

NO. 2007-SA-00109

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**IN THE SUPREME COURT OF MISSISSIPPI**

PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
OF MISSISSIPPI

APPELLANT/CROSS-APPELLEE

VS.

MARY CARD

APPELLEE/CROSS-APPELLANT

**REPLY BRIEF OF APPELLEE/CROSS-APPELLANT**

*ORAL ARGUMENT REQUESTED*

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APPELLANT

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NO. 2007-SA-00109

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Mary Card, Appellee/Cross-Appellant;
2. George S. Luter, Attorney for Appellee/Cross-Appellant;
3. Pat Robertson, Executive Director, Public Employees' Retirement System of Mississippi;
4. Honorable Jim Hood, Attorney General of Mississippi;
5. Mary Margaret Bowers, Special Assistant Attorney General assigned to the Public Employees' Retirement System of Mississippi; and,
6. Sheila Jones, Presiding Hearing Officer of the Disability Appeals Committee of the Public Employees' Retirement System of Mississippi

Respectfully submitted,

MARY CARD

BY:   
GEORGE S. LUTER  
ATTORNEY FOR APPELLEE/  
CROSS-APPELLANT

## TABLE OF CONTENTS

PAGE(S)	
CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE ISSUE ON DIRECT APPEAL.....	1
STATEMENT OF THE ISSUE ON CROSS APPEAL.....	1
STATEMENT OF THE CASE.....	1-2
STATEMENT OF THE FACTS.....	2-7
SUMMARY OF THE ARGUMENT ON DIRECT AND CROSS APPEAL.....	7-8
ARGUMENT ON DIRECT APPEAL.....	8-13
<p>The Circuit Court correctly reversed the decision of PERS denying Card regular disability retirement pursuant to Miss. Code Ann. 25-11-113(1)(a) because Card's medical disability is supported by reports of her treating surgeon, by her restrictions on her voice given by her Ear, Nose and throat specialist, a vocational expert, the <i>Manager of Employee Relations</i>, and by PERS' medical examiner who stated Card's "...subjective complaints of burning pain and persistent numbness/tingling are fairly impressive."</p>	
ARGUMENT ON CROSS-APPEAL.....	13-17
<p>The Circuit Court erred in affirming the decision of PERS denying Card's application for disability retirement pursuant to Miss. Code Ann. 25-11-114(6) since such decision by PERS is not supported by substantial evidence and is legally incorrect because no evidence exists that Card's carpal tunnel syndrome was not the direct result of an accident or traumatic event occurring in the line of duty and that such caused her disability</p>	
CONCLUSION.....	17
CERTIFICATE OF SERVICE.....	18

## **TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
<i>Brinston v. PERS</i> , 706 So. 2d 258 (Miss. App. 1998)	15
<i>Davis v. PERS</i> , 750 So. 2d 1225, 1229 (Miss. 1999)	15
<i>Fulce v. PERS</i> , 759 So. 2d 401 (Miss. 2000)	10, 15
<i>Marquez v. PERS</i> , 774 So. 2d 421 (Miss. 2001)	10, 11, 15
<i>PERS v. Thomas</i> , 809 So. 2d 690 (Miss. App. 2001)	10
<i>PERS v. Trulove</i> , Miss. Ct. App. No. 2006-SA-00550-COA, April 17, 2007	8, 16
<i>PERS v. Kelly Wright</i> , Ms. Ct. App., No. 2005-CC-02188-COA, Feb. 13, 2007	6
 <b><u>OTHER AUTHORITIES</u></b>	
Miss. Code Ann. 25-11-113(1)(a)	1, 2, 7, 10, 16
Miss. Code Ann. 25-11-105	9
Miss. Code Ann. 25-11-114(6)	1, 2, 7, 13

## **BRIEF OF APPELLEE/CROSS-APPELLANT**

### **STATEMENT OF THE ISSUE ON DIRECT APPEAL**

The Circuit Court correctly reversed the decision of PERS denying Card regular disability retirement pursuant to Miss. Code Ann. 25-11-113(1)(a) because Card's medical disability is supported by reports of her treating surgeon, by her restrictions on her voice given by her Ear, Nose and throat specialist, a vocational expert, the Manager of Employee Relations, and by PERS' medical examiner who stated Card's "...subjective complaints of burning pain and persistent numbness/tingling are fairly impressive."

### **STATEMENT OF THE ISSUE ON CROSS APPEAL**

The Circuit Court erred in affirming the decision of PERS denying Card's application for disability retirement pursuant to Miss. Code Ann. 25-11-114(6) since such decision by PERS is not supported by substantial evidence and is legally incorrect because no evidence exists that Card's carpal tunnel syndrome was not the direct result of an accident or traumatic event occurring in the line of duty and that such caused her disability.

