No. 09-AA-959

DISTRICT OF COLUMBIA COURT OF APPEALS

JOHNNIE R. MASON,

Petitioner,

v.

RED COATS/ADMIRAL SECURITY,

Respondent.

On Petition for Review from
the Office of Administrative Hearings

BRIEF OF PETITIONER

Bonnie I. Robin-Vergeer (No. 429717)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
(202) 628-1161

Counsel for Petitioner

April 19, 2010

STATEMENT PURSUANT TO RULE 28(a)(2)(A)

The parties to this case are Johnnie R. Mason, the petitioner, and Red Coats/Admiral Security, the respondent. Mr. Mason appeared *pro se* before the Office of Administrative Hearings. Mr. Mason is represented in this Court by Bonnie I. Robin-Vergeer of the Legal Aid Society of the District of Columbia. Respondent did not appear before the Office of Administrative Hearings. In this Court, respondent was ordered to identify its counsel first on August 24, 2009 and, again, on September 30, 2009, but respondent failed to do so. No intervenors or amici have appeared in this case.

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QUESTIONS PRESENTED

1. Whether the Office of Administrative Hearings ("OAH") erred in dismissing petitioner Johnnie R. Mason's administrative unemployment compensation appeal as untimely when (1) the Department of Employment Services ("DOES") failed to trigger the presumption of mailing because its certificate of service misspelled Mr. Mason's street address; (2) OAH credited Mr. Mason's sworn testimony that he did not receive his claims determination for five weeks, calling into question the accuracy of the DOES certificate and rebutting the presumption of mailing; and (3) no additional evidence was presented concerning DOES mailing procedures generally or the mailing of Mr. Mason's determination in particular.

2. Whether OAH erred in requiring Mr. Mason to satisfy the "*Frausto* factors" described in *Frausto v. United States Dep't of Commerce*, 926 A.2d 151 (D.C. 2007), and *Thomas v. National Children's Ctr., Inc.*, 961 A.2d 1063 (D.C. 2008), before it would conduct a factual inquiry into the *actual* date of mailing.

3. Whether, assuming that Mr. Mason must satisfy the "*Frausto* factors," OAH erred in concluding that Mr. Mason did not do so, when Mr. Mason called his claims examiner three to four times to inquire about the claims determination, twice requested that she send him the determination, and filed his administrative appeal in person with OAH the same day he finally received his determination in the mail.

STATEMENT OF THE CASE

This case presents a familiar scenario: OAH dismissed an administrative appeal of an unemployment compensation claims determination as untimely, relying on the certificate of service to establish conclusively the fact and date of mailing despite the claimant's evidence that he did not receive the determination in the mail within the appeal period. *See, e.g.*, *Thomas v.*

Nat'l Children's Ctr., Inc., 961 A.2d 1063 (D.C. 2008); *Chatterjee v. Mid Atl. Reg'l Council of Carpenters*, 946 A.2d 352 (D.C. 2008); *Rhea v. Designmark Serv., Inc.*, 942 A.2d 651 (D.C. 2008); *Bobb v. Howard Univ. Hosp.*, 900 A.2d 166 (D.C. 2006); *see also Wright-Taylor v. Howard Univ. Hosp.*, 974 A.2d 210, 215-16 (D.C. 2009) (discussing *Thomas*, *Chatterjee*, and *Rhea*).

What is new in this case is that, despite specifically crediting petitioner Johnnie R. Mason's testimony that he did not receive the claims determination denying him benefits within ten days of the date on the certificate of service, the Administrative Law Judge ("ALJ") concluded that, pursuant to this Court's decision in *Thomas*, as she understood it, Mr. Mason must satisfy additional evidentiary hurdles—the "*Frausto* factors"—to raise even a possibility of calling into question the accuracy of the certificate.[1] Because, after a brief analysis, the ALJ concluded that Mr. Mason had not met this new burden, she treated the certificate of service as conclusive proof that the claims determination had been mailed on the date certified without engaging in any fact-finding regarding whether the claims determination had in fact been mailed to Mr. Mason on the date certified and without seeking any evidence of DOES's internal mailing procedures.

STATEMENT OF FACTS

1. The Department of Employment Services. Mr. Mason applied for unemployment compensation benefits after he was discharged from his employment with Red Coats/Admiral Security ("Red Coats") on May 10, 2009. DOES claims examiner Rakisha

[1] As discussed below, these factors, which generally relate to a motion for relief from judgment, are "whether an individual (1) had actual notice of the proceedings; (2) acted in good faith; (3) took prompt action; and (4) presented an adequate defense." *Thomas*, 961 A.2d at 1066 (citing *Frausto v. U.S. Dep't of Commerce*, 926 A.2d 151, 154 (D.C. 2007)). In addition, "prejudice to the non-moving party" is also considered. *Id.*

Philson found Mr. Mason ineligible for benefits after concluding that Mr. Mason had engaged in "misconduct" because he had used a "company computer to visit gambling sites." Determination by Claims Examiner at 1 (App. A23). The final paragraph of this determination letter consists of a typed certificate of service by the claims examiner, stating: "I certify that a copy of this document was mailed to the claimant and to the employer named herein at the above addresses on 06/10/2009." *Id.* The "above address[]" listed for Mr. Mason was "1364 RANDLOPH [sic] ST NW WASHINGTON, DC - 20011-5528." *Id.* Although this determination listed correctly Mr. Mason's house number, his street name was misspelled—"RANDLOPH" instead of "RANDOLPH." *See id.* The claims examiner signed the determination letter. *Id.*

By statute, Mr. Mason was required to file his administrative appeal "within 10 days after the mailing of notice" of the claims determination to his "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). As discussed below, Mr. Mason did not receive the claims determination and the accompanying notice of appeal rights within ten days of June 10, 2009, the date of alleged mailing indicated by the claims examiner's certificate of service. Rather, it was not until July 13, 2009 that Mr. Mason received the claims determination in the mail. Transcript of Hearing at 3-5, Aug. 6, 2009 (hereinafter "Tr.") (App. A11-13). That same day, immediately after obtaining a copy of his claims determination, Mr. Mason filed his administrative appeal in person with OAH. *See* Request for Hearing to Appeal a Determination by a Claims Examiner Involving Unemployment Benefits at 1, July 13, 2009 (App. A22).

2. The Office of Administrative Hearings. On July 23, 2009, OAH issued a scheduling order for a hearing on Mr. Mason's administrative appeal, stating that "[b]ased on the DOES Claims Examiner's decision that has been appealed, the issues that will be considered at

the hearing are: Jurisdiction (whether the appeal was filed within the deadline) and Reasons for Separation (misconduct, voluntary quit, laid off)." Scheduling Order and Notice of In-Person Hearing at 1, July 23, 2009 (App. A18). As provided in the scheduling order, ALJ Erika Pierson held a hearing on Mr. Mason's administrative appeal on August 6, 2009. Mr. Mason appeared *pro se*. Red Coats, which bore the burden of proving that Mr. Mason was discharged for a reason justifying the denial of benefits, neither appeared at the hearing nor requested a postponement of the hearing. *See* Final Order at 1 & n.1 (App. A1).

