI if the UAC determined that he was eligible to receive benefits. Id.

The UAC scheduled a hearing on the eligibility question for April 2, 2002. Id. Due to his inability to gather witnesses prior to the April 2nd hearing date, the Petitioner appealed to the UAC for more time to prepare his case. Record at 7. The UAC informed the Petitioner that it was too late to reschedule the hearing as the Petitioner's request arrived too late. The UAC indicated that the Petitioner could re-appeal after the UAC dismissed his claim for failing to meet a scheduled hearing date. Id.

On April 3, 2002, the UAC dismissed the Petitioner's appeal for failing to appear at the telephonic hearing. Record at 15. Shortly thereafter, the Petitioner re-filed his petition for a rehearing with the UAC. Record at 7. On June 25, 2002, the UAC determined that the Petitioner established cause for a rehearing. Record at 16-17. Accordingly, the UAC reversed the Appeals Referee's dismissal action and granted the Petitioner's request for another hearing. Id.

The UAC scheduled the additional hearing for August 8, 2002. Record at 18. On August 21, 2002, the UAC concluded that the employer's allegation of employee misconduct was hearsay and reversed its original decision to deny the Petitioner unemployment benefits. Record at 19-20. Accordingly, the UAC ordered the AWI to pay the Petitioner benefits for the period between February 13, 2002 and March 24, 2002. Id.

However, when the Petitioner became aware that the AWI did not pay benefits for the time period in question, he immediately notified the AWI. Record at 7. An AWI employee told the Petitioner that he had to document the missing time periods by completing Forms UCB-206 (Fact Finding Statement) and UCB-61 (Local Office Claim Certification).[1] Id.

At an unknown period of time between August 21, 2002, and August 27, 2002, the Petitioner received both sets of forms. Record at 2. The record shows that the AWI Tallahassee Office received Form UCB-206 on August 29, 2002 from the Petitioner. Id. The AWI Jacksonville Office also received a copy of the same form on September 27, 2002. Id. For reasons unknown, the UCB-61 forms were not made part of the record, but the Petitioner's testimony shows that he received the UCB-61 and UCB-206 forms and them to the AWI as instructed. Record at 45.

Despite the record, on September 5, 2002, the AWI denied the Petitioner benefits for the period between March 24, 2002 and August 10, 2002, even though

he alleges compliance with the AWI's request to complete and return the requested forms. Record at 21. The AWI's sole reason for denying the Petitioner benefits was that he had failed to comply with the eligibility requirements of §§ 443.091(1)(a) and (b) of the Florida Statutes and Rules 3.013 and 3.015 of the Florida Administrative Code. Id.

The Petitioner appealed the AWI decision to the UAC; the UAC set a hearing date for October 22, 2004. Record at 22. In his testimony, the Petitioner discussed the reporting situation in depth with the Appeals Referee. Record at 38-47. The Petitioner argued that the AWI's telephonic reporting system prevented him from complying with the requirements of §§ 443.091(1)(a) and (b) of the Florida Statutes and Rules 3.013 and 3.015 of the Florida Administrative Code. Record at 38.

The Petitioner reiterated that the problem arose only after he had filed his original appeal with the UAC. Id. The Petitioner stated further that he had notified the AWI of the "lock out" situation on a timely basis and was told by an agency employee "not to worry" since the reporting "lock out" could occur when an appeal was pending. Record at 45.

The Appeals Referee did not find the Petitioner's testimony persuasive. On December 31, 2002, the UAC denied the Petitioner benefits for the time period in question. Record at 60. The Petitioner subsequently filed a timely Notice of

Appeal with the Fifth District Court of Appeals on January 27, 2003. Record at 67.

2. The Fifth District Court of Appeal's Decisions

Arguing pro se, the Petitioner alleged that the UAC erred when it denied his claim for unemployment benefits, stating that the UAC could not preclude him from receiving unemployment benefits solely due to his failure to file bi-weekly claim reports. Fla. 5th Dist. Ct. Dec, Jan 23, 2004 at 3.

Citing Dines v. Florida Unemployment Appeals Comm'n, 730 So.2d 378 (Fla. 3d Dist. Ct. App. 1999) as persuasive authority, the Petitioner argued that §§ 443.091(1)(a) and (b) and Rules 3.013 and 3.015 of the Florida Administrative Code were "advisory or directory only" and that ". . . the failure to make weekly reports cannot result in the forfeiture of benefits which . . . the claimant is otherwise entitled to by law." Id.

Contrary to Dines, the Fifth District Court affirmed the UAC's decision to deny the Petitioner benefits for failing to comply with Fla. Stat. § 443.111(1)(b) without reaching the question of whether Dines was properly decided under Fla. Stat. § 443.091(a) and (b). Id. The court simply held that the Petitioner had "[f]ailed to prove that, but for the filing of weekly reports, he would have been entitled to receive the benefits by law." Id.

In reaching its decision, the Fifth District Court observed that the AWI had instructed the Petitioner to ". . . CONTINUE REPORTING ON [HIS] CLAIM UNTIL ALL PREDETERMINATIONS/APPEALS ARE RESOLVED" (Court's emphasis). Id. (accord

Fla. Stat. § 443.091(1)(b)(2003)). In his Amended Motion for Rehearing, the Petitioner argued that the "continued reporting" requirement was not mandatory.

