IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI — **APPELLANT**

VS.

CAUSE # 2011-SA-00248
CONSOLIDATED WITH 2009-SA-01630-COA;
AND CONSILIDATED WITH 2008-CT-00627-COA

ALBERT "BUTCH" LEE — **APPELLEE**

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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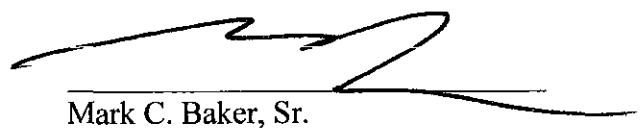
CERTIFICATE OF INTERESTED PERSONS

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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Albert "Butch" Lee	Appellee
Mark C. Baker, Sr., Esq.	Attorney for Appellee
Public Employees' Retirement System (PERS)	Appellant
Sheila Jones, Dr. Joe Blackston and Dr. Mark Meeks	PERS Appeals Committee
Hon. Jane L. Mapp	Attorney for Appellant



Mark C. Baker, Sr.
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I. STATEMENT OF THE ISSUE

THE CIRCUIT COURT SHOULD BE AFFIRMED AS PERS'S DENIAL OF DUTY-RELATED BENEFITS TO MR. LEE WAS ARRIVED AT BY INCORRECT APPLICATION OF LAW, WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND WAS ARBITRARY AND CAPRICIOUS

II. STATEMENT OF THE CASE

PERS seeks review of the circuit court's finding that PERS's categorization of Mr. Lee's benefits as Non Duty-Related as opposed to Duty-Related was arbitrary and capricious.

III. SUMMARY OF THE ARGUMENT

In denying Mr. Lee Duty-Related disability benefits, PERS misapplied the relevant law. In particular, PERS wrongly interpreted MCA Section 25-11-114(c) (1972 as amended) to exclude any person from receiving Duty-Related disability benefits if that person has any kind of condition, whether known or unknown, or whether the same became chronic or symptomatic as a result of work related trauma or injury.[1]

For the reasons set forth herein, it is respectfully submitted that within the framework of the applicable statutory and common law that Mr. Lee's disability should be determined to be Duty-Related and he receive the said benefits.

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[1]Until the November 2004 injury Mr. Lee was completely able to do anything that he wanted to do and was able to do his job without any restrictions up until that point and had prided himself in being physically fit such that he could out perform just about anybody else at his work. Vol.2 Pp.47-48.

IV. ARGUMENT

STANDARD OF REVIEW

The proper standard of review is *de novo* when an administrative agency misinterprets a question of law;[2] otherwise, the agency's order will not be disturbed otherwise unless the order: 1) is not supported by substantial evidence, 2) is arbitrary or capricious, 3) is beyond the scope or power granted to the agency, or 4) violates one's constitutional rights.[3]

V. ISSUE

This Court is asked to determine whether there was sufficient evidence to support the circuit court's finding that Mr. Lee's on-the-job injury was a direct result of an accident or traumatic event that occurred in the line of duty in his position as a state employee.

Prior to the circuit court reversing PERS, the Mississippi Court of Appeals decided *Public Employee's Retirement System v. Trulove*,[4] and it is respectfully submitted that *Trulove* is dispositive of the issue presented herein, despite its absence from PERS's brief.

Ms. Trulove asserted that she was injured on-the-job "restraining a twelve-year-old boy who was about to receive an injection when she felt a 'pop' in her neck which was immediately followed by pain in her head and arms."[5] In a similar fashion, Mr. Lee was lifting a rescue dummy that weighed between 160 and 170 pounds and was turning to drop it in a hole "...and for lack of a better

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[2] *Blackwell v. Miss. Bd. of Animal Health*, 784 So.2d 996, 999 (CA Miss. 2001).

[3] *Fulce v. Public Employees Retirement System of Mississippi*, 759 So.2d 401, 404 (Miss. 2000). See also *Bd. of Law Enforcement Officers Standards and Training v. Butler*, 672 So.2d 1196, 1199 (Miss. 1996).

[4] 954 So.2d 501 (CA Miss. 2007).