Because it failed to appear, Red Coats was "unable to meet [its] burden to establish that [Mr. Mason was] discharged for reasons that would disqualify [him] from receiving benefits." Tr. at 7 (App. A15). The ALJ therefore informed Mr. Mason that it was "not necessary for [him] to put on any testimony regarding the reasons for [his] separation"; the ALJ explained that if she found that Mr. Mason's appeal "was timely filed, then [Mr. Mason] would be eligible for benefits." *Id.*

Because the merits were not at issue, Mr. Mason testified only "on the issue of the timeliness of his appeal." Final Order at 1 (App. A1). Relying exclusively on the claims examiner's certificate of service indicating that she mailed the claims determination to Mr. Mason on June 10, 2009, the ALJ explained to Mr. Mason that, because he filed his appeal on July 13, 2009, his "appeal was filed 3 weeks outside of the time frame for filing an appeal." Tr. at 3 (App. A11). In response, Mr. Mason provided sworn testimony that he did not receive his claims determination in the mail until July 13, 2009, and that the same day, immediately after receiving his determination, he filed his administrative appeal in person with OAH. *See id.* at 3-5 (App. A11-13).

Mr. Mason detailed that, prior to July 13, 2009, he had called DOES "three or four times" to inquire about the status of his determination, and Mr. Mason then discussed two of the calls he made. *See id.* at 4-6 (App. A12-14). "[A]round the last of June," he called DOES and spoke with the claims examiner, Ms. Philson. *See id.* at 6 (App. A14). During this telephone conversation with the claims examiner, Mr. Mason requested that she "send [him] some reason why [he] was not being paid and so that [he] could appeal." *Id.* at 5-6 (App. A13-14). Mr. Mason stated that the claims examiner informed him "she had mailed it out on the 10th." *Id.* at 6 (App. A14). Because Mr. Mason explained that he had not received it, the claims examiner "said she would put another one in the mail." *Id.*

After this telephone call, Mr. Mason waited to receive his determination in the mail. *Id.* at 6 (App. A14). Around a "week and a half" later, although Mr. Mason had received "a notice saying that [he] needed to fill out biweekly job – to prove that [he] had been look [sic] for a job," *id.* at 4 (App. A12), he had still not received his determination in the mail. *Id.* at 6 (App. A14). Because Mr. Mason "could not appeal until [he] got the [claims determination] letter," *id.* at 4-5 (App. A12-13), he again called DOES to inquire about the status of his claim—presumably on or about the week of July 6, 2009. *See id.* at 6 (App. A14).

This time Mr. Mason had significant difficulty getting in contact with DOES over the telephone. He stated: "I stayed on the phone almost all day long, because every time I called, the line would be them putting me on hold, and I waited and waited and waited." *Id.* It is unclear from the record to whom Mr. Mason spoke, but, as discussed below, the ALJ concluded that Mr. Mason again spoke with the claims examiner and told her that he still had not received his determination. *See* Final Order at 2 (App. A2).

Mr. Mason testified that he finally received his claims determination in the mail on July 13, 2009. Tr. at 4-5 (App. A12-13). The record is silent regarding whether, prior to this date, Mr. Mason had received any forms from DOES indicating that he was disqualified from receiving benefits; accordingly, July 13, 2009 is the only established date in the record by which Mr. Mason received actual notice of the fact that he had been denied benefits.

Mr. Mason did not keep the envelope in which the determination arrived; he stated that by the time he saw the notice informing him to save the envelope (that is, the scheduling order sent to him on July 23, 2009, *see* Scheduling Order at 2 (App. A19)), he had already thrown the envelope away. *See* Tr. at 5 (App. A13). But Mr. Mason pointed out to the ALJ that his street name was misspelled on the determination itself ("RANDLOPH" instead of "RANDOLPH"). *Id.* at 6 (App. A14); *see* Determination by Claims Examiner at 1 (App. A23). The ALJ responded that she did not "think that would stop delivery of it." Tr. at 6-7 (App. 14-15). Mr. Mason also informed the ALJ that he had had problems with delivery of mail in the past. *See id.* at 7 (App. 15).

Mr. Mason concluded his testimony expressing that, whatever the reason that he did not receive his claims determination until July 13, 2009, he did his "best to get this paper appeal on time" and "tried [his] best to do the right thing." *See* Tr. at 6, 8 (App. A14, 16). Mr. Mason's testimony at the hearing was uncontroverted. Further, no evidence was presented regarding DOES's mailing procedures in general or with regard to Mr. Mason's claims determination in particular.

3. The Final Order. On August 11, 2009, OAH issued a final order dismissing Mr. Mason's appeal as untimely because Mr. Mason did not file his appeal with OAH within ten calendar days of June 10, 2009, the date indicated on the certificate of service. Final

Order at 2, 4-5 (App. A2, 4-5). In her written order, the ALJ's findings essentially mirrored Mr. Mason's testimony.

The ALJ found that Mr. Mason's claims determination "incorrectly spelled" his street name and that Mr. Mason "did not receive the Determination in the mail" until July 13, 2009. *Id.* at 2 (App. A2). She also recognized that, upon finally receiving his determination, Mr. Mason "filed his appeal, in person" with OAH that same day. *Id.*

The ALJ described two of Mr. Mason's telephone calls with DOES that occurred prior to receiving his determination in the mail, with each time Mr. Mason requesting that DOES mail him his determination: "[s]ometime after June 10, 2009, [Mr. Mason] contacted the Claims Examiner by phone and was told that a Determination had already been mailed and that she would send [Mr. Mason] another copy"; Mr. Mason "did not receive that copy of the Determination in the mail"; "after a few days [Mr. Mason] contacted DOES again" during which "[t]he Claims Examiner told [Mr. Mason] that she would mail him a third copy of the Determination." *Id.* The ALJ noted that the claims determination "bears the June 10, 2009, certification of mailing, and has no indication that a copy had been mailed, let alone two copies." *Id.* at 4 (App. A4). The ALJ then concluded her findings by stating that Mr. Mason had "a lot of problems with receiving mail at his home and is missing other mail." *Id.* at 2 (App. A2).

The ALJ made an explicit finding that Mr. Mason was credible: "I credit [Mr. Mason's] testimony that he did not receive the Determination in the mail . . . ." *Id.* at 4 (App. A4). Nevertheless, the ALJ, relying exclusively on the certificate of service, found that the claims examiner "mailed a copy of the Determination to the parties" on June 10, 2009. *See id.* at 2 & n.2, 3-4 (App. A2, 3-4).

After stating her factual findings, the ALJ discussed what she understood to be the applicable law according to this Court. She explained that "the law presumes that a certificate of service constitutes evidence of the mailing date and address, unless the certification is rebutted by reliable evidence." *Id.* at 3 (App. A3). She then noted that this Court, in *Thomas*, recently "held that a claimant's prompt action, taken in good faith, to address non-receipt of a determination letter *may* rebut the presumption that DOES mailed the letter on the date certified and require further proof of the accuracy of the certificate of service." *Id.* (citing *Thomas*, 961 A.2d at 1065) (emphasis in original). The ALJ explained that "[t]o determine whether a claimant's testimony is sufficient to rebut the presumption that DOES mailed a determination on the date certified, and thus require further proof of the accuracy of the certificate, [this Court] applied the same factors which are applied to deciding motions for relief from final order under OAH Rule 2833.2." *Id.* (discussing *Thomas* and citing *Frausto*, 926 A.2d at 154). "Those factors are: whether an individual (1) had actual notice of the proceedings, (2) acted in good faith, (3) took prompt action, and (4) presented an adequate defense. Prejudice to the nonmoving party is also relevant." *Id.* Here, even though the ALJ credited Mr. Mason's testimony that he did not receive the claims determination in the mail until July 13, 2009, she concluded that the presumption of mailing could be rebutted only if, additionally, the *Frausto* factors favored Mr. Mason. *See id.* at 3-4 (App. A3-4).