### **STATEMENT OF THE CASE**

The appellee/cross-appellant, Mary Card, filed for disability retirement with the Public Employees Retirement System (hereafter "PERS") for "in the line of performance of duty" disability pursuant to Miss. Code Ann. 25-11-114(6) on December 23, 2002. (R 58, ARE 2, Tab 2). PERS also considered her eligibility for disability retirement pursuant to Miss. Code Ann. 25-11-113(1)(a) since she had over four years of requisite service but denied her application under both statutes on June 22, 2004. (R 14, RE 71, Tab 14).

The Hinds County Circuit Court affirmed PERS' denial of "in the line of performance of

duty” disability benefits under Miss. Code Ann. 25-11-114(6) but reversed PERS’ denial of benefits pursuant to Miss. Code Ann. 25-11-113(1)(a). (R 37, RE 104, Tab 18). PERS has appealed such reversal to this Court while Card has cross appealed the affirmance by the Circuit Court of PERS’ denial for “in the line of performance of duty” disability pursuant to Miss. Code Ann. 25-11-114(6).

### **STATEMENT OF THE FACTS**

Mary Card was employed as an accounting assistant for the University of Mississippi for fifteen (15) years. (R 55, RE 18, Tab 9). On September 17, 2002, the University of Mississippi filed a report of injury reporting that Card had carpal tunnel injury to her hands and wrists due to “data entry” and “long term typing” and that her disability from such began September 3, 2002. (R 66, RE 1, Tab 1).

After being treated for carpal tunnel injury to her hands and having surgery performed on both hands by Oxford orthopedic surgeon Dr. Ernest B. Lowe, Jr. and still being unable to return to work as an accounting assistant, Card applied for “duty related disability (hurt on the job)” with PERS on December 23, 2002.<sup>1</sup> (R 1, RE 2, Tab 2).

On January 28, 2003, Dr. Lowe reported to PERS on its “Statement of Examining Physician” that Card had “moderate” severity carpal tunnel syndrome right and left, had “shown no improvement”, had performed right carpal release surgery on 9/15/02 and left carpal tunnel release surgery on 10/10/02, had impairments of “severe diminished use of [right and left] hands”, gave her permanent partial impairment rating of 20% to each hand, and gave as restrictions “avoid repetitive wrist motion.” (R 77, RE 3, Tab 3). Dr. Lowe noted on his February 24, 2003 office note, that he “...explained to her, I think the chance of her returning to her previous employment that required repetitive use of her hands and computer use would be extremely minimal.” (R 79, RE 4, Tab 3).

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<sup>1</sup> Card was subsequently found disabled by the Social Security Administration with an onset date of disability of August 30, 2002 due to “bilateral carpal tunnel syndrome, statue post surgical release.” (R 22, RE 90, Tab 17).

On July 22, 2003, Card underwent a "Physical Work Performance Evaluation Summary" which indicated Card demonstrated "self limiting participation" on 52% of tasks which Card reported was due to "shooting pain in both wrists, numbness in fingers, burning of hand, pain in knees, pain in low back, and shortness of breath." (R 9, RE 72, Tab 4). The report indicated that Card could not perform floor to waist lift or two handed carrying, which were two of the fourteen tasks reported by the University of Mississippi to be required for her job and was limited to sedentary work. (R 74, RE 11, Tab 4).

On August 4, 2003, PERS Executive Director Frank Ready wrote Card that "it has been determined that there was insufficient objective evidence to support the claim that your medical condition prevents you from performing your duties as described of an Accounting Assistant." (R 112, RE 12, Tab 5).

On August 14, 2003, Card filed her Notice of Appeal requesting a hearing before the Disability Appeals Committee. (R 50, RE 13, Tab 6).

On September 3, 2003, PERS requested that a representative of the University of Mississippi attend Card's disability hearing to "provide testimony with regard to this employee's claim for benefits." (R 109, RE 15, Tab 7).

On November 12, 2003, vocational expert C. Lamar Crocker reported that Card was 59 years old at the time of her injury, had a work life expectancy of 3.8 years, and had sustained a loss of access to the labor market of 100% based upon the restrictions of Dr. Lowe and the October 22, 2003 restriction of Oxford ear nose and throat specialist Dr. John F. Laurenzo that Card could not use her voice for more than two hours daily due to vocal paralysis. (R 136-137, RE 25-26, Tab 10).

