No. 07-AA-538

DISTRICT OF COLUMBIA COURT OF APPEALS

FELECIA BURTON,

Petitioner,

v.

NTT CONSULTING, LLC,

Respondent.

On Petition for Review from
the Office of Administrative Hearings

REPLY BRIEF FOR PETITIONER

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SUMMARY OF THE ARGUMENT

Our opening brief explained that the Office of Administrative Hearings (OAH) erroneously dismissed Ms. Burton's administrative appeal and denied her subsequent motions for relief without addressing the grounds for relief under OAH Rule 2833 (an administrative counterpart to Rule 60(b) of the Rules of Civil Procedure). The administrative law judge (ALJ) did not explicitly discuss the grounds for relief under that Rule, and did not explain why Ms. Burton could not satisfy them. That was an abuse of discretion.

In its brief to this Court, respondent NTT Consulting (NTT) asserts as a defense to Ms. Burton's unemployment benefits claim that OAH lacked jurisdiction over this case. That defense is unavailing, because the very issue raised by this appeal is whether OAH erred in denying Ms. Burton an opportunity to establish jurisdiction. Ms. Burton made a sufficient showing in her motions for relief at least to require OAH to conduct a factual inquiry into whether her administrative appeal was timely filed. Ms. Burton explained that she did not file her appeal from DOES within 10 days of the date noted on the certificate of service attached to the DOES claim determination because she did not receive the determination after it was purportedly first mailed. She did note her appeal within 10 days of the date that DOES reissued its claim determination.

NTT's other arguments are equally unavailing. NTT defends the constitutionality of DOES's means of service, but Ms. Burton has not argued that the service in this case was unconstitutional. NTT also argues that it would have been prejudiced if Ms. Burton's motions had been granted, but it cites only the costs it has incurred contesting this appeal, and does not identify any prejudice that would have arisen if OAH had given the parties a hearing on the merits. Finally, NTT asserts that Ms. Burton's failure to attend the initial hearing before OAH

was not excusable under OAH Rule 2833, but it does not distinguish numerous decisions of this Court in which parties represented by counsel missed a hearing due to carelessness. There is no valid reason why parties who proceed pro se before OAH should be held to a higher standard than parties who are represented by counsel.

ARGUMENT

I. OAH ERRED IN REFUSING TO REOPEN THIS UNEMPLOYMENT CASE AND TO CONDUCT A HEARING ON THE MERITS.

NTT concedes that OAH had an obligation to consider whether Ms. Burton's failure to attend the original hearing was excusable under OAH Rule 2833, and does not defend OAH's cursory treatment of Ms. Burton's motion in its brief to this Court. Resp. Br. 8 (citing Frausto v. United States Dep't of Commerce, 926 A.2d 151, 154 (D.C. 2007)). Instead, NTT attempts to salvage the order below by arguing that if the ALJ had conducted the necessary inquiry, he would have concluded that Ms. Burton's conduct was not excusable. Resp. Br. 9-12. This claim – which is necessarily speculative – is unsupported by the decisions of this Court.

Relief is warranted under Rule 60(b) or OAH Rule 2833 when an act of carelessness causes a party or counsel inadvertently to miss a hearing. See, e.g., Johnson v. Lustine Realty Co., 640 A.2d 708, 709 (D.C. 1994) (reversing the trial court's denial of a Rule 60(b) motion when the lawyer and his client did not appear because the lawyer's office had misfiled the hearing notice); Reid v. District of Columbia, 634 A.2d 423, 424 (D.C. 1993) (reversing the trial court's denial of a Rule 60(b) motion when the lawyer and his client did not appear because the lawyer failed to notice that a new procedure had been used to set the hearing date); accord, e.g., TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691 (9th Cir. 2001) (reversing the trial court's denial of a Rule 60(b) motion when the plaintiff had not appeared because she was served with the answer to her complaint while preparing to move across country with her children);

American Alliance Ins. Co., Ltd. v. Eagle Ins. Co., 92 F.3d 57 (2d Cir. 1996) (reversing the trial court's denial of a Rule 60(b) motion when an in-house counsel's clerk made a filing mistake).

NTT argues that Ms. Burton did not "exercise * * * due diligence" by failing to check her Post Office Box between May 3 and May 9, but it does not distinguish cases such as Johnson and Reid, where the Court excused the carelessness of parties represented by counsel. Ms. Burton's arguable carelessness in this case, in which she represented herself, is more understandable than the neglect of counsel or represented parties this Court has previously found excusable. See Johnson, 640 A.2d at 709; Reid, 634 A.2d at 424. Unemployment benefits claimants, who routinely appear pro se before OAH, may be expected to have greater challenges in complying with the agency's procedural requirements than would a represented party. See Rhea v. Designmark Service, Inc., 942 A.2d 651, 655 (D.C. 2008); Goodman v. D.C. Rental Housing Comm'n, 573 A.2d 1293, 1299 (D.C. 1990).