Briefly analyzing the *Frausto* factors, the ALJ first found that Mr. Mason "had actual notice that a Determination had been issued, although it [was] not clear from the record exactly when he learned the Determination had been issued." *Id.* at 3 (App. A3). She reasoned that Mr. Mason "testified that he was receiving claim forms in the mail that indicated he was disqualified from receiving benefits," *id.*, although there is no such testimony in the record. The ALJ

reasoned that "[b]ecause of the statement on the mail claim forms, [Mr. Mason] called the Claims Examiner, but it is not clear whether that was before or after the expiration of the 10-day timeframe for filing an appeal." *Id.*

The ALJ stated that she had "no reason to conclude that [Mr. Mason] was not acting in good faith," but then declined to determine whether Mr. Mason's actions were sufficiently prompt. *See id.* at 3-4 (App. A3-4). Despite Mr. Mason's uncontradicted testimony regarding his repeated efforts "to get this paper appeal on time" by calling DOES several times, twice requesting that DOES mail him his claims determination, and filing his appeal in person the same day he received his determination in the mail, *see* Tr. at 3-6 (App. A11-14), the ALJ stated she was "unable to determine whether [Mr. Mason's] actions were sufficiently prompt because [Mr. Mason] was not able to specify exactly when he contacted DOES." *Id.* at 3-4 (App. A3-4). The ALJ did, however, note that "[t]here was a five-week period between the date the Determination was issued and the date [Mr. Mason] filed his appeal." *Id.* at 4 (App. A4).

The ALJ did not specifically address whether Mr. Mason had an adequate defense, but during the hearing the ALJ explained to Mr. Mason that, if she deemed his appeal to be timely, he "would be eligible for benefits." *See* Tr. at 7 (App. A15). Relatedly, the ALJ found that "[t]he prejudice to [Red Coats] would be no different from the prejudice from its failure to appear at the hearing to meet its burden of proof." Final Order at 4 (App. A4).

Having considered and applied the *Frausto* factors, the ALJ concluded: "[A]though I credit [Mr. Mason's] testimony that he did not receive the Determination in the mail, his testimony was not sufficient to call into question the certified date of mailing or raise sufficient questions about the accuracy of the Determination such that a factual inquiry should be made." *Id.* The ALJ acknowledged that Mr. Mason's credited testimony raised two possibilities: (1) that

Mr. Mason "did not receive the Determination because of mail problems"; or (2) that "DOES failed to mail the Determination on two occasions." *See id.* But, without engaging in any additional fact-finding, the ALJ concluded her analysis of this dispositive question of fact by stating: "[Mr. Mason's] testimony *suggests* that he did not receive the Determination because of mail problems, not because DOES failed to mail the Determination on two occasions." *Id.* (emphasis added). The ALJ therefore dismissed Mr. Mason's administrative appeal because it was "not timely filed and jurisdiction [was] not established." *Id.* (citing D.C. Code § 51-111(b)).

Three days later, on August 14, 2009, Mr. Mason filed a timely *pro se* petition for review with this Court. After Mr. Mason filed his *pro se* petition, he retained the undersigned counsel.

STATEMENT OF JURISDICTION

OAH issued its final order on August 11, 2009. Mr. Mason was adversely affected by OAH's final order and filed his petition for review with this Court, three days later, on August 14, 2009. This Court therefore has jurisdiction to review Mr. Mason's petition. *See* D.C. Code § 2-1831.16; *id.* § 2-510; D.C. App. R. 15(a)(2).

STANDARD OF REVIEW

An OAH final order cannot stand unless "'(1) OAH made findings of fact on each materially contested issue of fact, (2) substantial evidence supports each finding, and (3) OAH's conclusions flow rationally from its findings of fact.'" *Thomas*, 961 A.2d at 1065 (quoting *D.C. Dep't of Employment Servs. v. Vilche*, 934 A.2d 356, 360 (D.C. 2007)). "It is well-settled that substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Washington Metro. Area Transit Auth. v. D.C. Dep't of Employment Servs.*, 683 A.2d 470, 476-77 (D.C. 1996) (quotations and citation omitted). Moreover, an OAH final order must, of course, be "in accordance with

law." *Thomas*, 961 A.2d at 1065 (quoting D.C. Code § 2-510(a)(3)(A)). OAH's legal rulings are reviewed de novo. *See Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 424 (D.C. 2009).

SUMMARY OF ARGUMENT

For four reasons, OAH erred in dismissing Mr. Mason's administrative unemployment compensation appeal. This Court should therefore reverse OAH's final order and remand this case for further proceedings.

First, DOES failed to meet its threshold burden of presenting a certificate of mailing to Mr. Mason's "correct address." By statute, if DOES fails to properly mail a claims determination to a claimant's last-known "correct address," then the claimant's ten-day appeal period does not begin until the actual delivery of his claims determination. *See Kidd Int'l Home Care, Inc. v. Dallas*, 901 A.2d 156, 158 (D.C. 2006); D.C. Code § 51-111(b). Furthermore, even if DOES in fact properly mails a determination to a claimant's last-known correct address, DOES must also provide "satisfactory proof" of having done so. *See Dallas*, 901 A.2d at 158.

Here, the *only* evidence of mailing is objectively incorrect—a claims determination in which DOES incorrectly spelled Mr. Mason's street name. *See* Final Order at 2 (App. A2). Because the envelope is not in the record, there is no way to know for certain whether the envelope was also misaddressed. However, given Mr. Mason's credited testimony that he did not receive the claims determination within ten days of the date on the certificate of service, the record suggests that DOES did not satisfy its statutory obligation of proper mailing. At the very least, DOES did not satisfy its burden of proof. Accordingly, by statute, Mr. Mason's ten-day appeal period should not have begun until the actual delivery of his claims determination on July 13, 2009. Because Mr. Mason filed his administrative appeal that same day, his administrative appeal should have been considered timely filed.

Second, OAH's final order is not supported by substantial evidence because Mr. Mason rebutted the presumption of mailing (even if triggered by the incorrect certificate) with his testimony. Although a certificate of service presumptively establishes the fact and date that DOES mailed a claims determination to a claimant, this Court has repeatedly held that a certificate is "insufficient proof of the date DOES mailed the determination" when a party fairly calls into question whether or when DOES in fact mailed the determination, as Mr. Mason did with his testimony. *See, e.g.*, *Thomas*, 961 A.2d at 1065-66; *Burton v. NTT Consulting, LLC*, 957 A.2d 927, 929 n.3 (D.C. 2008); *Chatterjee*, 946 A.2d at 355; *Rhea*, 942 A.2d at 654-55. This is because only *actual* mailing is significant; regardless of the date listed on a certificate of service, by statute, it is only on the date that DOES *in fact* properly mails a claims determination to a claimant that his ten-day appeal period actually begins to run. *See* D.C. Code § 51-111(b).

It is well established that DOES need not prove actual receipt of a claims determination. *Carroll v. D.C. Dep't of Employment Servs.*, 487 A.2d 622, 623-24 (D.C. 1985). But where, as here, a claimant credibly testifies that he did not receive his claims determination within ten days of the date on the certificate of service, the testimony "fairly call[s] into question the accuracy of the certificate of service" and casts doubt on whether the determination was in fact mailed on the date certified. *Chatterjee*, 946 A.2d at 356. Given that Mr. Mason's credited testimony called into question whether and when DOES in fact mailed a determination, OAH was required to engage in a factual inquiry to determine the date of mailing, and a dismissal on untimeliness grounds "'may stand only if additional proof, beyond the certificate itself, establishes that the appeal was in fact untimely.'" *Id.* (quoting *Rhea*, 942 A.2d at 656); *see also Burton*, 957 A.2d at 929 n.3.