Specifically, the Petitioner asserted that the court's decision wrongly incorporated language from the newly-amended version of Fla. Stat. § 443.091(1)(b)(2003), which the Florida Legislature passed on May 23, 2003, nearly three months after the Petitioner had begun the appeals process (March 4, 2002). Pet'r Am. Mot. for Rehearing at 4.

In his Amended Motion for Rehearing, the Petitioner argued that the court's conclusion that he had failed to provide an adequate transcript under Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979)(codified by Fla. Stat. § 9.200(e)) was incorrect. Pet'r. Am. Mot. for Rehearing at 5. The Petitioner noted that the court had failed to take notice that a transcript had been filed with the court and pointed to the court's own docket as proof. Id.

Alternatively, the Petitioner pointed out that the Fifth District Court's finding that a transcript was missing from the record required the court to allow him an opportunity to supplement the record under Kauffmann v. Baker, 392 So.2d 13 (Fla. 4th Dist. Ct. App. 1980), accord Fla. Stat. § 9.200(f)(2002). Pet'r. Am. Mot. for Rehearing at 6. Despite the Petitioner's requests, on March 1, 2004, the court denied the Petitioner's Amended Motion for Rehearing.

SUMMARY OF THE ARGUMENT

1. Dines and Fla. Stat. §§ 443.091(1)(b) and 443.111(1)(b)

This Court took jurisdiction in this case in part due to a conflict existing among the Third, Fifth, and Second District Courts of Appeal on the applicability Fla. Stat. § 443.091(1)(b). Moreover, there is also a conflict between the Third and Fifth District Courts of Appeal on the applicability of Fla. Stat. § 443.111(1)(b). The Petitioner raises two principle issues under this heading for the Court to review.

First, the Petitioner argues that Fla. Stat. § 443.091(1)(b)(2002) is ambiguous. Like Dines, there was no clear directive in the statute that a claimant should continue to file claim reports during a pending appeal. If this Court affirms the Dines decision, the Court can find for the Petitioner in this case as well since Fla. Stat. § 443.031(2002) requires a reviewing tribunal to construe ambiguous provisions in favor of unemployment claimants.

Second, the Petitioner argues that the relationship between Fla. Stat. §§ 443.091(1)(b)(2002) and 443.111(1)(b)(2002) is also ambiguous. In this case, the Fifth District Court read the statutes as two independent requirements while the Petitioner asserts that the two statutes should be read together. If this Court finds that the two statutes are ambiguous, the Court can also hold for the Petitioner under Fla. Stat. § 443.031(2002).

2. The Motion on Rehearing before the Fifth District Court

This Court also took jurisdiction in this case in part due to a conflict between the Fifth District Court and this Court's decision in Applegate v. Barnett

Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979), accord Fla. R. App. P. 9.200(e)(2002). Contrary to Barnett Bank, the Petitioner argues that the Fifth District Court erred when it failed to take notice that the Petitioner met his burden of supplying an adequate transcript under Barnett Bank and cited to the court's own docket as proof. Pet'r. Am. Mot. for Rehearing at 4.

Finally, this Court took jurisdiction in this case in part due to a conflict between the Fifth District Court's decision and the Fourth District Court's decision in Kauffmann v. Baker, 392 So.2d 13 (Fla. 4th Dist. Ct. App. 1980). Contrary to Kauffmann, accord Fla. R. App. P. 9.200(f)(2), the Fifth District Court did not allow the Petitioner an opportunity to supplement the record, even though it determined that a transcript was missing. Pet'r Am. Mot. for Rehearing at 5.

STANDARD OF REVIEW

A legal conclusion of the UAC may be overturned if it is clearly erroneous, Szniatkiewicz v. Unemployment Appeals Comm'n, 864 So.2d 498 (Fla. 4th Dist. Ct. App. 2004). The appellate court must assure that the correct rules of law are applied, Jackson v. Unemployment Appeals Comm'n, 730 So.2d 719 (Fla. 5th Dist. Ct. App. 1999), and where the UAC has erred as a matter of law, the court is empowered to reverse its determination, Krulla v. Barnett Bank, 629 So.2d 1005 (Fla. 4th Dist Ct. App. 1993).

ARGUMENT

I. THE THIRD DISTRICT COURT'S DECISION IN DINES V. UNEMPLOYMENT APPEALS COMM'N, 730 So.2d 378 (Fla.

3d Dist. Ct. App. 1999) WAS CORRECT IN FINDING THE STATUTE AMBIGUOUS, AND ALSO DUE TO ITS CONCLUSION THAT CONFORMS TO LEGISLATIVE INTENT UNDER FLA. STAT. § 443.091(1)(B)(1997)

A. Analysis of Third District Court Decision

In Dines v. Unemployment Appeals Comm'n, 730 So.2d 378 (Fla. 3d Dist. Ct. App. 1999), the appellant became unemployed on July 14, 1996, and then filed a claim for unemployment compensation benefits on July 18, 1996. Id. Although the AWI originally denied the appellant benefits on August 12, 1996 (presumably for cause), the appellant appealed, and on September 27, 1996, the UAC reversed the AWI's decision and ordered it to pay the appellant benefits. Id.

