IN THE SUPREME COURT OF MISSISSIPPI

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI (PERS)

APPELLANT

VS

CAUSE NO. 2011-SA-00248;
CONSOLIDATED WITH 2009-SA-01630-COA;
AND CONSOLIDATED WITH 2008-CT-00627-COA

ALBERT "BUTCH" LEE

APPELLEE

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed people 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.

The Board of Trustees of the Public Employees' Retirement System

Honorable Jane L. Mapp, Counsel for Appellant

Honorable Jim Hood, Attorney General

Honorable Winston Kidd, Hinds County Circuit Court Judge

Honorable Mark Baker, Counsel for Appellee

Mr. Albert "Butch" Lee, Appellee

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE

STATUTES & ADMINISTRATIVE CODES

STATEMENT REGARDING ORAL ARGUMENT

The issues in this matter have been fully briefed, thus, the Appellant asserts that oral argument will not aid or assist the decisional process of this Court.

STATEMENT OF THE ISSUES

I. THE CIRCUIT COURT ERRED IN ITS DECISION FINDING THAT THE DECISION OF PERS DENYING MR. LEE'S CLAIM FOR HURT-ON-THE-JOB DISABILITY BENEFITS WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS THEREFORE ARBITRARY AND CAPRICIOUS.

STATEMENT OF THE CASE

This matter involves an appeal filed by the Appellant, the Public Employees' Retirement System (PERS), wherein it seeks review of the Opinion and Order entered by the Circuit Court of the First Judicial District of Hinds County, Mississippi on July 2, 2007. Mr. Lee sought the receipt of hurt-on-the-job disability benefits from the Public Employees' Retirement System. The Medical Board reviewed his application and supporting documentation and approved him for the receipt of regular disability benefits, but denied his claim for hurt-on-the-job disability benefits. Thereafter, he appealed the denial of the claim for hurt-on-the-job disability benefits and was granted a hearing before the Disability Appeals Committee (DAC). The Committee, after reviewing the testimony and exhibits, presented its recommendation to the Board of Trustees. On April 18, 2006, the Board adopted the Proposed Statement of Facts, Conclusions of Law and Recommendation of the Disability Appeals Committee to deny Mr. Lee's request for the payment of hurt-on-the-job disability benefits as defined under Miss. Code Ann. Sections 25-11-113 and 25-11-114. Pursuant to Miss. Code Ann. Section 25-11-120 Mr. Lee prosecuted an appeal to the Circuit Court of the First Judicial District of Hinds County. Following the submission of all briefs, the Court reversed the Order of the Board of Trustees and granted hurt-on-the-job disability benefits to Mr. Lee. Aggrieved by the Circuit Court's decision, PERS appeals.

STATEMENT OF THE FACTS[1]

Mr. Lee was employed as an instructor for the Mississippi Fire Academy. He terminated employment October 31, 2005, with 21.75 years of service credit in the Mississippi Public Employees' Retirement System. Mr. Lee was approved for the receipt of regular disability benefits by the PERS Medical Board. (Vol 2, P. 32).

Mr. Lee appealed the denial of his claim for hurt-on-the-job disability benefits from PERS. He claimed that he sustained an on-the-job injury to his back on November 5, 2004, which rendered him disabled. (Vol. 2, P. 35). At the time of the alleged incident, which is the basis of his claim, Mr. Lee was preparing for a training scenario for fire academy candidates. He was going to place a rescue dummy in an underground vault for a rescue team. The dummy, according to Mr. Lee, weighs 160 to 170 pounds dry and can weigh 200 plus pounds wet. He earlier loaded the dummy on the back of an easy-go. At the time of the incident, he was lifting the dummy "to turn to go in to drop it in this hole." He testified that as he lifted the dummy and turned, he felt a sharp pain. (Vol. 2, P. 35, 51). He described the feeling he experienced as "excruciating." (Vol. 2, P. 35). The pain that hit him all of a sudden was described as affecting his "shoulder blades, all the way down through my groin into my legs." (Vol. 2, P. 36). He stated that he continued to experience pain in his left leg and below his knee and in his back. (Vol. 2, P. 37). He was asked: "Did that happen when you were lifting it or when you were turning?" In response he said, "When I was turning." (Vol. 2, P. 35).