Third, rather than engage in the required factual inquiry regarding the date of mailing, OAH imposed additional evidentiary hurdles for Mr. Mason to clear, requiring him to satisfy the *Frausto* factors—actual notice; good faith; prompt action; adequate defense; and prejudice to the non-moving party—before he even had a possibility of calling into question the accuracy of the certificate of service. Under *Chatterjee*, *Rhea*, and other cases, Mr. Mason's credited testimony burst the presumption of mailing raised by the certificate of service, leaving the question of mailing open to additional fact-finding. *See Chatterjee*, 946 A.2d at 355; *Rhea*, 942 A.2d at 656. But, without any discussion of *Chatterjee* and *Rhea* besides a citation in a string cite and a citation in a footnote, respectively, OAH read *Thomas* as, in effect, overruling *Chatterjee* and other cases. OAH's understanding of *Thomas* is wrong. In citing the *Frausto* factors relating to motions for relief from judgment, the Court in *Thomas* was providing guidance to OAH for purposes of its determination *whether* OAH should credit testimony of nonreceipt. *Thomas*'s application, however, ends at credibility; the *Frausto* factors discussed in *Thomas* are inapposite where OAH has already credited a claimant's testimony of nonreceipt. At this point, as here, this Court's case law as well as the Due Process Clause requires additional proof of *DOES*—not Mr. Mason.

Fourth, even assuming *Thomas* requires Mr. Mason to satisfy the *Frausto* factors, Mr. Mason's actions easily met this burden, and he has therefore rebutted the presumption raised by the certificate of service. Accordingly, DOES must provide additional proof to establish the date and fact of mailing.

ARGUMENT

I. DOES FAILED TO PRESENT SUBSTANTIAL EVIDENCE OF MAILING TO MR. MASON'S CORRECT ADDRESS.

Pursuant to statute, a party seeking to challenge DOES's unemployment compensation claims determination must file an administrative appeal "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); *see Wright-Taylor*, 974 A.2d at 212-13. Although the Court has affirmed the rule that this ten-day period is jurisdictional,[2] it has held repeatedly that "[a] prerequisite to invoking the jurisdictional bar imposed by the statutory ten-day filing period is [DOES's] obligation of giving notice which was reasonably calculated to apprise petitioner of the decision . . . and an opportunity to contest that decision through an

[2] Mr. Mason is entitled to a reversal and remand of OAH's final order regardless of whether the deadline imposed by D.C. Code § 51-111(b) is considered "jurisdictional." Nonetheless, Mr. Mason suggests that in an appropriate case this Court, sitting *en banc*, should revisit its previous rulings that the ten-day deadline is jurisdictional. Those rulings were based on the now-outdated notion that time limits automatically impose subject-matter jurisdiction limitations, rather than serving as claims-processing rules subject to equitable exceptions. Although this Court recently discussed Supreme Court decisions clarifying the use of the term "jurisdictional" in these deadline contexts, it suggested, without deciding, that, because the ten-day time limit for unemployment compensation appeals is statutory, the filing deadline may still be considered jurisdictional. *See Wright-Taylor*, 974 A.2d at 212-14 (citing *Bowles v. Russell*, 515 U.S. 205 (2007)). Mr. Mason submits that the Court's assumption that statutory time limits are necessarily jurisdictional is wrong. *See Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1246 (2010) ("A statutory condition that requires a party to take some action before filing a lawsuit is not automatically 'a *jurisdictional* prerequisite to suit.' Rather, the jurisdictional analysis must focus on the 'legal character' of the requirement, . . . discerned by looking to the condition's text, context, and relevant historical treatment.") (citations omitted) (emphasis in original); *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 130 S. Ct. 584, 596-97 (2009) (discussing examples of time limits imposed by statute that are not "jurisdictional"). And even if the ten-day deadline constrained *OAH's* jurisdiction, the time limit would not necessarily affect *this Court's* jurisdiction to consider challenges to adverse claims determinations. *See* D.C. Code § 2-1831; *id.* § 2-510.

administrative appeal." *Wright-Taylor*, 974 A.2d at 217 (internal quotations and citation omitted)); *see Thomas*, 961 A.2d at 1065; *Chatterjee*, 946 A.2d at 354-55.

Notice by mailing, authorized by statute, has been held to satisfy the constitutional requirement of due process. *See Carroll*, 487 A.2d at 623-24. But DOES does not satisfy its threshold burden of proving notice unless (1) DOES in fact mails the notice to the claimant's last-known "correct address," and (2) DOES "provide[s] satisfactory proof" of having done so. *See Dallas*, 901 A.2d at 158; *Bobb*, 900 A.2d at 167; *see also Town Ctr. Mgmt. v. D.C. Rental Hous. Comm'n*, 496 A.2d 264, 265 n.1 (D.C. 1985). If DOES fails to satisfy either obligation, then a dismissal on untimeliness grounds cannot stand. *See Thomas v. D.C. Dep't of Employment Servs.*, 490 A.2d 1162, 1164 (D.C. 1985) (holding agency failed to "demonstrate proof of notice" and therefore "declin[ing] to conclude that petitioner was jurisdictionally barred from appealing"); *Chatterjee*, 946 A.2d at 355-56. Here, because the record suggests that DOES failed to mail Mr. Mason's claims determination to his correct address and, at the very least, failed to provide satisfactory proof that it mailed the determination to the correct address and that it did so on the date certified, this Court should reverse OAH's final order dismissing Mr. Mason's administrative appeal and remand for further proceedings.

A. DOES Failed to Present Certification of Mailing to Mr. Mason's Correct Address.

In its Final Order, OAH expressly found that Mr. Mason's street name was incorrectly spelled on the claims determination and that Mr. Mason did not receive his claims determination in the mail until July 13, 2009—thirty-three days after DOES allegedly mailed it. *See* Final Order at 2, 4 (App. A2, 4). Moreover, OAH noted that the determination Mr. Mason received on July 13, 2009 and filed with his appeal, which, in OAH's opinion, was the third copy mailed, *see id.* at 2 (App. A2), "has no indication that a copy had been mailed, let alone two copies." *Id.* at 4

(App. A4). Nevertheless, without requiring any further proof from DOES, OAH concluded it was "highly unlikely that the minor spelling error affected the delivery of the Determination." *Id.* at 4-5 (App. A4-5). Because the record, in OAH's opinion, "suggests" that Mr. Mason did not receive his determination "because of mail problems, not because DOES failed to mail the Determination on two occasions," it deemed DOES's mailing sufficient to trigger the ten-day appeal period. *Id.*

Here, the *only* evidence of mailing is objectively incorrect—DOES incorrectly spelled Mr. Mason's street name on his claims determination. Because the envelope is not in the record, there is no way to know for certain whether the envelope was also misaddressed. Although the Court has not addressed this specific issue in the unemployment compensation context, it has never suggested that last-known correct address means anything short of exact. *Cf. Dallas*, 901 A.2d at 158; *McCaskill v. D.C. Dep't of Employment Servs.*, 572 A.2d 443, 445 (D.C. 1990) (holding that OAH's dismissal was proper because "the agency mailed petitioner notice of the hearing, ten days in advance, to the *exact address* he supplied on his forms") (emphasis added); *Kidd Int'l Home Care, Inc. v. Prince*, 917 A.2d 1083, 1086-87 (D.C. 2006) (reversing and remanding OAH's dismissal because, among other reasons, the certificate of service "did not include in the employer's address the unit number"). In short, DOES has not established that it in fact mailed the claims determination to Mr. Mason's correct address. *See Prince*, 917 A.2d at 1087 (reasoning that the failure of the certificate of service to list the employer's unit number, "together with the unrefuted representation" that a scheduling order was not received "raises at least a plausible possibility that the Order was misdelivered"). And at the very least, DOES did not satisfy its burden of proof. Accordingly, by statute, Mr. Mason's ten-day appeal period should not have begun until the actual delivery of his determination on July 13, 2009. *See* D.C.