Additionally, similar to the record at hand, the UAC affirmed a AWI decision which denied the appellant benefits for the time period between August 12, 1996 and September 27, 1996, when the AWI found him ineligible. Id. The sole basis for the AWI's ruling was that, during this period i.e., the period during which an appeal was pending, the appellant did not continue to file claims under Fla. Stat. § 443.091(1)(b)(1997). Id. Fla. Stat. § 443.091(1)(b) requires claimants to file weekly claim reports in order to receive unemployment benefits. Fla. Stat. § 443.091(1)(b)(1997).

The appellant filed a petition with the Third District Court of Appeals. Dines, 730 So.2d at 378. The court reversed the UAC's decision and awarded benefits for the time period at issue. Id. The court reasoned that "[b]ecause there are no rights at stake and only a non-essential mode of proceeding is prescribed, it

is apparent that, in this context, the statutory for the filing of weekly reports must be deemed to be advisory and directory only." Id.

The court reasoned further that the denial of benefits on this ground "is entirely erroneous both because ordering continuing claims to a tribunal which has already rejected the claimant's eligibility amounts to the prohibited requirement of performing a series of useless acts and because the failure [sic] to make the claims was an entirely harmless technicality in light of the indisputable evidence of the appellant's eligibility to receive those benefits." Id.

The first question this Court must address is whether Fla. Stat. § 443.091(1)(b)(1997) was clear and unambiguous at the time the appellant filed his appeal in the Dines case. If this Court finds that the statute was clear, then it can uphold the Second District Court's recent decision in Costarell v. Unemployment Appeals Comm'n, 874 So.2d 43 (Fla. 2d Dist. Ct. App. 2004). Such a decision would require the Petitioner in this case to show compliance therewith.

It is important to note, however, that if this Court finds Dines inapplicable and declares Fla. Stat. § 443.091(1)(b) to be plain and clear at the time the Petitioner filed his appeal, this Court must still decide another important threshold matter before considering whether the Fifth District Court ruled correctly in this case under the applicable standard of review.

Essentially, this Court must decide what the relationship is between Fla. Stat. §§ 443.091(1)(b) and 443.111(1)(b) since the Fifth District Court's decision

raised the question as to whether §§ 443.111(1)(b) and 443.091(1)(b) should be read together, or whether each statute can force independent compliance, as the Fifth District Court's decision seems to imply.

Conversely, if this Court determines that Fla. Stat. § 443.091(1)(b)(2002) was ambiguous at the time the appellant filed his appeal in Dines, then it can uphold the Third District Court's decision. Such a affirmation would require this Court to find in favor of the Petitioner and no further inquiry into the Fifth District Court's decision would be necessary since the court did not address the applicability of Dines under Fla. Stat. § 443.091(1)(b)(2002).

In support of the Petitioner's argument that the Third District Court's decision was correct, the Petitioner contends, like the appellant in Dines, that Fla. Stat. § 443.091(1)(b)(2002) was ambiguous at the time he filed his appeal. The Petitioner also maintains that the Third District Court reached a correct conclusion because its decision conforms with legislative intent.

The first rule of statutory interpretation is that courts may not resort to rules of construction unless the statute at issue is unclear and ambiguous. Levin v. Levin, 734 So.2d 1191 (Fla. 2d Dist. Ct. App. 1999). However, when a statute is clear, there is no room for construction, Ervin v. Peninsular Tel. Co., 53 So.2d 647 (Fla. 1951) or resort to extrinsic guides to construction, such as legislative history, Suwannee River Water Management Dist. v. Pearson, 697 So.2d 1224 (Fla. 1st Dist. Ct. App. 1997), rehearing denied, (Aug. 15, 1997).

At the time the appellant in Dines filed his appeal with the Third District Court, Fla. Stat. § 443.091(1)(b) read:

> (1) An unemployed individual shall be eligible to receive benefits with respect to any week only if the division finds that: (b) He has registered for work at, and thereafter continued to report at, the division, which shall be responsible for notification of the Florida State Employment Service in accordance with such rules as the division may prescribe; except that the division may, by rule not inconsistent with the purposes of this law, waive or alter either or both of the requirements of this subsection as to individuals attached to regular jobs; but no such rule shall conflict with s. 443.111(1). Fla. Stat. §443.091(1)(b)(1997).

However, in May, 2003, the Florida Legislature amended Fla. Stat § 443.091(1)(b) to include the very language the court in Costarell relied on to find the statute "plain and clear." See 2003 FL S.B. 1448 (SN), 2003 Florida Senate Bill No. 1448, Florida 105th R, (May 23, 2003); Costerall, 874 So.2d at 43.[2] The newly-amended version of Fla. Stat. § 443.091(1)(b) now reads:

> 1) An unemployed individual is eligible to receive benefits for any week only if the Agency for Workforce Innovation finds that: (b) She or he has registered for work with, and subsequently continued to report to, the Agency for Workforce Innovation in accordance with its rules. These rules must not conflict with the requirement in § 443.111(1)(b) that each claimant must continue to report regardless of any appeal or pending appeal relating to her or his eligibility or disqualification for benefits (emphasis added). The Agency for Workforce Innovation may by rule waive this paragraph for individuals attached to regular jobs. These rules must not conflict with § 443.111(1)(b). Fla. Stat. 443.091(1)(b)(2003).

When the language of both versions of the statute is compared, it supports the Third District Court's decision in Dines that found the statute ambiguous.[3] Simply, the appellant had no way of knowing whether he should continue to file claims during his pending appeal under the 1997 version of Fla. Stat. § 443.091(1)(b). Dines, 730 So.2d at 378.