Mr. Lee testified at the hearing before the Disability Appeals Committee that he had experienced back pain prior to the 2004 incident. When questioned about the prior

[1] Reference to the record is indicated by "Vol." for volume and "P." followed by the appropriate page number.

back pain, Mr. Lee said that in 1992 and 1993 he suffered back pain that was masked by other problems. He claimed that while he suffered back pain during this time it did not limit his activities. He did state, however, that sitting for long periods of time caused him great pain. (Vol. 2, P. 47). Records show that he was seen at MEA Medical Clinics in 1993 for complaints of lower back pain. Those notes say that Mr. Lee reported having back pain for 1½ to 2 years and that x-rays showed spondylolisthesis. (Vol. 2, P. 24; 88). Mr. Lee further testified that in 1994, some 10 years prior to the alleged on-the-job injury, he had fallen from a height of 12 to 16 feet. (Vol. 2, P. 7; 46). He again went to MEA in 1999 for various complaints including lower back pain. (Vol. 2, P. 96). On July 19, 2004, Dr. Myers notes show that he called complaining of prostatitis and lower back pain. (Vol. 2, P. 95). Mr. Lee also reported to his doctor that prior to the 2004 incident he had suffered from chronic back pain. (Vol. 2, P. 162).

Initially following the November 5, 2004 incident, Mr. Lee thought the pain he felt was caused by a prostate problem. (Vol. 2, P. 38). He saw his urologist who assured him it was not a prostate problem. Mr. Lee then went to see Dr. Belknap at the MEA Clinic some four days after the incident with the rescue dummy. Since he was experiencing abdominal pain the doctor not only took x-rays, but also tried to determine whether he suffered from a vascular problem. (Vol. 2, P. 39). Mr. Lee also underwent physical therapy. When the physical therapy did not alleviate his pain, he went back to Dr. Belknap who referred him to the Mississippi Spine Clinic where he saw Dr. Senter. (Vol. 2, P. 40).

Mr. Lee first saw Dr. Senter on December 21, 2004. In his office notes from that date Dr. Senter writes that Mr. Lee reported that he had been suffering significant back

pain since lifting a dummy two and a half to three months earlier, but that he had suffered with long term chronic low back pain predating the accident. (Vol. 2, P. 162). Dr. Senter also noted that Mr. Lee's x-rays showed "grade 1 L4 and L5 spondylolisthesis with marked degenerative disc disease." Dr. Senter wrote that Mr. Lee should continue to work until he returned with his MRI. (Vol. 2, P. 161).

After undergoing an MRI, Mr. Lee said that he was told he had "not only a bulging disk or ruptured disk, but in essence a dead disk." According to Dr. Senter's office notes dated December 23, 2004, the MRI showed "marked degenerative changes at 4-5 and also at 2-3, but a fairly normal appearing 3-4 disc and a pretty normal 5-1 disc, only with some desiccation." (Vol. 2, P. 160). Dr. Senter also diagnosed Mr. Lee as having spondylolisthesis, a congenital problem, in addition to degenerative problems. (Vol. 2, P. 49).

Mr. Lee secured a second opinion from Dr. Collum, which according to Mr. Lee, was the same as Dr. Senter's diagnosis; however, Dr. Collum's recommended treatment was not the same as Dr. Senter's. (Vol. 2, Pp. 40-41). Mr. Lee did not submit his medical records from Dr. Collum, but according to Dr. Senter's notes, Dr. Collum recommended Mr. Lee try nerve blocks and that if that did not work he could consider posterior spinal fusion. (Vol. 2, P. 159).

Mr. Lee had surgery on his back in March 2005, followed by physical therapy. (Vol. 2, P. 41). According to Mr. Lee the surgery helped tremendously. (Vol. 2, P. 42).