Code § 51-111(b). Because Mr. Mason filed his administrative appeal that same day, his appeal should have been considered timely filed.

B. Mr. Mason's Credited Testimony Fairly Called into Question the Accuracy of DOES's Certificate of Service, Therefore Requiring Additional Fact-Finding on When DOES *in Fact* Mailed His Claims Determination.

The unemployment compensation statute affords no special status to (and indeed does not even mention) a certificate of service. The Court, however, has come to "normally rely upon a certificate of service" as raising a rebuttable presumption of "the date and fact of mailing." *See Chatterjee*, 946 A.2d at 355. But the Court has held repeatedly that a certificate of service is "insufficient proof of the date DOES mailed the determination" when a party credibly testifies that he did not receive the determination within the appeal period, therefore calling into question whether or when DOES in fact mailed the determination. *See Burton*, 957 A.2d at 929 n.3; *Thomas*, 961 A.2d at 1065-66; *Chatterjee*, 946 A.2d at 355; *Rhea*, 942 A.2d at 654-55; *see also Wright-Taylor*, 974 A.2d at 215-16 (discussing and summarizing holdings in *Chatterjee*, *Thomas*, and *Rhea*). Underlying this Court's rule is a logical, simple proposition: As Dean Wigmore reasoned, "Whether [a] letter was *mailed*, becomes often the issue under the substantive law . . . . [S]uppose that the addressee testifies in *denial* of the *receipt*? If this denial be believed, then is not the non-arrival of the letter some evidence that it was never mailed?" 9 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 2519, at 432 (3d ed. 1940) (emphasis in original). Dean Wigmore continued: "[I]f . . . the efficiency [of the postal service in delivering letters duly stamped, addressed, and mailed into its custody] is operating, does not the non-arrival of an alleged letter indicate that such a letter was never given into the postal custody?" *Id.* § 2519, at 433; *see also Duder v. Shanks*, 689 N.W.2d 214, 218 (Iowa 2004) ("Despite the fact that service is accomplished upon

mailing and consequently it is not necessary to show receipt, proof that an addressee did not receive a piece of mail is competent evidence that it was not mailed.") (citing *Liberty Mut. Ins. Co. v. Caterpillar Tractor Co.*, 353 N.W.2d 854, 858 (Iowa 1984)); *Wilson v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 91 A. 913, 914 (N.H. 1914) ("[P]roof that no letter was received warrants a finding that it was never posted.")

In *Chatterjee*, for example, the Court made clear that "even a properly executed certificate of service is not conclusive." *Chatterjee*, 946 A.2d at 355. There, OAH specifically credited the claimant's testimony that he had not received a claims determination until two weeks after it was allegedly mailed. *Id.* In reversing and remanding OAH's dismissal on untimeliness grounds, the Court held that the claimant's testimony, which OAH credited, "raised two possibilities": (1) that the U.S. Postal Service failed to deliver the mail for two weeks; or (2) that DOES failed to mail the claims determination on the date certified. *See id.* ("Perhaps, as Mr. Chatterjee suggested, 'whatever they indicate that they're posting, they don't really post them on that particular date.'"). Accordingly, because the claimant's credited testimony "fairly called into question the accuracy of the certificate of service," the Court ruled that more fact-finding was required and that a dismissal "'may stand only if additional proof, beyond the certificate itself, establishes that the appeal was in fact untimely.'" *Id.* at 356 (quoting *Rhea*, 924 A.2d at 656); *see also Thomas*, 961 A.2d at 1065-66 ("[W]hen a party offers sufficient evidence to call the date of mailing into question, the ALJ must conduct a factual inquiry in order to evaluate the timeliness of an appeal."). Indeed, as the accuracy of the certificate was in dispute, it was "incumbent upon OAH to resolve this question of fact" by relying on additional evidence

apart from the certificate. *Chatterjee*, 946 A.2d at 355; *see also Burton*, 957 A.2d at 929 n.3 (citing *Chatterjee*, 946 A.2d at 355; *Dallas*, 901 A.2d at 158).[3]

In *Rhea*, the Court similarly vacated and remanded OAH's dismissal of an appeal as untimely, observing that the claimant's appeal to OAH was a single day late, if measured by the date in the claims determination's certificate of service, and that the "record also contain[ed] no description of agency procedures from which we could be confident that no such one-day error was made." *Rhea*, 942 A.2d at 654-55. In particular, the Court noted that "[t]he record does not disclose whether, on [the date noted in the certificate of service], the claims examiner's determination was placed in a DOES outbox from which mail is collected, or whether it was physically placed in the United States Mail." *Id.* at 655. The record in Mr. Mason's case lacks the same information—regarding how Mr. Mason's claims determination was handled as well as DOES mailing procedures more broadly—that precipitated the reversals and remands in *Chatterjee* and *Rhea*.

This Court's requirement that DOES present more than a bare certificate of service when mailing is contested by credible testimony is grounded in experience. First, a certificate of service—unsworn and *ex parte*—represents simply a present intention to perform a future action. *See Scheeler v. The Employment Sec. Dep't*, 93 P.3d 965, 968 & n.14 (Wash. Ct. App. 2004) ("[B]y itself, the language is insufficient to establish that the letter was properly sealed, stamped,

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[3] The rebuttable presumption raised by a certificate of service is at best a "bursting bubble" type of presumption, where, once the opponent of the presumption (here, Mr. Mason) "offers evidence against the fact presumed, the presumption vanishes." *Cf. Green v. D.C. Dep't of Employment Servs.*, 499 A.2d 870, 874 (D.C. 1985) (describing the "bursting bubble" theory of presumptions as the "prevailing view, to which jurists preponderantly have subscribed") (quotations and citation omitted). Under this Court's cases, credited testimony by a claimant that casts doubt on the accuracy of a certificate of service is sufficient to make this presumption "vanish[]" and therefore require additional fact-finding.

and deposited in the United States mail on that date because the notation may have been typed before the letter was purportedly mailed."). More specifically, though, the spate of recent appeals from unemployment compensation claimants and employers alike insisting that they had not received DOES claims determinations within ten days of the date on the certificate of service or had not received DOES scheduling orders suggests the possibility of systemic problems with DOES's internal mailing procedures—certainly enough to make it unreasonable to treat the certificate of service in this case as conclusive. *See, e.g.*, *Thomas*, 961 A.2d at 1065-66; *Chatterjee*, 946 A.2d at 354-56; *Rhea*, 942 A.2d at 652-55; *Burton*, 957 A.2d at 928-31; *Prince*, 917 A.2d at 1084-88; *Dallas*, 901 A.2d at 156-58; *Bobb*, 900 A.2d at 167-68; *McDowell v. Sw. Distrib.*, 899 A.2d 767, 767-68 (D.C. 2006); *see also Allen v. D.C. Dep't of Employment Servs.*, 578 A.2d 687, 688 (D.C. 1990) (employer, the District of Columbia, asserting nonreceipt of a claims determination).