On November 14, 2003, University of Mississippi Manager of Employer Relations Wilma F. Webber-Colbert responded by faxed letter to an inquiry from PERS Disability analyst

Sharon Roberts<sup>2</sup> as to “whether The University of Mississippi would be able to accommodate Mary Card’s medical condition.” Webber-Colbert replied that she had reviewed Card’s personnel file but stated:

“I know that the PERS Form 6B that our office sent you in January 2003 indicated that Ms. Card’s department would be willing to work with her in trying to accommodate her. However, that was almost a year ago. At that time, her department had no indication that she would not ever be able to return to her accounting assistant position. Now her physician has made it clear that she cannot return to her accounting assistant position. Instead, her physician limits her to possibly being able to do sedentary work.

I have reviewed Ms. Card’s personnel file to try to determine her previous work experience, skills, and other qualifications. I have also consulted our Director of Equal Opportunity and Regulatory Compliance. We have discussed the jobs that are currently open for applications. Most are research or faculty positions for which she does not appear to be qualified. There are some open custodial positions which require use of wrists and hands and which are not sedentary. There were some clerical type of positions that were open. However, they generally have typing requirements and /or involve data entry and other repetitive motions. We did not find any open positions that we felt Ms. Card might be qualified for that could be considered as sedentary.

Therefore, I cannot say, at this point, that the university would be able to accommodate her by placing her in a sedentary job. Hopefully, this letter answers your questions...” (R 127-128, RE 32-33, Tab 11).

The Disability Appeals Committee, consisting of presiding Hearing Officer Sheila Jones and Drs. Mark Meeks and William Nicholas, afforded Card a hearing on November 17, 2003, with Card being represented by Batesville attorney William L. Cook, now deceased.

Card testified that severe pain started in the morning of August 30, 2002 in her right hand and she went to the emergency room that night. (R 28-29, RE 40-41, Tab 12). [Card notified her employer of this incident on September 3, 2002 and an incident report for her worker’s compensation carrier was made September 17, 2002. (R 66, RE 1, Tab 1)]

<sup>2</sup> What sort of inquiry and in what manner Roberts made of Ms. Webber-Colbert regarding Card is unknown since no letter from Roberts to Webber-Colbert is contained in the record and Roberts did not testify as to what sort of inquiry she made.



Card further testified she had wrist pain in her left hand a few days. (R 31, RE 43, Tab 12). She later saw orthopedic surgeon Dr. Ernest Lowe Jr. who performed carpal tunnel surgery on her right hand on September 19, 2002 and on the left hand the following month. (R 33, RE 45, Tab 12).

Card further testified that she still had numbness and pain in her hands after the surgery. (R 34, RE 46, Tab 12).

Card testified that she had difficulty lifting things in the functional capacity evaluation and did some of the tasks but had difficulty doing them. (R 35, RE 47, Tab 12).

On direct examination by her attorney, Card testified her hands are tender, she could not shake hands, and it was very painful for anyone to touch her hand, that she had done everything Dr. Lowe had asked her to do, including therapy and all tests. (R 38, RE 50, Tab 12). On cross examination by PERS attorney Margo Bowers, Card testified she was still on leave with the University without pay and had applied for Social Security Disability and was awaiting a hearing.<sup>3</sup> (R 39, RE 51, Tab 12).

Card further testified that she had heart bypass surgery on March 31, 2003 and had a paralyzed vocal cord from the surgery and that part of her job was talking to vendors and she sometimes filled in for the receptionist. (R 45, RE 57, Tab 123).

The Disability Appeals Committee voted to defer making a decision on Card's case pending an evaluation by "a hand specialist" and referred her to Oxford orthopedic surgeon Dr. Cooper Terry, who was seeing Card on February 19, 2004 at the instance of her workers' compensation carrier, AmFed.<sup>4</sup> (R 162-163, RE 61-62, Tab 13).

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<sup>3</sup> As stated earlier, Card was subsequently found disabled by the Social Security Administration with an onset date of disability of August 30, 2002 due to "bilateral carpal tunnel syndrome, status post surgical release." (R 22, RE 90, Tab 17).

<sup>4</sup> PERS apparently elected to use the same report Dr. Terry provided her worker's compensation carrier. (R 162-163, RE 61-62, Tab 13).

Dr. Terry stated that Card reached maximum medical improvement on October 17, 2003, the last day she was seen by Dr. Lowe and the only thing that could be done “would be a repeat right carpal tunnel release based on her persistent carpal tunnel symptoms.” He stated the outcome would be unpredictable and the likelihood it would help “is minimal.” Dr. Terry gave Card a 5% impairment to the left upper extremity and a 10% impairment to the right upper extremity. Although, Dr. Terry thought it “unusual” Card could not return to her former job he stated “However, her subjective complaints of burning pain and persistent numbness/tingling are fairly impressive.” (R162, RE 62, Tab 13).