This conclusion is reasonable in light of the fact that if the statute was clear and unambiguous at the time the appellant filed his appeal, there would have been no reason for the Florida Legislature to later amend the statute. Today, the statute is clear and unambiguous; claimants now know that they have to file claim reports during a pending appeal. Accord, Costarell, 874 So.2d at 43. However, at the time the appellant in Dines filed his appeal, no such clarity in the law existed.

Like the appellant in Dines, the Petitioner also did not know whether he should continue to file claims during his pending appeal under the 2002 version of Fla. Stat. § 443.091(1)(b). Note that the language of both versions of the statutes are virtually identical. The "continuous" reporting language which one finds in the 2003 version of the statute is absent in both drafts applicable to Dines and the Petitioner in this case. Compare, Fla. Stat. § 443.091(1)(b)(1997) with Fla. Stat. § 443.091(1)(b)(2002). Accordingly, the Petitioner asserts that the statute was ambiguous at the time he filed his appeal.

If this Court finds that Fla. Stat. § 443.091(1)(b)(2002) was ambiguous at the time the appellant filed his appeal, the next question this Court must address is

whether Third District Court's conclusion conforms with legislative intent. The Petitioner argues that the Third District Court's conclusion is consistent with legislative intent since its decision is consistent with the legislative mandate that Fla. Stat. § 443.031(2002) prescribes, i.e., to be construed liberally.

Specifically, Fla. Stat. § 443.031 requires reviewing bodies to liberally construe ambiguous statutory language "[i]n favor of a claimant of unemployment benefits who is unemployed through no fault of his or her own. Any doubt as to the proper construction of the statute shall be resolved in favor of conformity with federal law, including, but not limited to, the Federal Unemployment Tax Act, the Social Security Act, the Wagner-Peyser Act, and the Workforce Investment Act. Fla. Stat. § 443.031(2002)." Fla Stat. § 443.031(2002).

In Dines, the court relied extensively on Savage v. Unemployment Appeals Comm'n, 719 So.2d 1209 (Fla. 3d Dist. Ct. App. 1998), to conclude that under Fla. Stat. § 443.091(1)(b)(1997), failure to file weekly claim reports is "entirely erroneous" [4] In Savage, the Third District Court was concerned primarily with the lower tribunal's decisions to circumvent appellate precedent in pro se cases.[5] Savage, 719 So.2d at 1210.

While the court did not expressly state that its reasoning conformed to Fla. Stat. § 443.031, its decision to hold for the appellant, like the reasoning it fashioned in Dines, represented an implied effort by the court in both cases to

construe statutory language in favor of the claimant where ambiguity existed under Fla. Stat. § 443.031(1997).

In sum, both the Savage and Dines courts correctly determined that Fla. Stat. § 443.091(1)(b) was ambiguous. Savage, 719 So.2d. at 1209; Dines 730 So.2d at 378. Moreover, the results and reasoning of both courts support the conclusion that they inferentially complied with legislative mandate of Fla. Stat. § 443.031 when they arrived at their decision. Id. Accordingly, the Petitioner believes that the Dines court's decision was correct and should be followed in this case.

B. Analysis of Fifth District Court Decision

Like Dines, the Petitioner also filed for unemployment benefits and similarly, the AWI originally found the Petitioner ineligible for benefits. Fla. 5th Dist. Ct. Dec., Jan 23, 2004 at 1. Id. Also on point in both the Dines case and this case, the UAC later reversed and subsequently awarded the Petitioner partial benefits. Id. The Petitioner appealed, but like Dines, the UAC denied the Petitioner benefits for a certain time period for the petitioner's failure to comply with Fla. Stat. § 443.111(1)(b)(2002). Id.

Contrary to Dines, however, the Fifth District Court affirmed the UAC's decision to deny the Petitioner benefits, but did not reach the question of whether Dines was properly decided under Fla. Stat. § 443.091(b)(2002). Fla. 5th Dist. Dec. Jan 27, 2004 at 2. Instead, the Fifth District Court ignored Fla. Stat.

§ 443.091(1)(b) altogether and simply found the Petitioner out of compliance with Fla. Stat. § 443.111(1)(b). Id.

The Petitioner maintains that since the facts and circumstances in Dines are virtually identical to those in this case, a decision by this Court to affirm Dines and follow said reasoning in this case would moot any further inquiry into the Fifth District Court's decision since it never addressed the applicability of Dines under Fla. Stat. § 443.091(b).[6]

However, if this Court finds Dines inapplicable, the Petitioner argues in the alternative that the Fifth District Court erred in its decision since it misconstrued Fla. §§ 443.091(1)(b) and 443.111(1)(b). In support of the Petitioner's argument that the Fifth District Court misconstrued Fla. Stat. § 443.111(1)(b), the Petitioner maintains that the Fifth Circuit's understanding of Fla. Stat. § 443.111(1)(b) caused confusion when it mandated compliance with Fla. Stat. § 443.111(1)(b).

In sum, the question is whether an ambiguity exists as to the relationship between the application of the two statutes. Specifically, this Court must determine whether Fla. Stat. §§ 443.091(1)(b) and 443.111(1)(b) are "mutually inclusive" requirements, or whether they are "mutually exclusive" requirements that can independently preclude an unemployment claimant from receiving benefits.