[5] *Id.* at 502.

word, at that point in time, I describe it as a bolt of lightning - I've heard that before and you have too, but it was excruciating."[6] This event was summarized by Dr. Blackston, one of the PERS hearing officers, "Q. And you had it in your hands, I guess, and you lifted it and turned and you felt a sharp paid in your back, is that correct?" A. "Correct."[7]

In *Trulove*, as in Mr. Lee's case, PERS found the claimant to be disabled but wrongly denied her Duty-Related disability benefits by contending that the proximate cause of her disability was the result of a pre-existing condition.[8] The Court of Appeals, in affirming the Circuit Court for the First Judicial District of Hinds County, determined without dissent, that the injuries that Ms. Trulove suffered were the direct result of an accident that occurred in the line of duty.[9]

Consistent with the analysis in *Trulove*, Mr. Lee satisfied his burden of establishing that he was disabled as a result of an on-the-job injury by providing PERS with his medical records and incident report indicating his initial injury.[10] Moreover, Mr. Lee did more than this as he also presented his PERS Form 9A: "Application for Retirement Benefits Employment and Wage Certification" which became a part of the record[11] and Mr. Greg Duncan and Ms. Pam Ladner, both

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[6]Vol.2 P.35.

[7]Vol.2 P.51.

[8]*Trulove*, 954 So.2d at 503-04.

[9]*Id.*

[10]Vol.2 P.128. As in *Trulove*, PERS failed to give full consideration to medical records presented by Mr. Lee. In particular, PERS cherry picked a statement from Dr. Belknap that he felt Mr. Lee had suffered only lumbar back strain. Vol.2 P.24. A comparison of the previous statement in PERS's denial of Mr. Lee's Duty Related status demonstrates that in addition to misapplying the law, PERS ignored medical evidence when Mr. Lee's counsel pointed out Dr. Belknap's note also stated he "deferred those questions about [...] impairment [...] to Dr. Senter." Vol.2 P.23. Dr. Senter, as we now know, went on to determine the singular event that caused Mr. Lee's disability.

[11]Vol.2 P.112-14.

"Authorized Employer Representatives", "certif[ied] that [Mr. Lee's] accident or injury occurred in the performance of duty causing this claim to be filed."[12] Mr. Lee also submitted his PERS Form 6: "Disability Retirement Benefit Payment Selection Form" whereby it was indicated that he had been hurt on-the-job.[13] Pursuant to *Trulove*, the substantial evidence presented by Mr. Lee indicates that his injury resulted from the placement of the dummy was an accident and/or traumatic event that occurred in the line of duty and demonstrated that PERS acted arbitrarily and capriciously.

Ultimately, *Trulove* puts to rest PERS' flawed interpretation of MCA Section 25-11-114(6) that a person with a common, asymptomatic condition that becomes symptomatic as a direct result of injury at work, is precluded from having their injury classified as Duty Related simply because of the underlying condition.

MR. LEE'S INJURY ON NOVEMBER 5, 2004 WAS THE RESULT OF AN ACCIDENT OR TRAUMATIC EVENT

MCA Section 25-11-114(6) (1972 as amended) provides in pertinent part that:

> Regardless of a 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.....Permanent and total disability resulting from a cardiovascular, pulmonary or musculo-skeletal condition which was not a direct result of a traumatic event occurring in the performance of duty shall be deemed an ordinary disability.

To establish his claim for hurt-on-the-job disability benefits, Mr. Lee must prove two elements. First, that he is disabled as defined by MCA Section 25-11-113(1)(a) (1972 as amended).[14] and second, that he became disabled as the direct result of an on-the-job injury as required by MCA

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[12] *Id.* at Section 4.

[13] *Id.* at Section 3.

[14] PERS found Mr. Lee disabled. Vol.2 P.18. This is not in dispute.

Section 25-11-114(6).[15] In *PERS v. Smith*, the court opined that "the pivotal question...is whether...(the) disability occurred as a direct result of the on-the-job injury".[16]

> A general statute has codified what has long been the rule in statutory interpretation that 'words and phrases contained in the statutes are used according to their common and ordinary acceptation and meaning; but technical words and phrases according to their technical meaning.' If a statute is not ambiguous, the court should apply the plain meaning of the statute. Whether this statute is 'plain' depends on whether the phrase "actuarial method" has a technical meaning that is plain.[17]

It respectfully submitted that instead of "actuarial method" as used above, "trauma" and "traumatic event" are terms which should be given their medical definitions herein. The term "trauma" as defined in Dorland's Medical Dictionary means: "a wound or injury".[18] "Traumatic" as defined by *Taber's Cyclopedic Medical Dictionary* means: "caused by or relating to an injury." As opined in *Smith* and *Trulove* (discussed *supra*), and as defined, the identifiable event of placing a rescue dummy which directly results in immediate injury requiring the care of numerous physicians resulting in an Anterior Body Fusion and a Posterior Percutaneous Instrumentation at L-4-5, to correct what Dr. Senter refers to as a spondylitic spondylolisthieses with approximately grade 1 slip of L4-5,[19] meets this test of "traumatic event".