On March 19, 2004, PERS Executive Director Donna Edwards wrote Card’s new attorney William Trusty stating the Disability Appeals Committee was seeking answers to certain questions regarding Card’s carpal tunnel syndrome and was sending Card to be evaluated by Dr. Terry. (RE 76). On April 5, 2004, Trusty sent Edwards medical records from Dr. Ernest Lowe and Dr. Cooper Terry and a questionnaire Dr. Lowe answered. (RE 78) On May 7, 2004, Ready wrote Trusty that the additional information would be presented to the Committee without the questionnaire filled out by Dr. Lowe.<sup>5</sup> (RE 83).

On May 14, 2004, the Disability Appeals Committee entered its written recommendation that “...Ms. Card had not persuaded this Committee that she is entitled to Duty Related Disability. There is no testimony of an accident or trauma as required by the statute and interpreted by the Attorney General’s office. Ms. Card’s counsel pleads the micro trauma<sup>6</sup> theory, but that theory has never been adopted by PERS. The medical literature is now showing

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<sup>5</sup> The action of Ready in which he decreed the questionnaire completed by Dr. Lowe would not be presented to the Committee would seem to be a violation of Card’s due process rights to respond to the report of PERS’ medical expert, Dr. Terry. See *PERS v. Kelly Wright*, Miss. Ct. App., February 13, 2007, in which the Court of Appeals held that due process requires that when new evidence is considered the opposing party should be given an opportunity to rebut that evidence or submit additional evidence”----which action Ready would not allow Card to do when he stated such questionnaire would not be presented to the Disability Appeals Committee.

<sup>6</sup> Card’s former counsel never used the words “micro trauma” but stated her injury “is basically a cumulative impact” apparently in response to Presiding Hearing Officer Sheila Jones’ assertion that “A cumulative impact is not considered duty related.” (R 27, RE 39, Tab 12).

that carpal tunnel syndrome is not the result of micro traumas, but more likely the result of obesity, diabetes and other illnesses or conditions.” (R 19, RE 68, Tab 14).

The Committee further found that Card was not entitled to regular disability because “There must be objective findings to support the complaints of pain and Dr. Lowe has failed to document any physical findings to support Ms. Card’s complaints.” (R 19, RE 68, Tab 14).

The Committee then recommended that Card’s application for disability retirement under both Miss. Code Ann. 25-11-113 and 25-11-114 be denied. (R 21, RE 70, Tab 14). PERS Board of Trustees adopted such recommendation of denial on June 22, 2004. (R 14, RE 71, Tab 14).

Card timely appealed to Hinds County Circuit Court on July 20, 2004. (R 10, RE 72, Tab 15).

PERS filed the record with the Hinds County Circuit Clerk’s office on April 12, 2005.

On July 21, 2005, an agreed order to supplement the record was filed with Exhibit 1 consisting of eight pages of correspondence including the questionnaire from Dr. Ernest Lowe that PERS Executive Director Frank Ready stated would not be presented to the Disability Appeals Committee. (RE 76-83).

On December 6, 2006, the Hinds County Circuit Court affirmed PERS’ denial of “in the line of performance of duty” disability benefits under Miss. Code Ann. 25-11-114(6) but reversed PERS’ denial of benefits pursuant to Miss. Code Ann. 25-11-113(1)(a). PERS appealed such reversal to this Court on December 27, 2006 and Card cross appealed the Circuit Court affirmance on January 3, 2007. (R 38 &46, RE 105-106, Tab 19)

#### **SUMMARY OF THE ARGUMENT ON DIRECT AND CROSS APPEAL**

The Circuit Court did not err in finding Card disabled, however, it did err in not finding Card disabled pursuant to Miss. Code Ann. 25-11-114(6). No substantial evidence exists to uphold PERS’ denial of disability benefits since in light of Card’s numerous physicians’ opinions

and even PERS' independent medical examiner, Dr. Cooper Terry who stated Card's "subjective complaints of burning pain and persistent numbness/tingling are fairly impressive..." The Circuit Court erred in not applying the rule of *PERS v. Trulove*, Miss. Ct. App. No. 2006-SA-00550-COA, which held an on the job injury has been proven by the introduction of medical records and the incident report in such cases.