The Petitioner argues that Fla. Stat. § 443.111(1)(b) is implicitly incorporated as part of Fla. Stat. § 443.091(1)(b) and therefore takes an a superior

position in priority. The Petitioner contends that compliance with Fla. Stat. §443.111(1)(b) is clear only when read together with Fla. Stat. §443.091(1)(b) This issue is a matter of first impression with this Court.

At the time the Petitioner filed his appeal, Fla. Stat. § 443.091(1)(b) read:

> (1) An unemployed individual shall be eligible to receive benefits with respect to any week only if the division finds that: (b) She or he has registered for work at, and thereafter continued to report at, the division, which shall be responsible for notification of the Agency for Workforce Innovation in accordance with such rules as the division may prescribe; except that the division may, by rule not inconsistent with the purposes of this law, waive or alter either or both of the requirements of this subsection as to individuals attached to regular jobs; but no such rule shall conflict with s. 443.111(1). Fla. Stat.§ 443.091(1)(b)(2002).

Fla. Stat. § 443.111(1)(b) read:

> Each claimant shall report in the manner prescribed by the division to certify for benefits which are paid and shall continue to report at least bi-weekly to receive unemployment benefits and to attest to the fact that he or she is able and available for work, has not refused suitable work, was seeking work, and, if he had worked, to report earnings from that work. Fla. Stat. § 443.111(1)(b)(2002).

When the Court compares both statutes separately, the ambiguity of the relationship between the two statutes is apparent. Not only does a claimant not know whether he or she should continue to file claim reports during an appeals process, a claimant also does not know what the relationship is between the two statutes.

Unlike the Fifth District Court, the Petitioner argues that the two statutes must be read together, otherwise both statutes remain ambiguous. Fla. Stat. § 443.091(1)(b) requires claimants to file claim reports whereas Fla. Stat § 443.111(1)(b) dictates that claimants must acknowledge similar information in a bi-weekly claim report. Specifically, claimants must attest to the fact that [one] is able and available for work, has not refused suitable work, is seeking work, and, if [one] had worked, to report earnings from that work. Fla. Stat. § 443.111(1)(b)(2002).

Read together, Fla. Stat. § 443.091(1)(b) is "a" claim report; in contrast, Fla. Stat. § 443.111(1)(b) lists the "components" or elements of a claim report. Ordinarily, claimants answer the statutory questions by telephone; however, if the telephone system is unavailable, Forms UCB-61 and UCB-206 are prepared by claimants to document this same information.

The Fifth District Court's "independent compliance" construction makes the relationship between Fla. Stat. § 443.091(1)(b) and Fla. Stat. § 443.111(1)(b) ambiguous. Accordingly, the Court should reverse the Fifth District Court's decision and affirm the UAC's decision in favor of the Petitioner.

STANDARD OF REVIEW

The standard of review of an administrative agency's factual findings is whether those findings are supported by competent, substantial evidence, Cain v. Unemployment Appeals Comm'n, 876 So.2d 592 (Fla. 5th Dist. Ct. App. 2004).

The UAC' order is entitled to a presumption of correctness on appeal, Rosier v. Unemployment Appeals Comm'n, 873 So.2d 614 (Fla. 2d Dist. Ct. App. 2004).

The UAC ruling will not be disturbed unless it is clearly erroneous, Smith v. Unemployment Appeals Comm'n, 698 So.2d 1344 (Fla. 5th Dist. Ct. App. 1997), that is, unless it is manifestly against the weight of the evidence, Tyner v. Florida Dept. of Commerce, Div. of Employment Sec., 362 So.2d 366 (Fla. 4th Dist. Ct. App. 1978), or there is no substantial evidence to support it, Walz v. Reggie's Seafood and BBQ House, Inc., 718 So.2d 861 (Fla. 1st Dist. Ct. App. 1998).

II. THE UAC'S DECISION TO AFFIRM THE AWI'S RULING WHICH DENIED THE PETITIONER UNEMPLOYMENT BENEFITS IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE SINCE EVIDENCE EXISTS IN THE RECORD ESTABLISHING THAT THE PETITIONER HAD FILED A SUBSTITUTE CLAIM REPORT UNDER FLA. STAT. § 443.091(1)(B)(2002).

If this Court determines that the Petitioner was required to file bi-weekly claim reports during his pending appeal, the Petitioner argues in the alternative that he can prove compliance therewith. In its decision, the Fifth District Court stated that:

> Although [the Petitioner] testified that an agency employee had advised him that he did not need to report while his appeal was pending (thereby appearing to assert a waiver-type defense), apparently the appeals referee found the testimony not credible since the decision states that, with regard to such testimony, "the claimant's contentions are respectfully not accepted." Fla. 5th Dist. Ct. Dec., Jan. 23, 2004 at 2.

In support of his argument that his testimony is credible and that he can prove compliance with Fla. Stat. § 443.091(1)(b)(2002), the Petitioner argues that the AWI appeals referee's ruling (and the UAC's decision to affirm the AWI's ruling) was decidedly against the weight of the evidence. Contrary to the AWI's finding, the record establishes that the Petitioner did file a "substitute" claim report (Form UCB-206), albeit late, with the AWI. Record at 1-2.

As discussed below, the existence of an alternative system to accept the filing of late claims is important since it establishes that the AWI applies a more liberal compliance standard under Fla. Stat. § 443.091(1)(b) than was applied to the Petitioner at either the administrative hearing or appellate levels. In sum, filing Form UCB-206 met the compliance standard under Fla. Stat. § 443.091 (1)(b). Therefore, this Court should reverse the UAC's decision to affirm the AWI's ruling since it is not supported by competent, substantial evidence.