After reviewing the medical documentation and testimony, the Disability Appeals Committee found that Mr. Lee suffered a congenital problem and that the November 5, 2004 incident merely aggravated this pre-existing condition. They further found that the

act of turning while holding the dummy did not constitute a traumatic event as set forth in Miss. Code Ann. Section 25-11-114. Accordingly, the Disability Appeals Committee recommended that Mr. Lee's application for hurt-on-the-job disability be denied. The Board of Trustees adopted the Recommendation of the Disability Appeals Committee by Order entered April 18, 2006.

Aggrieved by the decision of the Board of Trustees, Mr. Lee filed an appeal in the Circuit Court pursuant to Miss. Code Ann. § 25-11-120 (Rev. 2006). The Circuit Court determined that Mr. Lee is entitled to hurt-on-the-job disability benefits and that the decision of the Board of Trustees of PERS is not supported by substantial evidence and, thus, is arbitrary and capricious.

SUMMARY OF THE ARGUMENT

The Order of the PERS Board of Trustees is supported by substantial evidence. It was error for the Circuit Court to reweigh the evidence and substitute its judgment for that of PERS. In order to qualify for a hurt-on-the-job disability benefit under PERS law, Mr. Lee must prove that his disability was the direct result of an accident or traumatic event resulting in a physical injury occurring in the performance of duty and that as a result he terminated employment. Pursuant to Miss Code Ann. §25-11-114, a disability which stems from the aggravation of a pre-existing musculo-skeletal condition, such as Mr. Lee's congenital spondylolisthesis and degenerative disc disease, is to be treated as a regular disability. The medical evidence, as reviewed by the Disability Appeals Committee, clearly does not establish that Mr. Lee suffered an on-the-job injury directly resulting in a disability as defined in Miss Code Ann. §25-11-114. Accordingly, although

he is entitled to a regular disability benefit, he is not entitled to a PERS hurt-on-the-job disability benefit. The Circuit Court erred in using its own judgment to determine that the single event of lifting a dummy and turning "was the genesis of Lee's symptomatic spondylolisthesis" and that he was therefore entitled to hurt-on-the-job disability benefits. (Vol. 1, P. 8) The decision of the Circuit Court should be reversed and the decision of the Board of Trustees reinstated.

ARGUMENT

STANDARD OF REVIEW

The standard of review on appeal from an administrative decision of the PERS Board of Trustees is limited to a determination of whether the Board's decision: (1) was supported by substantial evidence; (2) was arbitrary or capricious; (3) was beyond the authority of the Board to make; or (4) violated a statutory or constitutional right of the claimant. ***Thomas v. Public Employees' Retirement System***, 995 So. 2d 115, 118 (Miss. 2008); ***Laughlin v. Public Employees' Retirement System***, 11 So.3d 154, 158 (Miss. Ct. App. 2009); ***Public Employees' Retirement System v. Dozier***, 995 So. 2d 136, 138 (Miss. Ct. App. 2008). "There is a rebuttable presumption in favor of a PERS ruling. Neither [the appellate court] nor the circuit court is entitled to substitute its own judgment for that of PERS, and it is impermissible for a reviewing court to re-weigh the facts of the case." ***Public Employees Retirement System v. Card***, 994 So. 2d 239, 242 (Miss. Ct. App. 2008)(quoting. ***Public Employees' Retirement System v. Dishmon***, 797 So. 2d 888, 891 (Miss. 2001)). Stated differently, even if this honorable court would have reached a different conclusion had it been sitting as finder of fact, the Court may not reweigh the

evidence and substitute its own opinion for that of the Board. ***See Bynum v. Miss. Dept. of Education***, 906 So.2d 81, 91 (Miss. Ct. App. 2005).

I. THE CIRCUIT COURT ERRED IN ITS DECISION FINDING THAT THE DECISION OF PERS DENYING MR. LEE'S CLAIM FOR HURT-ON-THE-JOB DISABILITY BENEFITS WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS THEREFORE ARBITRARY AND CAPRICIOUS.