Further, in denying Mr. Lee's Duty-Related benefits, PERS ignored all other sources and relied specifically on a definition of "traumatic event" from an attorney general's opinion written in

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[15] *Public Employee's Retirement System v. Smith*, 880 So.2d 348, 351 (Miss. 2004).

[16] *Id.* at 355.

[17] *Estate of Baxter v. Shaw Associates, Inc.*, 797 So.2d 396, 404 (CA Miss. 2001). Internal citations omitted.

[18] *Dorland's Medical Dictionary* and Vol. 2 P. 70.

[19] Vol.2 P.158.

response to a question arising from a starkly different context than the facts resulting in Mr. Lee's injury.[20] The question presented to the attorney general in the relied upon opinion was:

> If a factual scenario were to exist in which an applicant has submitted a claim for "line-of-duty"disability benefits and the applicant has a psychiatric diagnosis and medical documentation which describes a mental incapacity attributable to the applicant's psychological reaction to a specific event or to general situations which have occurred on an ongoing basis in the performance of a duty, would the applicant be eligible for benefits if **no medical evidence** is presented to show the mental incapacity was directly caused by an accident or traumatic event to result in some physical injury which in turn causes the physical mental incapacity or may such incapacity result with no physical injury whatsoever?"[21]

Medical evidence **was** presented that a singular event was the genesis of Mr. Lee's symptomatic spondylolithesis.[22] This opinion applied to the instant facts militates against PERS's position and further demonstrates that PERS made its decision regarding Mr. Lee in disregard of the substantial evidence present and by will alone.[23]

Furthermore, the attorney general's response states, "It should be noted that the requirement of a traumatic event or accident would preclude a claim for line of duty disability benefits based exclusively on general situations occurring on an ongoing basis as described in your letter." Mr. Lee did not suffer a series of "general situations occurring on an ongoing basis." Dr. Senter identified

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[20]Vol.2 P.23.

[21]1994 WL 117329 (Miss.A.G.) (emphasis added).

[22]In his final office note of December 5, 2005, Dr. Senter determined that "I do think he has a congenital condition that is usually asymptomatic but do (sic) to the injury in October 2004 became symptomatic." Vol. 2 P. 74.

[23]The supreme court defines arbitrary as "not done according to reason or judgment, but depending on the will alone." Capricious means "done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles." "If an administrative agency's decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary and capricious." *Wright v. Public Employee's Retirement System*, 24 So.3d 382 (Miss. 2009) (internal citations omitted).

the singular point of symptomatic onset of Mr. Lee's condition-the events of November 5, 2004. PERS has misconstrued MCA Section 25-11-114(6) in its application of the terms "accident or traumatic event". Moreover, PERS's unreasonably constricted definition of "traumatic event" from a merely persuasive source[24] distinguishable from Mr. Lee's injury is against the substantial evidence presented and is arbitrary and capricious. Dr. Senter's identification of this event is at least as strong as that in *Trulove*, which the Court of Appeals determined was not given proper consideration.[25]

THE PERMANENT DISABILITY SUSTAINED BY MR. LEE RESULTED FROM A CARDIOVASCULAR, PULMONARY OR MUSCULO-SKELETAL CONDITION WHICH WAS THE DIRECT RESULT OF A TRAUMATIC EVENT OCCURRING IN THE PERFORMANCE OF DUTY

In considering the question of debilitating spondylolisthesis as an eligible condition, the following question was posed to Dr. Blackston by Mr. Lee's counsel, "Q: 'As I understand spondylolisthesis and other type conditions like that in people over 40 is almost an automatic diagnosis. It's something we have.' A: 'It's not uncommon.'"[26]

In fact, in describing his understanding of this condition, Dr. Blackston made the following statement, "I don't think that the traumatic event which is lifting or pain, or whatever, that didn't cause his spondylolisthesis. It certainly caused him pain and everybody here will be willing to admit that, I think. That's my - the cause of spondylolisthesis is, you know, kind of the way God made

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[24] "An attorney general's opinion is entitled to careful consideration and regarded as persuasive; however, the opinion in (sic) not binding upon the court considering the same question of law." *Blackwell*, 784 So.2d at 1000 *citing State ex re. Holmes v. Griffin*, 667 So.2d . 1319, 1326 (Miss. 1995).