STANDARD OF REVIEW

The appropriate standard of review of the propriety of a denial of a motion for rehearing is whether the court abused its discretion. See, Brink v. Bank of America, N.A., 811 So.2d 751 (Fla. 1st Dist. Ct. App. 2002).

ARGUMENT

III. THE FIFTH DISTRICT COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN APPLEGATE V. BARNETT BANK OF TALLAHASSEE, 377 SO.2D 1150 (FLA. 1979), ACCORD, FLA. R. APP. P. 9.200(E)(2002), SINCE IT DISREGARDS THAT AN ADEQUATE TRANSCRIPT WAS ON FILE WITH THE CLERK OF THE COURT.

The Petitioner argues that the Fifth District Court abused its discretion when if failed to take notice that an adequate transcript was on file with the Clerk of the Court. In this case, the Fifth District Court affirmed the appeals referee's decision under Barnett Bank, allegedly due to the Petitioner's failure to provide the court with a transcript of his hearing. Fla. 5th Dist. Ct. Dec., Jan. 27, 2004 at 2.

Under Barnett Bank, a reviewing court must affirm the lower tribunal's decision if an appellant does not furnish a copy of the transcript.[7] Nevertheless, Fla. R. App. P. 9.200(d)(2002) places the burden of initially preparing and filing the record on the State. However, as the Fifth District Court has previously held in Powers v. Powers, 831 So.2d 724 (Fla. 5th Dist. Ct. App. 2002), that Rule 9.200(e)(2002) places the ultimate burden of bringing an adequate record on the appellant. As the Fifth District Court also held in Sheehan v. Sheehan, 853 So.2d 523 (Fla. 5th Dist. Ct. App. 2003), an adequate record includes a transcript.

Rule 9.200(e) reads in pertinent part that "[t]he burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the petitioner or appellant. Any party may enforce the provisions of this rule by motion." Fla. R. App. P. 9.200(e)(2002).

In its decision, the Fifth District Court concluded:

> Because [the Petitioner] failed to provide us with a transcript of the hearing, we are unable to undertake an independent review thereof. However, [the Petitioner] has the burden of proving his right to appellate relief, and

absent a transcript, he has not met that burden." Fla. 5th Dist. Ct. Dec., Jan 23, 2004 at 2 (citing Barnett Banks).

The court docket shows that on May 19, 2003, the Petitioner complied with the mandates of Rule 9.200(e) and Barnett Bank by verifying that a copy of the transcript was filed with the Fifth District Court as part of the record. Appendix at 1. The Petitioner argues that the court's failure to take judicial notice harmed his case since the transcript contained evidence from which a reviewing court could conclude that he complied with Fla. Stat. § 443.111(1)(b)(2002).

IV. THE FIFTH DISTRICT COURT' DECISION CONFLICTS WITH THE DECISION REACHED IN KAUFFMANN V. BAKER, 392 SO.2D 13 (FLA. 4TH DIST. CT. APP. 1980), ACCORD FLA. R. APP. P. 9.200(F)(2)(2002), WHEN THE COURT FAILED TO GRANT THE PETITIONER A REHEARING AFTER IT DETERMINED THAT A TRANSCRIPT WAS MISSING FROM THE RECORD AND DID NOT ALLOW THE PETITIONER TO SUPPLEMENT THE RECORD.

The Petitioner argues that the Fifth District Court also abused its discretion when it did not provide him the opportunity to supplement the record. Rule 9.200(f)(2) reads in pertinent part that "[i]f the court finds the record is incomplete, it shall direct a party to supply the omitted parts of the record. No proceeding shall be determined, because of an incomplete record, until an opportunity to supplement the record has been given." Fla. R. App. P. 9.200(f)(2)(2002).

In its decision, the Fifth District Court concluded that "[b]ecause Tetzlaff failed to provide us with a transcript of the hearing, we are unable to undertake an independent review thereof." Fla. 5th Dist. Ct. Dec., Jan. 23, 2004 at 5. This finding shows that the court had knowledge of a missing transcript and should have

allowed the Petitioner an opportunity to supplement the transcript under Rule 9.200(f)(2)(2002).

Both the alleged missing transcript, and the failure of the court to allow supplementation proved detrimental to the Petitioner's case since he could not offer proof that he complied with Fla. Stat. § 443.111(1)(b)(2002). In the first instance, the court should have taken judicial notice of their error; in the second instance, the court should have allowed the Petitioner to supplement the record. Accordingly, the Fifth District Court's decision to grant a rehearing should be reversed.

V. THE FIFTH DISTRICT COURT'S ERRONEOUS FINDING THAT IT DID NOT HAVE A COPY OF THE TRANSCRIPT AND ITS FAILURE TO GRANT A REHEARING BASED ON RULE 9.200(F)(2)(2002) PROVED DETRIMENTAL TO THE PETITIONER'S CASE SINCE EVIDENCE IN THE TRANSCRIPT ESTABLISHES THE PETITIONER'S COMPLIANCE UNDER FLA. STAT. §443.111(1)(B)(2002).