In addition to service retirement benefits, PERS provides disability benefits to members who meet the statutory requirements for such benefits. There are two (2) categories of disability benefits available to PERS members: (1) a regular disability benefit payable to members who are vested and who become disabled for any reason, and (2) a hurt-on-the-job disability benefit, payable to members regardless of the number of years of creditable service, where the member becomes disabled due to an injury resulting from an accident or traumatic event occurring in the line of duty. Miss. Code Ann. §§25-11-113 and 25-11-114 (Rev. 2010).

Applications for disability benefits are reviewed by the PERS Medical Board, which arranges and passes upon all medical examinations for disability purposes. The PERS Medical Board is composed of three physicians appointed by the PERS Board of Trustees. Miss. Code Ann. §25-11-119(7) (Rev. 2010). Any person aggrieved by a determination of the PERS Medical Board may request a hearing before the designated hearing officer of the PERS Board of Trustees, pursuant to Miss. Code Ann. §25-11-120 (Rev. 2010). The Board has established a Disability Appeals Committee made up of two physicians and a nurse/attorney to perform the duties of hearing officer and to then make a recommendation to the Board.

Disability, as defined under PERS law, Miss. Code Ann. §25-11-113, is in pertinent part:

> . . . 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.

§25-11-113 further provides that:

> . . . in no event shall the disability retirement allowance commence before the termination of the state service, provided that the medical board, after a 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 should be retired . . .

The Medical Review Board found that Mr. Lee did in fact qualify for regular disability pursuant to the criteria set out in § 25-11-113, but found he did not qualify for duty-related, a/k/a hurt-on-the-job disability benefits under § 25-11-114. The statutory requirements for hurt-on-the-job disability benefits are set forth in Miss. Code Ann. §25-11-114(6), as follows:

> 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 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 retirement allowance shall equal the allowance on disability retirement as provided in Section 25-11-113 but shall not be less than fifty percent (50%) of average compensation.
>
> 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**. [*Emphasis Added*].

Since the Medical Review Board approved Mr. Lee for the receipt of regular disability benefits, the sole issue before the Disability Appeals Committee and the PERS Board of Trustees was whether his disability was the "direct result of a traumatic event occurring in the performance of duty," thus entitling him to a hurt-on-the-job disability benefit instead of the regular disability benefit. The Disability Appeals Committee found, and the Board agreed, that Mr. Lee's disability was not the direct result of a traumatic event occurring in the performance of duty. This decision is supported by the diagnosis of Mr. Lee's own doctor, Dr. Senter, that he suffered from congenital spondylolisthesis and degenerative disc disease. The Board found that Mr. Lee suffered from a pre-existing musculo-skeletal condition and that while the November 5, 2004, incident may have aggravated his condition, it was not the direct cause of his disability. They further found that turning his torso while lifting a rescue dummy did not constitute an "accident or traumatic event" as required by statute.

"Unless PERS' order was not supported by substantial evidence, or was arbitrary or capricious, the reviewing court should not disturb its conclusions." ***Public Employees' Retirement System v. Howard,*** 905 So.2d 1279, 1284 (Miss. 2005). Upon close reading of the record presently before this Honorable Court, it is evident that the decision of the PERS Board of Trustees is based upon substantial evidence. Substantial evidence has

been defined as "evidence which affords an adequate basis of fact from which the fact at issue can be reasonably inferred." ***Brakefield v. Public Employees' Retirement System*** *940* So.2d at 948; ***Public Employees' Retirement System v. Howard,*** 905 So.2d at 1285; ***Davis v. Public Employees' Retirement System***, 750 So.2d 1225, 1233 (Miss. 1999). This Court has further defined substantial evidence as evidence that is "more than a scintilla; it must do more than create a suspicion, especially where the proof must show bad faith." ***Mississippi State Board of Examiners for Social Workers and Marriage and Family Therapists v. Anderson***, 757 So.2d 1079, 1086 (Miss. Ct. App. 2000) (*quoting* ***Mississippi Real Estate Commission v. Ryan***, 248 So.2d 790, 794 (Miss. 1971)(citing 2 Am. Jur. 2d *Administrative Law* § 688 (1962)). ***See also Howard***, 905 So.2d at 1285.