### **ARGUMENT ON DIRECT APPEAL**

**The Circuit Court correctly reversed the decision of PERS denying Card regular disability retirement pursuant to Miss. Code Ann. 25-11-113 because Card's medical disability is supported by reports of her treating surgeon, by her restrictions on her voice given by her Ear, Nose and throat specialist, a vocational expert, the Manager of Employee Relations, and by PERS' medical examiner who stated Card's "...subjective complaints of burning pain and persistent numbness/tingling are fairly impressive."**

Although Card's initial application for disability retirement was for in the line of duty disability pursuant to Miss. Code 25-11-114(6)<sup>7</sup>, PERS' decision went on to consider whether Card was eligible for disability pursuant to Miss. Code Ann. 25-11-113(1)(a) since she had over the four years of requisite service.

The legal requirement of proving PERS "regular" disability is stated at Miss. Code Ann. 25-11-113(1)(a) which states:

"...any active member in state service who has at least four (4) years of membership service credit may be retired by the Board of Trustees... provided the Medical Board, after medical examination shall certify that the member is mentally or physically incapacitated for the further performance of duty, that such incapacity is likely to be permanent, and that the member shall be retired."

Disability is defined in the same code section as the following:

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<sup>7</sup> PERS' application for disability benefits at Section 2 Retirement Type states "Select Only One". It is unknown why PERS' application does not allow applicants to select both "In the line of duty disability and non duty related disability when some applicants may have over the four years of requisite service and also become disabled in the line of duty.

“...the inability to perform the usual duties of employment or the incapacity to perform such lesser duties, if any, as the employer, in its discretion, may assign without material reduction in compensation, or the incapacity to perform the duties of any employment covered by the Public Employees’ Retirement System (Section 25-11-101 et seq.) that is actually offered and is within the same general territorial work area, without material reduction in compensation.”

Thus, Card only had to prove she had four years of service (which she met with her fifteen (15) years of service) and that she was unable to perform her job at the University as an accounting assistant due to all of her medical problems which included carpal tunnel syndrome, pain, heart bypass surgery on March 31, 2003, and the October 22, 2003 restriction of Oxford ear nose and throat specialist Dr. John F. Laurenzo that Card could not use her voice for more than two hours daily due to vocal paralysis. (R 136-137, RE 25-26, Tab 10).

Further, PERS incorrectly dismissed Card’s inability to speak more than two hours daily:

“Further, this Committee also finds that the condition of Ms. Card’s subclavian artery and vocal cords were fine on her last day of work and she did not sustain any problem with them until well after her last day of work. Thus, those problems are not to be taken into consideration with regard to disability in this forum as they did not result in her termination and are certainly not duty related.”

PERS legally erred in not considering such condition regardless of when it happened.

Rather, Card was not terminated, but testified she was still an employee of the University but was on “leave without pay.” (R 39, RE 51, Tab 12). Thus she was still a member of PERS. Miss. Code Ann. 25-11-105 states:

### **“III. TERMINATION OF SERVICE.**

“Membership in this system shall cease by a member withdrawing accumulated contributions, or by a member withdrawing from active service with a retirement allowance, or by a member’s death.”

Card, having never withdrew her contributions or received a retirement allowance

at that time or died, was still a member and thus PERS' refusal to consider her vocal paralysis as part of her disability was legally erroneous. Card's vocal paralysis and voice limitation was certainly relevant as her inability to perform her job particularly when she testified she often had to speak with vendors and act as a receptionist. Further, the consideration of such voice restrictions in combination with her hand restrictions was exceedingly relevant to her claim of regular disability pursuant to Miss. Code 25-11-113.

PERS' refusal to consider the voice restriction was legally erroneous since it occurred while Card was still a University employee and PERS member and was thus arbitrary and capricious. As stated most recently in *Public Employees' Retirement System v. Thomas*, 809 So. 2d 690 (Miss. App. 2001):

"An act is arbitrary when it is not done according to reason or judgment, but depending on the will alone. *Burkes v. Amite County Sch.. Dist.*, 708 So. 2d 1366, 1370 (Miss. 1998). An act is capricious when done without reason, in a whimsical manner, implying either lack of understanding or a disregard for the surrounding facts and settled controlling principles."

PERS apparently does not understand its own law regarding termination or who is a member and when such membership is terminated. The fact that Card was not terminated and still a PERS member at the time she received her voice injury means that such injury must be considered in combination with her carpal tunnel syndrome in determining whether she is entitled to regular disability retirement pursuant to Miss. Code 25-11-113.