If this Court determines that the Petitioner must comply with Fla. Stat. § 443.111(1)(b), the Petitioner argues that he complied with such statute. Fla. Stat. § 443.111(1)(b)(2002) states " . . . [i]n order to be entitled to benefits for any time period, the applicant must attest to the fact that he is able and available for work, has not refused suitable work, was seeking work, and, if [one] worked, to report earnings from that work." Fla. Stat. § 443.111(1)(b)(2002).

The record shows that the Petitioner complied with Fla. Stat. § 443.111(1)(b)(2002) because he filed Forms UCB-206 with the AWI. Record at 1-2.

Note that "Section I Late Report" on Form UCB-206 evidences that the UAC accepts late reports; "Section II Reason" section also describes what the grounds are for filing late reports. Record. at 1. The Petitioner "last reported on 3/27/02." Record at 2. Note also, that the AWI Tallahassee Office received this form from the Petitioner on August 29, 2002 (top of p. 1, right-hand corner); the AWI Jacksonville Office received this form on September 27, 2003. Id.

Had the Fifth District Court reviewed this document, it could have determined that the Petitioner met the Fla. Stat. § 443.111(1)(b)(attestation questions) standard which the court required. In sum, the court could have found the following: First, in the "UCB-45 Worksheet" segment of the "Section II Claims Office Comments" section, the adjudicator listed the dates from March 24, 2002 through August 10, 2002 (the period at issue). Record. at 2.

Specifically, the adjudicator recorded the fact that the Petitioner had indeed filed a late claim report for the period at issue: the "Claim Effective Date" is January 27, 2002; the "Issue Start Date" is March 24, 2002; and the "Issue End Date I" is August 10, 2002. Id. The adjudicator also listed the reason why the Petitioner could not file bi-weekly claim reports: "Pet. Ltr. States can't claim weeks. Appealing order." "Date Entered" 9/4/02." Id.

Second, in the "Section I Visitor's Report" section, it shows that, for the period at issue, the Petitioner swore and attested that he was able and available for work and was seeking work when he listed his "work search contacts for the

week(s) claimed" (See Question 4), and when he said that "I am willing to remain in this area if offered suitable work" (see Question 5). Id.

Moreover, the Petitioner did not refuse suitable work since he states that he "started work on 9/4/02 with People Leasing." Id. Finally, the Petitioner did not earn any wages since he had just started work on the same day that the adjudicator entered the Petitioner's information into the AWI's system; accordingly, there were no earnings to report. In sum, Form UCB-206 establishes compliance with the Fla. Stat. § 443.111(1)(b)(2002) informational requirements.

In its decision, the Fifth District Court stated that "[a]though [Petitioner] testified that an agency employee had advised him that he did not need to report while his appeal was pending, the appeals referee found the testimony "not credible" since the decision states that, with regard to such testimony, 'the claimant's contentions are respectfully not accepted.'" Fla. 5th Dist. Ct. Dec., Jan. 23, 2004 at 6.

Had the AWI appeals referee, the UAC, and Fifth District Court given weight to the evidence contained on Form UCB-206, they should have concluded that the Petitioner did indeed comply with Fla. Stat. § 443.091(1)(b) when he submitted Form UCB-206 and answered the attestation questions affirmatively. Accordingly, this Court should reverse the Fifth District Court's decision to affirm the UAC's decision that denies the Petitioner benefits.

CONCLUSION

The Petitioner argues the Dines decision was correct since it found Fla. Stat. § 443.091(1)(b)(1997) ambiguous, and also because its decision conforms with legislative intent under Fla. Stat. § 443.031(1997). Moreover, the Petitioner argues that the relationship between Fla. Stat. § 443.031(2002) and Fla. Stat. § 443.111(1)(b)(2002) is ambiguous on its face. In either or both instances, this Court should reverse the Fifth District Court's decision to deny the Petitioner unemployment benefits.

The Petitioner further and alternatively argues that the Fifth District Court should have granted him a rehearing. First, the court erred when it failed to recognize that a transcript was on file with the Clerk of the Court in conformity with Fla. R. App. P. 9.200(e). Second, even if the transcript had not been filed, as was not the case at hand, the court erred when it did not allow record supplementation under Fla. R. App. P. 9.200(f)(2). Accordingly, this Court should reverse the Fifth District Court's decision to grant a rehearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and authentic copy of this Brief on the Merits has been furnished to John D. Maher, Unemployment Appeals Commission, Webster Building, Suite 300, 2671 Executive Center Circle W, Tallahassee, Florida, 32399-0681 on this, the 1st day of February, 2005.

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CERTIFICATE OF FONT TYPE

I HEREBY CERTIFY that this Brief on the Merits complies with Fla. R. App. P. 9.210(a)(2) of the Florida Rules of Appellate Procedure. It is typed in 14-point Times New Roman font in Microsoft Word and Windows XP proportionality format.

_____

MIKE JORGENSEN
Florida Bar No. 726893

[1] Claimants use these forms when telephonic reporting is either impossible or the system becomes unavailable. Form UCB-61 documents whether a claimant is able and available for work, has not refused suitable work, was seeking work, and, if he had worked, to report earnings from that work. Claimants file one claim form for each bi-weekly reporting period. Claimants also file Form UCB-206 along with Form UCB-61. It documents the same information that Form UCB-61 does, but in summary form. Record at 1-2.