As stated ***supra***, for a claimant to receive hurt-on-the-job benefits instead of regular disability, he must prove that he became "disabled as a direct result of an accident or traumatic event resulting in a physical injury occurring in the line of performance of duty." Miss. Code Ann. § 25-11-114(6). This definition establishes two elements which must be shown by the claimant: first, that an "accident or traumatic event" caused his injury, and second, that the traumatic event *alone* caused the injury. ***Public Employees' Retirement System v. Card***, 994 So.2d 239 (Miss. Ct. App. 2008); ***Public Employees' Retirement System v. Smith***, 880 So.2d 348 (Miss. Ct. App. 2004). Aggravation of pre-existing conditions, while possibly qualifying the claimant for regular disability, would not meet the statutory standards for hurt-on-the-job benefits. ***Brinston v. PERS***, 706 So.2d 258 (Miss. Ct. App. 1998).

Injuries sustained in the normal course of one's job requirements often will not meet the stricter statutory definition of disability found in § 25-1-114. ***See Card***, 994

So.2d at 245-46. In ***Card***, the claimant developed carpal tunnel syndrome over the course of her fifteen year career with a state medical center. ***Id.*** at 241. Attempting to apply for hurt-on-the-job disability, she was unable to show any single "accident or traumatic event." ***Id.*** at 245. The court upheld PERS's denial of benefits. ***Id.*** In so doing, the court pointed to the definition of a traumatic event given by the Mississippi Attorney General:

> an event in which a worker involuntarily meets with a physical object or some other external matter and the worker is a victim of a great rush of power that he himself did not bring into motion. This definition was *held not to include physical injuries resulting from a slip and fall accident and physical conditions resulting from an excessive work effort.* ***Id.*** at 246 (quoting Op. Att'y Gen. *Walker* (Mar. 16, 1994))(emphasis original).

The Court's meaning was clear: even if Ms. Card's workplace activities had contributed to the development of her carpal tunnel, short of a specific, extraordinary causal event, she would not qualify for hurt-on-the-job disability benefits.

Mr. Lee's November 5, 2004, injury similarly failed to meet this definition of traumatic event. Mr. Lee trained firemen for a living. Lifting, moving and placing training equipment and dummies was a routine part of his job. No external force, no "great rush of power that he himself did not bring into motion" caused or even contributed to his injury. His back problems developed over time and the strain on his back was the unfortunate result of his own, routine actions and pre-existing condition. That Mr. Lee's back problems have left him unable to continue work as a fire academy instructor is an undisputed fact, but his injuries fail to meet the strict statutory definition of hurt-on-the-job disability because they were not the result of a traumatic event under Mississippi law.

Even when a claimant can show a specific accident or traumatic event occurred in the workplace, if the resulting injury only served to exacerbate a preexisting condition he will be unable to meet the statutory definition of hurt-on-the-job disability. In ***Public Employees' Retirement System v. Smith***, 880 So. 2d 348, 349 (Miss. Ct. App. 2004), the Claimant was employed as a laundry worker at the Mississippi State Hospital at Whitfield where he claimed he was injured while lifting laundry, feeling a sharp pain in his back which he subsequently reported to his supervisor. ***Id.*** at 349. While the claimant in ***Smith*** was able to demonstrate that a specific accident, one ostensibly meeting the definition of "traumatic event," had occurred while he was at work, the court nevertheless affirmed PERS's denial of hurt-on-the-job benefits. ***Id.*** at 358. Smith had a history of back problems, having suffered several different accidents and complained of persistent back pain for several years leading up to his application for disability. ***Id.*** at 350. The ***Smith*** Court found there was substantial evidence to support PERS' finding that Smith's disability was not the direct result of the incident at the State Hospital. ***Id.*** at 358. As with Smith's claim, it was Mr. Lee's burden to prove that his injury was the direct result of a single traumatic event, a burden he failed to overcome because of his previous medical issues. ***See id.*** at 353.