The law is clear in Mississippi that the decision of an administrative agency must be undisturbed unless it is (1) not supported by substantial evidence, (2) is arbitrary and capricious, (3) is beyond the scope or power granted to the agency, (4) violates one's constitutional rights. *Public Employees' Retirement System v. Marquez*. 774 So. 2d 421 (Miss. 2001); *Fulce v. Public Employees' Retirement System*, 759 So. 2d 401, 404 (Miss. 2000).

Substantial evidence is “relevant evidence as reasonable minds might accept as adequate to support a conclusion. *Marquez, supra*.

Regardless of the foregoing PERS denied Card’s eligibility for regular disability stating:

“The Committee further found that Card was not entitled to regular disability because “There must be objective findings to support the complaints of pain and Dr. Lowe has failed to document any physical findings to support Ms. Card’s complaints.” (R 19, RE 68, Tab 14).

However, a review of the record will show that PERS’ denial of regular disability benefits to Card was arbitrary and capricious and not supported by substantial evidence. In fact, Dr. Lowe fully documented his physical findings and Card’s complaints of pain and even PERS’ own expert, Dr. Terry stated Card’s pain complaints were “...fairly impressive...” (R162, RE 62, Tab 13).

First, Dr. Lowe, Card’s longtime treating surgeon reported to PERS on its “Statement of Examining Physician” that Card had “moderate” severity carpal tunnel syndrome right and left, had “shown no improvement”, had performed right carpal release surgery on 9/15/02 and left carpal tunnel release surgery on 10/10/02, had impairments of “severe diminished use of [right and left] hands”, gave her permanent partial impairment rating of 20% to each hand, and gave as restrictions “avoid repetitive wrist motion.” (R 77, RE 3, Tab 3). Further, Dr. Lowe’s records document the continuing pain Card had before and after surgery in his office notes particularly from October 18, 2002 through February 10, 2003. (R 79-80, RE 5-6, Tab 3).

Second, On July 22, 2003, Card underwent a “Physical Work Performance Evaluation Summary” which indicated Card demonstrated “self limiting participation” on 52% of tasks due to “shooting pain in both wrists, numbness in fingers, burning of hand, pain in knees, pain in low back, and shortness of breath.” (R 9. RE 72, Tab 4).

Third, even PERS’ independent medical examiner, Oxford orthopedist Dr. Cooper Terry stated “However, her subjective complaints of burning pain and persistent numbness/tingling are

fairly impressive.” (R162, RE 62, Tab 13). So, can it really be said with substantial evidence that Card’s complaints of pain are not supported by the two orthopedic surgeons who treated and examined Card?

In addition, Oxford ear nose and throat specialist Dr. John F. Laurenzo restricted Card to not use her voice for more than two hours daily due to vocal paralysis suffered after heart bypass surgery. (R 136-137, RE 25-26, Tab 10).

More evidence of Card’s disability from her job were the impairment ratings given Card by the two doctors. Dr. Lowe gave Card permanent partial impairment rating of 20% to each hand, and gave as restrictions “avoid repetitive wrist motion.” (R 77, RE 3, Tab 3). Dr. Terry, although more conservative, still gave Card a 5% impairment to the left upper extremity and a 10% impairment to the right upper extremity. (R 162, RE 62, Tab 13).

Further, the impairment ratings and restriction of no repetitive use of her hands given by Dr. Lowe convinced vocational expert C. Lamar Crocker to conclude that Card had sustained a loss of access to the labor market of 100% based upon the restrictions of Dr. Lowe. (R 136-137, RE 25-26, Tab 10).

Moreover, University of Mississippi Manager of Employer Relations Wilma F. Webber-Colbert in responding to an inquiry from PERS Disability analyst Sharon Roberts as to “whether The University of Mississippi would be able to accommodate Mary Card’s medical condition” stated the following:

“We did not find any open positions that we felt Ms. Card might be qualified for that could be considered as sedentary.

Therefore, I cannot say, at this point, that the university would be able to accommodate her by placing her in a sedentary job. Hopefully, this letter answers your questions...” (R 127-128, RE 32-33, Tab 11).

Finally, taking such impairments, pain, restrictions and lack of vocational accommodation already suffered by Card and combine that with the vocal paralysis that Card suffered after heart



bypass surgery that resulted in Dr. Lorenzo's limitation that Card could not use her voice for more than two hours daily it should be obvious that substantial evidence does not exist to uphold PERS denial of regular disability benefits and the Circuit Court correctly found Card disabled.

The Court should affirm the Circuit Court's finding that substantial evidence does not support PERS' denial of Card's application for disability retirement and then reverse the Circuit Court's affirmance of PERS' denial of disability retirement pursuant to Miss. Code 25-11-114(6) for duty related disability.