Indeed, making reference to this repeated issue, the Court noted that "[i]n several recent cases, we have had occasion to remand unemployment benefit dismissals that involve the issue whether a notice of a claims examiner's decision has been 'mailed' so as to start the running of the ten-day period." *Wright-Taylor*, 974 A.2d at 215. In doing so, the Court explicitly "cautioned against over-reliance on the so-called presumption of mailing arising from the execution of a certificate of service." *Id.* (citing *Thomas*, 961 A.2d at 1066; *Chatterjee*, 946 A.2d at 356; *Rhea*, 942 A.2d at 656). These repeated calls for caution are especially appropriate given that final orders by OAH in other recent cases filed in this Court reveal multiple instances in which DOES did *not* mail claims determinations on the dates certified. *See, e.g.*, *Westview Med. & Rehab. Servs. v. Price*, No. 09-AA-1135, Final Order at 1-2 (filed Sept. 22, 2009) (twenty-four day error) (App. A26-27); *Holiday v. Edward C. Mazique Parent Child Ctr.*, No.

09-AA-1402, Final Order at 2 (filed Nov. 19, 2009) (four-day error) (App. A31); *Whitman-Walker Clinic v. Mischka*, No. 09-AA-1397, Final Order at 2-3 (filed Nov. 17, 2009) (four-day error) (App. A41-42); *Rojas v. PBE Walter Reed, Inc.*, No. 09-AA-1316, Final Order at 2 (filed Oct. 30, 2009) (one-day error) (App. A46); *Hicks v. Nat'l Assocs., Inc.*, No. 09-AA-1059, Final Order at 2 (filed Aug. 31, 2009) (three-day error) (App. A53).

It is clear that this Court's line of cases counseling restraint and cautioning against over-reliance on certificates of service requires reversal and remand here. Indeed, *Chatterjee* is directly on point, indistinguishable from Mr. Mason's case—except for the misspelling of the street name in Mr. Mason's claims determination, which makes the need for further fact-finding here even stronger than in *Chatterjee*.

The certificate of service on Mr. Mason's claims determination indicated that it had been mailed on June 10, 2009. OAH found, however, that Mr. Mason did not receive an actual copy of the determination until July 13, 2009. Like the claimant in *Chatterjee*, Mr. Mason did not keep the envelope in which it arrived; he stated that by the time he saw the notice informing him to save the envelope (that is, the scheduling order sent to Mr. Mason on July 23, 2009, *see* Scheduling Order at 2 (App. A19)), he had already thrown it away. *See* Tr. at 5 (App. A13); c*f. Chatterjee*, 946 A.2d at 354 (Petitioner "did not keep the envelope in which [the claims determination] arrived."); *see also D.C. Pub. Employee Relations Bd. v. D.C. Metro. Police Dep't*, 593 A.2d 641, 642 (D.C. 1991) (assistant general counsel to the Metropolitan Police Department threw away original postmarked envelope). Like the claimant in *Chatterjee*, Mr. Mason also testified to having problems with mail in the past. *See* Tr. at 7 (App. A15); *cf. Chatterjee*, 946 A.2d at 354 (Petitioner testified that "'the mail has often been . . . late.'"). Furthermore, like in *Chatterjee*, OAH stated that it "credit[ed] [Mr. Mason's] testimony that he

did not receive the Determination in the mail," that is, until July 13, 2009. Final Order at 4 (App. A4); *cf. Chatterjee*, 946 A.2d at 353 (OAH "'credit[ed] [petitioner's] testimony that [he] did not receive the [notice of ineligibility for unemployment compensation] until after it was too late for him to file a timely appeal . . . .'") Nevertheless, like in *Chatterjee*, OAH concluded, relying exclusively on the certificate of service, that Mr. Mason's "testimony was not sufficient to call into question the certified date of mailing or raise sufficient questions about the accuracy of the Determination such that a factual inquiry should be made." Final Order at 4 (App. A4); *cf. Chatterjee*, 946 A.2d at 353 (OAH concluded that petitioner's "'testimony [did] not provide a basis for overcoming the presumption . . . .'").

Just as in *Chatterjee*, this was error. Mr. Mason's credited testimony that he did not receive his claims determination in the mail until after the 10-day period had passed "fairly called into question the accuracy of the certificate of service." *See Chatterjee*, 946 A.2d at 356. Specifically, Mr. Mason's testimony raised two possibilities: (1) that it took thirty-three days for the U.S. Postal Service to deliver Mr. Mason's determination within the District of Columbia; or (2) that DOES did not mail Mr. Mason's determination on the date certified. *See* Final Order at 4 (App. A4); *cf. Chatterjee*, 946 A.2d at 355. And here, unlike in *Chatterjee*, Mr. Mason's claims determination incorrectly spelled his street address. But OAH—without engaging in any additional fact-finding—concluded that Mr. Mason's "testimony *suggests* that he did not receive the Determination because of mail problems, not because DOES failed to mail the Determination on two occasions." *See* Final Order at 4 (emphasis added) (App. A4).

"Under these circumstances, it was incumbent upon OAH to resolve this question of fact." *Chatterjee*, 946 A.2d at 355. Because OAH failed to do so, instead treating the certificate of service as conclusive, OAH's final order is not supported by substantial evidence. *See id.* at

355-56. This Court should therefore reverse OAH's final order and remand this case, requiring OAH to "engage in a factual inquiry" regarding when DOES mailed the claims determination to Mr. Mason. *See id*. at 356. And, upon remand, a dismissal of Mr. Mason's "appeal on jurisdictional grounds 'may stand only if additional proof, beyond the certificate itself, establishes that the appeal was in fact untimely.'" *See id.* (quoting *Rhea*, 942 A.2d at 656); *see also Burton*, 957 A.2d at 929 n.3.

II. OAH ERRED IN IMPOSING AS AN ADDITIONAL REQUIREMENT THAT MR. MASON SATISFY THE *FRAUSTO* FACTORS AFTER CREDITING HIS TESTIMONY OF NONRECEIPT.

In dismissing Mr. Mason's administrative appeal as untimely, OAH's entire discussion of *Chatterjee* and *Rhea* consisted of one string citation for a general, undisputed proposition, and one citation in a footnote, respectively. *See* Final Order at 3 (*citing Chatterjee*, 946 A.2d at 355) (App. A3); *id.* at 2 n.3 (citing *Rhea*, 942 A.2d 651) (App. A2). Instead, OAH treated *Thomas* as controlling and concluded, in effect, that *Thomas* (1) overruled *Chatterjee*; (2) rejected this Court's repeated calls for caution against over-reliance on certificates of service; and (3) imposed, at least, four additional evidentiary hurdles that Mr. Mason must clear before he can even raise the possibility of calling into question the accuracy of the certificate.

OAH's reading of *Thomas* is wrong. *Thomas* does not displace or change *Chatterjee*. Indeed, *Thomas* cited *Chatterjee* with approval and made no attempt to distinguish or limit it. *See Thomas*, 961 A.2d at 1065-66. Nor does *Thomas* change the clear trend in this Court's case law addressing the appropriate amount of reliance on certificates of service—less, not more. Since *Thomas*, this Court has cited both cases for the same proposition: that OAH must exercise "caution[] against over-reliance on the so-called presumption of mailing arising from the

execution of a certificate of mailing." *Wright-Taylor*, 974 A.2d at 215-16 (citing *Thomas*, 961 A.2d at 1066; *Chatterjee*, 946 A.2d at 356).