The Mississippi Court of Appeals was faced with another similar case in ***Brinston***. Even more so than the claimant in ***Smith***, Brinston was able to point to a specific traumatic event in the workplace, as she had been shoved against a wall and hurt her shoulder. ***Brinston***, 706 So.2d at 259. Her accident, the result of an external force, appeared to meet the Attorney General's definition of traumatic event to the letter; however, Brinston had been diagnosed with carpal tunnel over a year before her accident.

Id. at 260. Her disability "evolved over a period of time and events" and the court found it clear that "there were many other factors which may have contributed to or caused [her] condition and disability." ***Id.*** Her condition had been aggravated by the injury at her workplace, but to qualify for PERS hurt-on-the-job benefits, a disability "must be the direct result of the injury and the injury must be the *sole cause* of the disability." ***Id.*** (*emphasis added*).

Even if it were conceded that Mr. Lee's November injury was a "traumatic event" under the PERS disability statute, it was far from the sole cause of his disability. In 1990, Mr. Lee injured himself while lifting a fire extinguisher. In 1994, he fell from a height of 12 to 16 feet. He had complaints of back pain throughout the decade, and told Dr. Senter that he had experienced "long term chronic low back pain" since before the accident. (Vol. 2, P. 162). Mr. Lee himself was unable to initially attribute his condition to the November 11, 2004 event; he at first believed his symptoms to be the result of a prostrate issue, not any workplace trauma. Only after visiting several doctors was he able to pinpoint the problem in his back, a diagnostic journey indicative of the fact that no single event caused his disability.

The pain Mr. Lee experienced lifting and twisting a dummy in his role as a fireman cannot be said to be the "sole cause" of his disability in the face of such medical history. As such, the PERS Board was correct in determining that his case did not meet the statutory requirements for hurt-on-the-job benefits. This conclusion is supported by substantial evidence as set out by the Disability Appeals Committee in their extensive review of the medical evidence and testimony. The Committee did not dispute the Medical Review Board's finding that Mr. Lee is disabled from further performance of his

duties as a Fire Academy Instructor. They did find however, that he suffered from congenital and degenerative back problems that pre-dated the November 5, 2004, work-related incident and was not entitled hurt-on-the-job disability benefits. They presented the following summary of the medical evidence offered by Mr. Lee in support of his claim:

> Mr. Lee saw Dr. Belknap at the MEA clinic on November 9, four days after he injured himself at work. He reported lifting a dummy at work and experiencing low back pain. X-rays showed L4-5 spondylolisthesis, "low disc spine L2-3" and his diagnosis was lumbar back strain. His diagnosis appeared to be low back strain. He was placed on Zanaflex (a muscle relaxer) for pain. When Mr. Lee returned to MEA twenty days later, he reported he was still having pain but he was improved. Dr. Belknap wrote on December 13, 2004, that Mr. Lee was experiencing low back pain, persistent, and that **his diagnosis was spondylolisthesis**. He was referred to Dr. Senter.
>
> Mr. Lee first saw Dr. Senter on December 21, 2004, and he reported that he had injured his back lifting a dummy but had **suffered with long term chronic low back pain predating the accident. X-rays showed "grade 1 L4 and L5 spondylolisthesis with marked degenerative disc disease.**" Dr. Senter wrote that Mr. Lee should continue to work until he returned with his MRI. Two days later, **the MRI showed marked degenerative changes at L4-5 and also L2-3 but a fairly normal appearing L3-4 disc and pretty normal L5-S1 disc only with some slight dessication** (thinning out of the disc).
>
> Mr. Lee apparently had a second opinion with Dr. Collum who recommended that blocks be considered. We do not have Dr. Collum's records so we are relying on the records from Dr. Senter which refer to this evaluation. Dr. Senter wrote that nerve blocks did not seem to work well with a mechanical back pain. He said that Mr. Lee did not have any signs of radiculopathy.
>
> Dr. Senter admitted Mr. Lee to the hospital on March 10, 2005, writing that **Mr. Lee has experienced severe back pain for five months but had long term, chronic low back pain predating an accident in the fall of 2004.** Dr. Senter performed an anterior and posterior fusion on March 10, 2005, inserting a screw at L4-5 for the diagnosis of L4-5 spondylolisthesis. He did well