[2] An important observation to make in this case is that the Petitioner filed his appeal with the Fifth District Court on January 27, 2003 whereas the Florida Legislature passed the newly-amended version of statute on May 23, 2003. Recognizing that the appellant in Costarell filed his case before the newly-amended statute went into effect, the court appended a footnote stating "[w]e recognize that the 2002 statute applies to Costarell. Nevertheless, we may consider the later amendment in determining the legislative intent behind the 2002 version" (citing Finley v. Scott, 707 So.2d 1112, 1116-17 (Fla. 1998). In contrast, the Petitioner believes that Finley does not apply in this case since the legislative intent behind Fla. Stat. 443.091 requires liberal construction in favor of an unemployment claimant. That is not the case in Finley. Accordingly, the Petitioner believes the usage of Finley in Costarell is inapplicable since the presumption of liberal construction suggests no ex post facto rulings.

[3] While the Dines court never explicitly stated that the statute was ambiguous, one can infer such a conclusion based on the fact that the court used an extensive array of case law to support its conclusion. Such an analysis implies use of the Canons of Construction. See e.g., Savage v. Macy's Inc., 719 So.2d 1208 (Fla. 3d Dist. Ct. App. 1998), review denied, (Fla. Feb. 11, 1999); C.U. Assoc's v. R.B. Grove, Inc., 472 So.2d 1177 (Fla. 1985); Haimovitz v. Robb, 178 So.827 (1937); Hoshaw v. State, 533 So.2d 886 (Fla. 3d Dist. Ct. App. 1988); Griffin v. Workman, 73 So.2d 844 (Fla. 1954); and Lumbermans Mut. Cas. Co. v. Mann, 399 So.2d 536 (Fla. 3s Dist. Ct. App. 1981); Reid v. Southern Development Co., 42 So.206 (1906).

[4] In Dines, the court, citing Savage, concluded: "We now hold, as we said in dictum in Savage v. Macy's East, Inc., 719 So.2d 1208, 1209-10 (Fla. 3d DCA 1998), review denied, (Fla. Feb. 11, 1999), that the denial of benefits on this ground is entirely erroneous '[b]oth because ordering continuing claims to a tribunal which has already rejected the claimant's eligibility amounts to the prohibited requirement of performing a series of useless acts, C.U. Assocs. v. R.B. Grove, Inc., 472 So.2d 1177 (Fla.1985); Haimovitz v. Robb, 130 Fla. 844, 178 So. 827 (1937); Hoshaw v. State, 533 So.2d 886 (Fla. 3d DCA 1988), and because the failure formally to make the claims was an entirely harmless technicality in light of the indisputable evidence of Ms. Savage's eligibility for those benefits. See Griffin v. Workman, 73 So.2d 844 (Fla.1954); Lumbermens Mut. Cas. Co. v. Martin, 399 So.2d 536, 537 (Fla. 3d DCA 1981), review denied, 408 So.2d 1094 (Fla.1981). Savage, 719 So.2d at 1209-10.

Because no rights are at stake, Reid v. Southern Development Co., 52 Fla. 595, 42 So. 206 (1906), and only a non-essential mode of proceeding is prescribed, Fraser v. Willey, 2 Fla. 116 (1848); Allied Fidelity Ins. Co. v. State, 415 So.2d 109, 111 (Fla. 3d DCA 1982), it is apparent that, in this context, the statutory requirement for the filing of weekly reports must be deemed to be advisory or directory only. Allied, 415 So.2d at 111. In the admitted absence of any prejudice to the Commission or the employer, therefore, the failure to make them cannot result in the forfeiture of benefits to which the unemployed applicant is otherwise entitled by law. See Dept. of Bus. Regulation, Div. of Para-Mutual Wagering v. Hyman, 417 So.2d 671 (Fla.1982)(applying the principle of administrative harmless error); Ewing v. Kaplan, 474 So.2d 302 (Fla. 3d DCA 1985), and cases cited, review denied, 486 So.2d 595 (Fla.1986).

[5] Like the Petitioner in this case, there was also the concern of administrative decisions being arbitrary and capricious in Savage. In a footnote, the Savage court stated "[i]n several respects, the circumstances of this case raise serious concerns about the Commission's and the Department's conduct in the administration and adjudication of these claims. First, we are told that, in several of the many prior cases in which determinations of ineligibility have been reversed by the courts of appeal, the Department has improperly enforced its present contentions as to claimants who are typically unrepresented by counsel and are both unaware of and are not told of their rights under the law. Furthermore, and possibly even worse, the Commission, after being reversed on the misconduct issue in literally scores of cases by every district court of appeal, has virtually contentiously continued to ignore its duty to follow the established law, even if it disagrees, by repeatedly doing so to the prejudice not only of those who bring their cases before us but, very likely, of many unrepresented claimants who have failed to perfect their appellate rights." Savage, 719 So.2d at 1208.

[6] The 2002 version of Fla. Stat. § 443.091(1)(b) is virtually identical to its 1997 version: (1) An unemployed individual shall be eligible to receive benefits with respect to any week only if the division finds that: (b) She or he has registered for work at, and thereafter continued to report at, the division, which shall be responsible for notification of the Agency for Workforce Innovation in accordance with such rules as the division may prescribe; except that the division may, by rule not inconsistent with the purposes of this law, waive or alter either or both of the requirements of this subsection as to individuals attached to regular jobs; but no such rule shall conflict with § 443.111(1)(b).

[7] Fla. R. App. P. 9.200(e) essentially codified the ruling in Barnett Bank.