Thomas, after pointing out that the unemployment statute is "remedial in character . . . and . . . must be construed accordingly," 961 A.2d at 1066 (quotations and citation omitted), suggested that OAH "explor[e]" the *Frausto* factors—actual notice; good faith; prompt action; adequate defense; and prejudice to the non-moving party—in making a credibility determination. *See id*. For example, a claimant's prompt action may show that he is being diligent about his appeal and would not have let the ten-day appeal period lapse without filing an appeal. Similarly, a claimant's strong claim on the merits also bolsters the claimant's credibility by tending to show that he would not pass up the opportunity to appeal an adverse claims determination. *Thomas* therefore provides OAH with guidance, specifically a set of factors, for purposes of "inform[ing] *whether* . . . a petitioner's *testimony* is sufficient to rebut the presumption that DOES mailed a determination letter on the date certified." *See id.* (emphasis added). But *Thomas*'s applicability ends where, as here, OAH credits a claimant's testimony, fairly calling into question the accuracy of the certificate. In short, the *Thomas* inquiry duplicates a determination OAH made in a different way; it is not an independent basis for denying relief.

In Mr. Mason's case, OAH specifically credited his testimony of nonreceipt. Another objective factor—the misspelling of Mr. Mason's street address—provides additional reason to credit Mr. Mason's testimony and to challenge the sufficiency of the notice provided by DOES. At this point, cases such as *Chatterjee* and *Rhea* apply, and OAH may no longer rely on the certificate of service alone to establish the date of mailing. *Compare Thomas*, 961 A.2d at 1066 (holding that the *Frausto* factors will inform whether the claimant's "claims" and "assertions"

were sufficient to require further fact-finding), *with Chatterjee*, 946 A.2d at 356 (holding that the claimant's "credited" testimony "fairly called into question the accuracy of the certificate" and therefore required further fact-finding). No further evidence on the part of the claimant is necessary; DOES must come forward with further proof of the fact and date of mailing or, at the very least, evidence regarding its internal mailing procedures. *See Chatterjee*, 946 A.2d at 356; *Rhea*, 942 A.2d at 654-56.

Furthermore, as the Court has recognized in the context of unemployment compensation benefits, "[i]t cannot be questioned that the due process clause is applicable where, as here, a property interest is at stake." *Sterling v. D.C. Dep't of Employment Servs.*, 513 A.2d 253, 254 (D.C. 1986). When credible evidence of nonreceipt casts doubt on a bare certificate of service, as here, the Due Process Clause at a minimum requires the kind of factual inquiry into mailing called for in *Chatterjee*, without imposing additional requirements applicable to seeking relief from a final judgment.

The Due Process Clause is not satisfied by certificates of service, except insofar as they may be evidence that DOES in fact mailed proper notice. So once a claimant testifies or presents other evidence that calls into question whether or when DOES has actually mailed a claims determination, or mailed it to the correct address, then it is a violation of due process for OAH to disregard that testimony and simply insist, in the face of contrary evidence, that the letter was mailed to the claimant on the date certified and that notice accordingly had been provided. *See Jones v. Flowers*, 547 U.S. 220, 226-30 (2006) (holding that due process imposes further obligations on the government when the government becomes aware, prior to a property deprivation, that its attempt at notice has failed); *Thomas*, 490 A.2d at 1162 (alleged failure of claimant to receive notice does not itself constitute a deprivation of due process, but only as long

as "the record evidence before the court [is] sufficient for it to conclude" that the agency "did in fact mail" the notice) (quotations and citation omitted). This Court's own cases and final orders accompanying other petitions for review filed in this Court provide ample reason to question whether DOES mailing practices satisfy due process. *See supra* pp. 20-21.

Although in the context of a motion to dismiss, *Meachem v. Wing*, 77 F. Supp. 2d 431 (S.D.N.Y. 1999), held that such type of action stated a valid class action claim for due process violations. In *Meachem*, class action plaintiffs alleged that their due process rights had been violated by a state welfare agency's "excessive reliance" on mailing affidavits, submitted by the agency to demonstrate that it has a procedure in place for mailing notice. *Id.* at 444. The plaintiffs contended that "a systemic failure exists, put in place by defendants, which prevents plaintiffs from marshaling evidence to challenge the presumption of mailing and receipt," and "hearing officers routinely fail to determine whether the mailing affidavits are, inter alia, internally inconsistent or out of date . . . ." *Id.* Instead, these "fair hearing officers generally deem the mailing affidavits to establish a presumption in favor of mailing and to satisfy the City agencies' burden of proof." *Id.* Denying the defendants' motion to dismiss, the district court held: "These claims are sufficient to survive this motion to dismiss because they involve alleged systemic failures of the State's administrative scheme for conducting fair hearings to meet the standards required by federal constitutional law and statutory law." *Id.*[4]

[4] *See also U.A.W. v. Giles*, 1982 U.S. Dist. LEXIS 17945, *35 (N.D. Ohio July 2, 1982) (holding that even though mailing, as a general matter, may be reasonable, "sending notice by ordinary mail, coupled with the brief statutory period allowed for filing an appeal, and the establishment of a conclusive presumption that mailing notice results in its receipt by plaintiffs" violates due process); *Bennett v. Lopeman*, 598 F. Supp. 774, 782 (N.D. Ohio 1984) (adopting the reasoning of *Giles*).

Yet, under OAH's erroneous interpretation of *Thomas*, even if OAH specifically credits a claimant's testimony of nonreceipt—previously sufficient under *Chatterjee* to make the presumption vanish, triggering the need for further fact-finding—a claimant must also satisfy the *Frausto* factors: actual notice; good faith; prompt action; adequate defense; and prejudice to the non-moving party. And, as OAH uses emphasis to note, even if a claimant satisfies the *Frausto* factors, this simply raises a *possibility* of rebutting the presumption; this "*may* rebut the presumption." Final Order at 3 (emphasis in original) (App. A3).

In short, OAH used the *Frausto* factors against Mr. Mason, concluding that, despite his specifically credited testimony, Mr. Mason failed to satisfy some of the *Frausto* factors and thus could not rebut the presumption of mailing. OAH's interpretation, however, cannot stand. *Thomas* is inapposite here where *Chatterjee* is directly on point and requires that this Court reverse OAH's final order and remand for further proceedings.[5]

III. ASSUMING THAT *THOMAS* REQUIRES MR. MASON TO SATISFY THE *FRAUSTO* FACTORS, MR. MASON'S ACTIONS MET THIS BURDEN, THEREFORE REQUIRING FURTHER FACT-FINDING REGARDING THE DATE OF MAILING.

Even if Mr. Mason were required to satisfy the *Frausto* factors, he easily did so, and OAH's conclusion to the contrary was in error.

1. Actual Notice. The only date established in the record by which Mr. Mason acquired actual notice of the substance of his claims determination (and how to appeal that determination) was on July 13, 2009—the same day he filed his administrative appeal. Yet OAH's final order states: "[Mr. Mason] had actual notice that a Determination *had been issued*,

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[5] OAH's implicit interpretation of *Thomas* as overruling *Chatterjee* is wrong for an additional reason. This Court has "adopted the rule that no division of this court will overrule a prior decision of this court . . . and that such result can only be accomplished by this court en banc." *Smith v. United States*, 601 A.2d 1080, 1082 (D.C. 1992).

although it is not clear from the record exactly when he learned the Determination had been issued." Final Order at 3 (App. A3). Initially, notice that a determination had been issued is not enough; even if Mr. Mason were aware that a claims determination had been issued, his subsequent actions are entirely dependent on the *substance* of the determination. Had Mr. Mason been awarded the benefits he requested, he would not need to appeal that determination.