> postoperatively and was discharged four days later. Mr. Lee saw Dr. Senter post-operatively and on August 5, 2005, Dr. Senter wrote that Mr. Lee was doing well and not taking any medicine. His x-rays showed good early fusion and the doctor wanted him to go through a rehabilitation program. He was released to return to work on September 15, 2005, with a 50-pound lifting restriction. On October 5, 2005, Mr. Lee returned to Dr. Senter and the note states that Mr. Lee was doing better but still having some back pain from time to time. He assigned a 45-pound lifting restriction and told to find another line of work. **Dr. Senter completed a PERS Form 7, Statement of Examining Physician stating that Mr. Lee has spondylolisthesis, congenital, and he was able to return to work with a 45-pound permanent lifting restriction.** On December 5, 2005, Dr. Senter wrote in his office note that Mr. Lee was doing fairly well but he was worried about being rejected for disability. Dr. Senter opined that Mr. Lee would not be able to return to work as a firefighter or even teaching at the academy. **Dr. Senter wrote that he thinks Mr. Lee has a congenital condition that is usually asymptomatic** and his "injury" in October of 2004 caused it to become symptomatic.
>
> Mr. Lee's history also includes being followed by Dr. Dotherow for internal hemorrhoids and a small sessile distal sigmoid colon polyp. Dr. Myers also has followed for prostatitis. Mr. Lee has suffered on the job injuries on May 16, 1990, when he pulled muscles in the back of his neck and upper shoulders. (Vol 2; P. 20-22)(emphasis added).

Additionally, Mr. Lee's own testimony shows that he experienced back pain dating back to at least 1992. The Record shows he was seen at MEA Medical Clinics in 1993 for complaints of lower back pain and was diagnosed with congenital condition spondylolisthesis at that time. He also suffered a fall from a significant height in 1994. He again went to MEA in 1999 for various complaints including lower back pain. (Vol. 2, P. 96). He complained to Dr. Myers on July 19, 2004, of prostatitis and lower back pain. (Vol. 2, P. 95). The evidence before the Court clearly documents Mr. Lee's congenital and degenerative back problems manifesting in a long history of back pain. While Mr. Lee's condition became more problematic after turning while carrying a

dummy when setting up mock recovery at the training academy, the November 5, 2004 injury in and of itself was not the direct cause of his disability.

Based on the record and the law governing hurt-on-the-job disability, the incident that took place with the dummy does not qualify Mr. Lee for anything but a regular disability. It is the burden of the claimant to prove he is in fact disabled as the result of an on-the-job injury. Mr. Lee's condition is congenital and he has suffered from back problems prior to the incident. The disability he now suffers from was not the direct result of a trauma or an accident suffered on the job. The disability is the result of an underlying condition that was aggravated by an on the job injury.

Moreover, as previously mentioned, Miss. Code Ann. Section 25-11-114 (6) provides that "Permanent and total disability resulting from a ....musculo-skeletal condition that was not the result of a traumatic event occurring in the performance of duty shall be deemed an ordinary disability". Musculosketal is defined as "relating to muscles and to the skeleton." ***See Stedman's Medical Dictionary***, 26th Edition (1995). The record provides overwhelming evidence that Mr. Lee suffered from back problems prior to the November 5, 2004, incident. If not for Mr. Lee's pre-existing, congenital spondylolisthesis, twisting while holding the dummy, which was a routine part of his job and not an accident or traumatic event, would not have resulted in a disability. The PERS Board of Trustees rightfully concluded that Mr. Lee was not rendered disabled as the direct result of an on-the-job accident or traumatic event as defined in Miss. Code Ann. § 25-11-114. ***See, Brinston,*** 706 So.2d 258 (Miss. Ct. App. 1998)(where claimant suffering from carpal tunnel syndrome which was aggravated when he was shoved into a well in a work-related accident, court held that the disability was not be the direct result

of an accident or traumatic event in that there were other factors which may have "contributed to or caused Brinston's condition and disability.") The Board's decision is supported by substantial evidence and the Circuit Court erred in reweighing that evidence and reversing the decision of the Board. As the Court opined in ***Smith***:

> The decision to deny Smith disability benefits was made by PERS through its Medical Board and Disability Appeals Committee, which consists of five medical doctors. These doctors review medical records, testimony and other evidence to determine, based on their professional medical opinion, whether the statutory requirements have been met. In ***Public Employees' Retirement System v. Howard***, [905 So.2d 1279 (Miss. 2005)], the Mississippi Supreme Court held:
>
> > Sorting through voluminous and contradictory medical records, then determining whether an individual is permanently disabled is better left to physicians, not judges. This is the idea behind the creation and expansion of administrative agencies. "The existence within government of discrete areas of quasi-legislative, quasi-executive, quasi-judicial regulatory activity in need of expertise is the *raison d'etre* of the administrative agency." ***McGowan v. Mississippi State Oil & Gas Board***, 604 So.2d 312, 323 (Miss 1992). "Because of their expertise and the faith we vest in it, we limit our scope of judicial review." ***Id.***
>
> (citations omitted.)
>
> PERS, through its medical doctors, was in a far better position to evaluate Smith's medical history and the evidence presented to decide whether there was a direct causal connection between Smith's disability and the incident on November 11, 1992, at the State Hospital.

Smith, 880 So.2d at 352.

The Committee, in their position of finder of fact and utilizing their medical expertise, provided a "reasoned and unbiased evaluation of the evidence." ***See Public Employees' Retirement System v. Cobb,*** 839 So.2d 605, 609 (Miss. Ct. App. 2003). The

Committee found, the Board agreed, and the record confirms that there is no substantial evidence to indicate that Mr. Lee's disability was the direct result of a traumatic event as that term has been interpreted, but that his pre-existing condition was exacerbated when merely he turned to place the dummy in a hole. As the Committee noted, Mr. Lee "was not struck by any object or force." What happened was that "he simply turned" and the turning was not caused by an unforeseen event. Even if this incident did meet the definition of an accident or traumatic event, the statute controlling whether a member in PERS is awarded hurt-on-the-job disability would exclude him as he had an "underlying and preexisting musculo-skeletal problem." Although Dr. Senter noted that Mr. Lee's back was not symptomatic until November 5, 2004, the record is replete with evidence that Mr. Lee suffered for back pain long before this incident. The Board's decision to grant regular disability, but to deny hurt-on-the-job disability was clearly supported by substantial evidence and should be reinstated.

CONCLUSION

The record before this Court clearly supports the decision entered by the PERS Board of Trustees. The medical evidence and the statutory provisions governing the administration of the Public Employees' Retirement System support Mr. Lee's claim for regular disability but not hurt-on-the-job disability benefits as set forth in the well reasoned and unbiased evaluation of the Disability Appeals Committee which was adopted by the Board of Trustees. The Order of the PERS Board of Trustees is supported by substantial evidence, is neither arbitrary nor capricious as determined by the Circuit Court and was not entered in violation of either statutory or constitutional rights of the

CERTIFICATE OF SERVICE

I, Jane L. Mapp, Attorney for the Appellee, Board of Trustees of the Public Employees' Retirement System, do hereby certify that I have this day hand delivered or mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing ***Brief of Appellee*** to:

Mark C. Baker, Sr., Esq.
Baker Law Firm, PC.
306 Maxey Drive, Suite D, Baker Building
Brandon, MS 39042

Judge Winston Kidd
Hinds County Circuit Court Judge
Post Office Box 327
Jackson, MS 39205-0327

This the 27th day of July 2011.

Jane L. Mapp, MSB 9618
Special Assistant Attorney General