II. OAH HAD JURISDICTION OVER MS. BURTON'S ADMINISTRATIVE APPEAL OF HER UNEMPLOYMENT BENEFITS CLAIM.

NTT devotes much of its brief to an issue frequently addressed by this Court: whether OAH has jurisdiction over a claimant's or employer's administrative appeal from DOES that was not filed within 10 days from the date noted on the certificate of service appended to the DOES claims determination because the appellant did not receive that determination within the 10 day period for appeal, if at all. See, e.g., Chatterjee v. Mid Atlantic Regional Council of Carpenters, 2008 D.C. App. LEXIS 217 (D.C. April 18, 2008); Rhea, 942 A.2d 651; Kidd International Home Care, Inc. v. Dallas, 901 A.2d 156 (D.C. 2006); Bobb v. Howard University Hospital, 900 A.2d 166 (D.C. 2006).

The deadline for filing an administrative appeal of an unemployment benefits determination to OAH is governed by D.C. Code 51-111(b), which provides two alternative

triggers for the 10 day appeals period: "The Director [of DOES] shall promptly notify the claimant and any party to the proceeding of its determination, and such determination shall be final within 10 days after the mailing of notice thereof to the party's last-known address or in the absence of such mailing, within 10 days of actual delivery of such notice." D.C. Code 51-111(b).[1]

In Chatterjee, Rhea, Kidd, and Bobb, this Court reversed the dismissal of an unemployment benefits claim for lack of jurisdiction. In each of those cases, the Court concluded that the certificate of service appended to a DOES claim determination was insufficient proof of the date DOES mailed the determination in light of the appellant's explanation that they did not receive anything by mail from DOES within the 10 day period for appeal, if at all. Chatterjee, 2008 D.C. App. LEXIS 217 at *6-*7; Rhea, 942 A.2d at 654-655; Kidd, 901 A.2d at 158; Bobb, 900 A.2d at 168. Because the certificate of service was insufficient proof of when (if ever) the determination was first mailed, the 10 day period for appeal did not begin to run until DOES reissued the determination.

In this case, Ms. Burton filed her appeal with OAH on April 17, 2007. That date was outside the period for appeal if the 10 day clock ran from the date when, according to its original certificate of service, the DOES claim determination was purportedly first mailed. But it was well within the period for appeal if the 10 day clock began on April 13, the date that DOES

[1] The question raised by Ms. Burton's motion was whether the DOES claim determination "was mailed on the date shown in the certificate of service." Chatterjee, 2008 D.C. App. LEXIS 217 at *6. For the reasons discussed by this Court in Chatterjee, NTT's discussion of the "common law mailbox rule" is not relevant to the jurisdictional issue presented here. See Resp. Br. 4 (relying on "a rebuttable presumption that a letter properly addressed, stamped, and mailed, and not returned to the sender, has been delivered to the addressee.") As the Court has repeatedly acknowledged, the question whether the determination was mailed is distinct from the question whether the determination was received. See, e.g., Chatterjee, 2008 D.C. App. LEXIS 217 at *6.

reissued the claim determination. Ms. Burton also explained in her motions for relief that she had not received the claim determination after it was purportedly first mailed. In light of this Court's prior consideration of the same jurisdictional issue, the ALJ erred in concluding that OAH lacked jurisdiction to hear Ms. Burton's claim based solely on the certificate of service appended to the DOES claim determination. Without a description of specific agency mailing procedures or other additional proof of the date of mailing, the date that the determination was first mailed cannot confidently be ascertained.[2] Chatterjee, 2008 D.C. App. LEXIS at *7; Rhea, 942 A.2d at 654-655; Kidd, 901 A.2d at 158; Bobb, 900 A.2d at 168.

* * *

Although Ms. Burton's pro se motions, one of which was filed before the Final Order was entered, satisfied the grounds for relief under OAH Rule 2833, the ALJ refused to reopen this case and to decide Ms. Burton's claim on the merits. Instead, the ALJ relied on a certificate of service to dismiss that claim for lack of jurisdiction. The ALJ's failure to explain why Ms. Burton was not entitled to a hearing on the merits of her claim was an abuse of discretion that warrants reversal.

[2] The Final Order acknowledged that "a question is raised by the fact that the Determination bears a notation that it was 'remailed' on April 13, 2007," but concluded that it was "impossible" to resolve that question in favor of Ms. Burton because she "did not appear for the hearing." Final Order 4.

CONCLUSION

The Office of Administrative Hearings' Final Order and Order Denying Motion for Reconsideration should be reversed, and this case remanded for a hearing on the merits.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Reply Brief For Petitioner to be delivered by first-class mail, postage prepaid, this 13th day of May, 2008, to:

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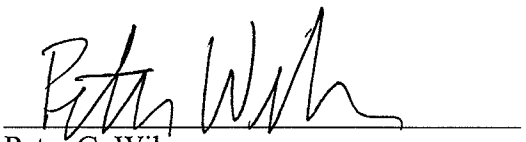

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