[25] *Trulove*, 954 So.2d at 504.

[26] Vol.2 P.57.

us."[27] Unfortunately, Dr. Blackston's view ignored the injurious outcome of the actions required by Mr. Lee's occupation.

In addition, Ms. Jones added that in her opinion "it can become symptomatic without anything happening".[28] However, something did happen to Mr. Lee; he was injured after lifting a 160+ pound dummy while performing his duties as a state employee.[29] While there is evidence that Mr. Lee had back pain prior to November 2004, there is no evidence in the record that such was in any way disabling or limiting to any degree whatsoever.[30] In *Brinston v. Public Employees' Retirement System*,[31] the Court of Appeals focused its attention on whether there was one accident or traumatic event which caused the actual disability.[32] Moreover, as noted in *Smith, infra*, in analyzing the question of whether Mr. Smith's disability was the result of an on-the-job injury so as to meet the requirements of MCA Section 25-11-114(6), the Court noted that in essence the question turns on the issue of whether there is a direct causal connection between Smith's disability and the incident alleged to have caused the same.[33] Mr. Lee had prior back pain, but the same was infrequent, not disabling in any way, and did not result in any work related limitations or restrictions.

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[27]Vol.2 P.57.

[28]Vol.2 P.35.

[29]*Id.*

[30]Vol.2 Pp.47-48.

[31]706 So.2d 258, 260 (CA Miss. 1998).

[32]*Id.* at 260.

[33]*Smith*, 880 So.2d at 352.

Both *Brinston* and *Smith* are instructive in the analysis of a Duty-Related disability. In both the court concluded that there was *not* one accident or traumatic event that caused the purported disability. The contradictory facts in those cases do not exist in this case. In this case, there is no indication that prior to the November 5, 2004 incident that Mr. Lee had suffered any back problems which had resulted in prior surgery, limitations in his work, or in any way negatively affected his ability to perform his job.[34] This is further bolstered by the sheer mountain of personal and medical leave accrued by Mr. Lee prior to the said incident.[35] The only conclusion to be drawn is that prior to November 5, 2004, as opined by Dr. Senter, Mr. Lee was asymptomatic with a condition confessed by one of the PERS' panel members as not uncommon, which was caused to become symptomatic by the traumatic events of November 5, 2004. It is respectfully submitted that PERS' conclusions that Mr. Lee's permanent disability is not Duty-Related misapprehend the applicable law, are not supported by the substantial evidence and are arbitrary and capricious.

V. CONCLUSION

It is respectfully submitted that Mr. Lee's permanent disability was the result of an on-the-job injury meeting the requirements of MCA Section 25-11-114(6) and that for all reasons that decisions from PERS are reversible, the decision of the circuit court should be affirmed. It is respectfully submitted that for all of the reasons set forth herein, contained in the record and as reasonably relied upon in reviewing such decisions, that the Court reverse the decision of PERS in this respect and

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[34]Vol.2 P.47.

[35]Vol.2 P.58.

determine that Mr. Lee is entitled to Duty-Related disability benefits rather than Non-Duty related benefits.

Respectfully submitted, this the 16th day of August, 2011.

ALBERT "BUTCH" LEE, Appellee

BY: _____
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CERTIFICATE OF SERVICE

I, MARK C. BAKER, SR., attorney for the Appellee, do hereby certify that I have this day mailed, postage prepaid, via United States Mail, a true and correct copy of the above and forgoing to:

Hon. Jane L. Mapp
Office of the Attorney General
429 Mississippi Street
Jackson, Mississippi 39205

Hon. Winston Kidd
Circuit Court Judge for the Seventh Circuit
Court District
P.O. Box 327
Jackson, Mississippi 39205

THIS, the 16th day of August, 2011.

MARK C. BAKER, SR.