Critical instead is when Mr. Mason had actual notice that he had been denied benefits (and how he could appeal that denial). On this issue, the record is silent whether or when Mr. Mason received any information from DOES that might have suggested to him that he had been found ineligible for benefits prior to July 13, 2009. Although Mr. Mason did testify that he had received "a notice saying that [he] needed to fill out biweekly job – to prove that [he] had been look [sic] for a job," Tr. at 4 (App. A12), OAH's conclusion that "[Mr. Mason] testified that he was receiving claim forms in the mail that indicated he was disqualified from receiving benefits," *see* Final Order at 3 (App. A3), is without support in the record.

2. Good Faith. Mr. Mason's good faith is uncontested. *See id.*

3. Prompt Action. Given that Mr. Mason called DOES several times, twice requested that DOES mail him his claims determination, and immediately filed his administrative appeal in person the day he finally received his determination in the mail, Mr. Mason's actions were sufficiently prompt. OAH's final order, however, failed to make a finding on this factor, stating: "I am unable to determine whether [Mr. Mason's] actions were sufficiently prompt because [Mr. Mason] was not able to specify exactly when he contacted DOES." *Id.* at 3-4 (App. A3-4). OAH, however, made a point of noting that "[t]here was a five-week period between the date the Determination was issued and the date [Mr. Mason] filed his appeal." *Id.* at 4 (App. A4).

Initially, although OAH failed to determine whether Mr. Mason's actions were prompt, it appeared to view the "five-week period between the date the Determination was issued and the date [Mr. Mason] filed his appeal," as the relevant frame of time. This was error. When examining whether actions were sufficiently prompt, the Court has looked at when a party learned of the matter at issue. *See Frausto*, 926 A.2d at 155 (reviewing OAH's order and noting that "[t]he order does not suggest that Frausto failed to act promptly to reopen her case *after she learned of the OAH's order*") (emphasis added); *Brown v. Kone, Inc.*, 841 A.2d 331, 334 (D.C. 2004) (considering whether a party acted promptly from the date that the party "discovered . . . that her complaint had been dismissed"). And this makes sense: A party cannot take appropriate action until that party knows action is necessary. Here, as discussed above, the record is silent regarding whether or when Mr. Mason received information from DOES that might have suggested to him that he had been found ineligible for benefits. But the record is clear that on the day that Mr. Mason finally received the determination in the mail, July 13, 2009, Mr. Mason immediately filed his administrative appeal in person with OAH. If the Court views Mr. Mason's actions from this date, then no delay at all must be sufficiently prompt.

Even assuming, though, that the prompt-action-clock starts running on the date that DOES allegedly mailed the claims determination and ends when a claimant files his appeal with OAH—a thirty-three day period in this case—the record shows that Mr. Mason called DOES several times, during which he "waited and waited and waited" on hold, and when he finally got through, twice requested that DOES send him a copy of his claims determination. Tr. at 4-6 (App. A12-14). Without citation to any authority, however, OAH hedged, stating that it was "unable to determine whether [Mr. Mason's] actions were sufficiently prompt." Final Order at 3 (App. A3). This, also, was error. *Thomas*—presenting a similar fact pattern and indeed the very

case that suggested use of the *Frausto* factors—took place over the span of twenty-seven days.[6] It cannot be that a mere six days makes the difference between what is and what is not sufficiently prompt action.

And, to the extent that *Thomas* does not resolve the matter, this Court has repeatedly found similar time frames between three weeks and one month to be sufficiently prompt. *See Gill v. Tolbert Constr., Inc.*, 676 A.2d 469, 469-71 (D.C. 1996) (reversing order denying motion to vacate and holding that the petitioner's actions were sufficiently prompt: the order dismissing his case was docketed on January 11, 1994; he received the order dismissing his case on January 19, 1994; he went to the courthouse five days later, on January 24, 1994, to obtain a copy of the opposing party's motion; and he filed his motion to vacate on February 10, 1994—a total of thirty days); *Brown*, 841 A.2d at 334 (stating that a party "may have acted with reasonable promptness in filing her motion" to set aside a default order when she discovered "in mid-January 2003 that her complaint had been dismissed," and on "February 11, 2003, she . . . filed a motion to vacate"). Under the Court's case law, Mr. Mason's actions were sufficiently prompt.

4. Adequate Defense. If OAH had found that Mr. Mason's appeal was timely filed, he would have been eligible for benefits. Red Coats, bearing the burden of establishing that Mr. Mason had been fired for reasons that would disqualify him from receiving benefits, did not appear before OAH. Nor has it appeared before this Court. Ms. Mason was therefore entitled to

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[6] *Thomas* did not specifically apply any of the *Frausto* factors to the facts of that case. But "[g]iven petitioner's assertions regarding his non-receipt of notice of the initial determination, as well as the surrounding circumstances in the record," the Court vacated and remanded OAH's final order. *Thomas* 961 A.2d at 1066. The Court "suggest[ed] that appropriate inquiry, exploring the factors noted in *Frausto*, would resolve the question [of untimeliness] appropriately." *Id.* Accordingly, it appears implicit in *Thomas* that the Court considered the petitioner's actions sufficiently prompt.

prevail on his claim without presenting any evidence.[7] *See, e.g.*, *Morris v. U.S. EPA*, 975 A.2d 176, 181 (D.C. 2009); Tr. at 7 (informing Mr. Mason that because Red Coats did not appear at the hearing it was not necessary for him "to put on any testimony regarding the reasons for . . . separation" and explaining that if OAH found the appeal timely, Mr. Mason "would be eligible for benefits") (App. A15).

Relatedly, one more factor supporting reversal here is that Red Coats has failed to identify its counsel or otherwise participate in the proceedings before this Court. Although not a *Frausto* factor, the Court has expressly considered an opposing party's "non-participation in the proceedings" in reversing an OAH final order: "[G]iven [the petitioner's] uncontradicted representation that it did not receive actual notice either of [the respondent's] appeal or of the hearing at which [the petitioner] failed to appear, and in light of [the respondent's] non-participation in the proceedings before this [C]ourt, we conclude that" OAH's final order should be reversed. *Prince*, 917 A.2d at 1088.

In sum, even assuming *Thomas* requires Mr. Mason to satisfy the *Frausto* factors, OAH's final order cannot stand because Mr. Mason's actions met this burden, "requir[ing] further proof of the accuracy of the certificate" from DOES. *See Thomas*, 961 A.2d at 1066.

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[7] For the same reason, Red Coats could not have been prejudiced had OAH considered Mr. Mason's claim on the merits. *See* Final Order at 4 ("The prejudice to [Red Coats] would be no different from the prejudice from its failure to appear at the hearing to meet its burden of proof.") (App. A4); *cf. Thomas*, 961 A.2d at 1066 ("We will also consider prejudice to the non-moving party.").

CONCLUSION

For the foregoing reasons, this Court should reverse OAH's final order dismissing Mr. Mason's administrative appeal for lack of jurisdiction and remand for further proceedings.

Respectfully submitted,

Bonnie I. Robin-Vergeer (No. 429717)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
(202) 628-1161
Fax (202) 727-2132

Counsel for Petitioner

Date: April 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Petitioner to be delivered by first-class mail, postage prepaid, this 19th day of April, 2010, to each of the following:

Red Coats/Admiral Security
ATTN: Human Resources
4401 East West Highway
Bethesda, M.D. 20814

Todd S. Kim, Solicitor General
Office of the Solicitor General
441 4th Street, N.W.
Suite 600 South
Washington, D.C. 20001

Bonnie I. Robin-Vergeer