### **ARGUMENT ON CROSS APPEAL**

**The Circuit Court erred in affirming the decision of PERS denying Card's application for disability retirement pursuant to Miss. Code Ann. 25-11-114(6) since such decision by PERS is not supported by substantial evidence and is legally incorrect because no evidence exists that Card's carpal tunnel syndrome was not the direct result of an accident or traumatic event occurring in the line of duty and that such caused her disability.**

Miss. Code Ann. 25-11-114(6) allows any active PERS member to qualify for disability retirement regardless of the number of years of service under the following conditions:

"(6) Regardless of the number of years of creditable service upon the application of a member or employer, any active member who becomes disabled as a direct result of an accident or traumatic event resulting in a physical injury occurring in the line of performance of duty, provided the medical board or other designated governmental agency after a medical examination certifies that the member is mentally or physically incapacitated for the further performance of duty and such incapacity is likely to be permanent, may be retired by the board of trustees on the first of the month following the date of filing such application but in no event shall the retirement allowance commence before the termination of state service."

The Disability Appeals Committee entered its written recommendation that "...Ms. Card had not persuaded this Committee that she is entitled to Duty Related Disability. There is no

testimony of an accident or trauma as required by the statute and interpreted by the Attorney General's office. Ms. Card's counsel pleads the micro trauma theory, but that theory has never been adopted by PERS. The medical literature is now showing that carpal tunnel syndrome is not the result of micro traumas, but more likely the result of obesity, diabetes and other illnesses or conditions." (R 19, RE 68, Tab 14).

Card would contend that the PERS erred in its statement that there was "no testimony of an accident or trauma as required by statute..." Rather, the documentary evidence is Card began working for the University of Mississippi on July 1, 1988 as a full time accounting assistant. (R 66, RE 1, Tab 1). The University filed a Notice of Injury with AmFed, their workers compensation carrier on September 17, 2002 stating that Card had an injury of "carpal tunnel" to both "hands' wrists" and stated "long term typing" was the "illness/abnormal health condition occurred...sequence of events and include any objects or substances that directly....made the employee ill" and stated "LONG TERM TYPING". ((R 66, RE 1, Tab 1).

Further, Card testified that severe pain started in the morning of August 30, 2002. (R 28-29, RE 40-41, Tab 12). She added she had wrist pain in her left hand a few days later and she later saw orthopedic surgeon Dr. Ernest Lowe Jr. who performed carpal tunnel surgery on her right hand on September 19, 2002 and on the left hand the following month.<sup>8</sup> (R 28-33, RE 40-45, Tab 12). Even Dr. Cooper Terry, PERS' medical examiner, never gave any opinion that Card's carpal tunnel syndrome was not caused by any other event than her employment, stating:

"She says she had pain and aching, numbness, and tingling off and on and on for years. She says she was writing and typing a good deal at work when the pain became worse on August 20, 2002. She reported the injury. She has been out of work since that time." (R 163, RE 61, Tab 13).

One previous PERS in the line of duty case exists regarding carpal tunnel syndrome:

<sup>8</sup> Dr. Lowe checked "Yes" to the question "Was your treatment for the claimant caused by the on the job injury of 8-30-02?" on a questionnaire propounded by the late William L. Cook's office to Dr. Lowe after PERS requested answers to such questions post hearing but PERS Executive Director Frank Ready responded that such would not be presented to the Disability Appeals Committee despite the Committee's requesting an independent medical examination after the hearing by Dr. Cooper Terry. (RE 78, Tab 16).

*Brinston v. Public Employees' Retirement System*, 706 So. 2d 258 (Miss. App. 1998). However, in that case unlike Card's, the Court of Appeals found Brinston's injury predated her two periods of employment and a shoving incident that worsened her problems with her hands.

The Court of Appeals noted:

"She was employed with them on two separate occasions. The first was from 1982 until 1987 and the second was from December 1, 1991 through August 24, 1994. She has been diagnosed with bilateral carpal tunnel syndrome. However it is not clear when the diagnosis was made....No matter which of these date is correct, they both predate the injury in question." (706 So. 2d at 259).

Additionally, in Brinston's case one member of the PERS Medical Board, Dr. Vohra, testified that "...the pre-existing condition also could have been aggravated by duties performed at home." (706 So. 2d at 260).

Here no evidence exists that Card's injury occurred anywhere else except directly from her duties at the University. PERS' physician, Dr. Terry, never gave any opinion that the injury could have been caused by any other trauma or even aggravated by anything else. No evidence exists that Card, unlike Brinston, ever left her employment of the University but worked there continuously since 1988.

The law is clear in Mississippi that the decision of an administrative agency must be undisturbed unless it is (1) not supported by substantial evidence, (2) is arbitrary and capricious, (3) is beyond the scope or power granted to the agency, (4) violates one's constitutional rights. *Public Employees' Retirement System v. Marquez*. 774 So. 2d 421 (Miss. 2001); *Fulce v. Public Employees' Retirement System*, 759 So. 2d 401, 404 (Miss. 2000); *Davis v. Public Employees' Retirement System*, 750 So. 2d 1225, 1229 (Miss. 1999).

Card would assert that no evidence, testimony, or even reference to medical literature exists in the record or PERS' decision in denying Card's application for in the line of duty disability to support their incredible assertion that "The medical literature is now showing that

carpal tunnel syndrome is not the result of micro traumas, but more likely the result of obesity, diabetes and other illnesses or conditions.” (R 19, RE 68, Tab 14). Such reasoning by PERS without reference to evidence in the record has been expressly condemned in *Public Employees’ Retirement System v. Thomas*, 809 So. 2d 690 (Miss. App. 2001) stating, “The substantial evidence that is sufficient to withstand appellate scrutiny cannot be evidence contained within the confines of the doctors’ heads.”

Card would assert that substantial evidence cannot be found in the record to affirm PERS’ denial that Card did not receive an in the line of duty injury from performing her duties for the University or that such did not directly cause her disability.

Disability is defined in Miss. Code Ann. 25-11-113(1)(a) as:

“...the inability to perform the usual duties of employment or incapacity to perform such lesser duties, if any, as the employer, in its discretion, may assign without material reduction in compensation, or the incapacity to perform the duties of any employment covered by the Public Employees’ Retirement System that is actually offered and is within the same general territorial work area, without material reduction in compensation.”

Card would further assert that both PERS and the Circuit Court erred in denying her in the line of duty disability because they incorrectly found Card did not suffer an “accident or trauma”.<sup>9</sup> Rather, the Court of Appeals in *PERS v. Trulove*, Miss. Ct. App. No. 2006-SA-00550-COA, seems to indicate that Card met her burden of proof as it did when it held that Truelove “by providing the Committee with her medical records and the incident report has satisfied her burden that she is disabled as a result of an on-the-job injury...” Here, Card provided the Committee with exhaustive medical records and opinions from two surgeons and the incident report that was made seventeen days after her last day of work after she notified her employer three days after her date of injury. (R 66, RE 1, Tab 1). Card would assert that the

<sup>9</sup> The recommendation of the PERS Disability Appeals Committee stated “There is no testimony of accident or trauma as required by the statute and interpreted by the Attorney General’s office” while the Circuit Court stated “Ms. Card provided no evidence that her disability is the result of an accident or traumatic event...” (R 19, RE 68, Tab 14; R 36, RE 103, Tab 18).

'accident or trauma" required by statute occurred on August 30, 2002 when her right hand suddenly starting bothering her and she sought emergency medical attention that ultimately resulted in bilateral carpal tunnel surgery and the subsequent end of her continuous fifteen year employment at the University of Mississippi. (R 31, RE 43, Tab 12)

The Circuit Court's affirmance of PERS' denial of Card's in the line of duty disability application pursuant to Miss. Code Ann. 25-11-114(6) is legally incorrect and unsupported by substantial evidence and should be reversed and rendered and benefits ordered to be paid to Card under such statute.

### CONCLUSION

On cross appeal, the Court should reverse and render the decision of the Circuit Court affirming PERS' denial of Card in the line of duty disability benefits pursuant to Miss. Code Ann. 25-11-114(6) or alternatively, affirm the Circuit Court's reversal of PERS' decision denying Card regular disability benefits pursuant to Miss. Code Ann. 25-11-113. on direct appeal.

Respectfully submitted,

MARY CARD, Appellee/Cross-Appellant

BY: George S. Luter  
GEORGE S. LUTER, Her Attorney

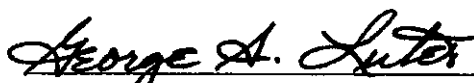
**CERTIFICATE OF SERVICE**

I, George S. Luter, attorney for Appellee/Cross-Appellant, hereby certify that I have hand delivered a copy of the foregoing Brief of Appellee/Cross-Appellant to the following:

Hon. Winston Kidd  
Hinds County Circuit Court  
Hinds County Circuit Courthouse  
Jackson, MS 39201

Margo Bowers, Esq.  
Public Employees' Retirement System of Mississippi  
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SO CERTIFIED this the 24th day of October, 2007.



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