

**BEFORE THE EXECUTIVE DIRECTOR
OF THE INDIANA PUBLIC RETIREMENT SYSTEM**

IN THE MATTER OF)	1977 POLICE OFFICERS' AND
ROGER L. KILBURN,)	FIREFIGHTERS' PENSION AND
Petitioner,)	DISABILITY FUND
)	
v.)	
)	
INDIANA PUBLIC)	
RETIREMENT SYSTEM,)	
Respondent.)	


FINAL ORDER

The Board of Trustees ("Board") of the Indiana Public Retirement System ("INPRS") is the ultimate authority in administrative appeals brought by members of the 1977 Police Officers' and Firefighters' Pension and Disability Fund (the "77 Fund") under IC 4-21.5-3-28 and 35 IAC 2-5-5(a)(7). In the Statement of Board Governance, the Board delegates to the Executive Director the authority to conduct a final authority proceeding, or a review of decision points by the administrative law judge ("ALJ"), to issue a final order in this matter.

1. The ALJ entered a Trial Order ("Order") in this matter on December 31, 2011.
2. Copies of the Order have been served upon the parties.
3. Pursuant to IC 4-21.5-3-29(d)(2) and Indiana Trial Rule 4.17(B)(2), it has been more than fifteen (15) days since the ALJ served the Order upon the parties.

NOW THEREFORE the Decision and the Order of the Administrative Law Judge is affirmed.

DATED January 27, 2012



Steve Russo, Executive Director
Indiana Public Retirement System
One North Capitol, Suite 001
Indianapolis, IN 46204

CERTIFICATE OF SERVICE

I certify that on the 27th day of January, 2012, service of a true and complete copy of the foregoing was made upon each party or attorney of record herein by depositing same in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed.

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**BEFORE AN ADMINISTRATIVE LAW JUDGE
OF THE INDIANA PUBLIC RETIREMENT SYSTEM**

IN THE MATTER OF
ROGER L. KILBURN,

Petitioner.

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1977 POLICE OFFICERS' AND
FIREFIGHTERS' PENSION AND
DISABILITY FUND

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PUBLIC EMPLOYEE'S
RETIREMENT FUND

TRIAL ORDER

Summary and Procedural History

Petitioner, Roger L. Kilburn ("Kilburn"), served approximately 19 years with the Carmel Fire Department ("CFD"). By virtue of his service, Kilburn was a member of the 1977 Police Officers' and Firefighters' Pension and Disability Fund ("1977 Fund"), administered by the Indiana Public Retirement System ("INPRS").¹

Kilburn resigned from the CFD in November 2010. The local pension board of the CFD determined that Kilburn had a covered impairment that was a Class 2 disability. Exhibit 1.² Kilburn applied for disability benefits from the 1977 Fund on approximately November 22, 2010. Ex. 2.

On December 15, 2010, based at least in part upon a report issued by Dr. Omkar Markand, M.D., the 1977 Fund issued an initial determination in which it found that: (1) Kilburn was eligible for benefits; and (2) there was no suitable and available work for Kilburn within the CFD. The 1977 Fund determined that Kilburn had a covered, Class 3 disability with a 10% degree of impairment. Ex. 3.

¹ Effective July 1, 2011, the Indiana Public Employees' Retirement Fund and the Indiana Teachers' Retirement Fund were merged to create the Indiana Public Retirement System. For purposes of clarity, all other references to these entities are to the Indiana Public Retirement System.

² The only exhibits offered were 18 exhibits submitted jointly by the parties.

Kilburn filed timely an appeal of the 1977 Fund's initial determination of his class
of disability and degree of disability. Ex. 4. An evidentiary hearing was conducted on
October 6, 2011.

Findings of Fact

[REDACTED]

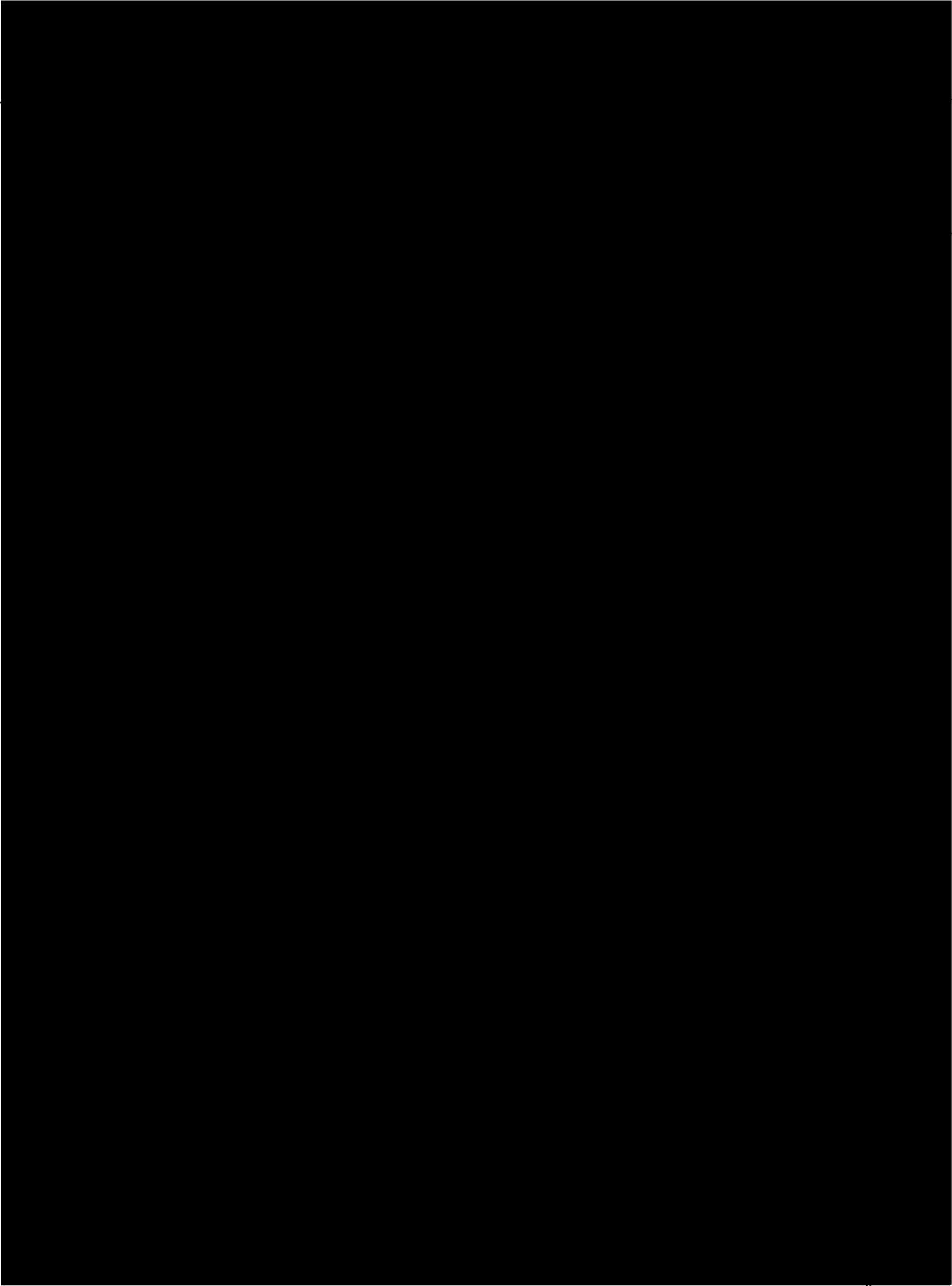
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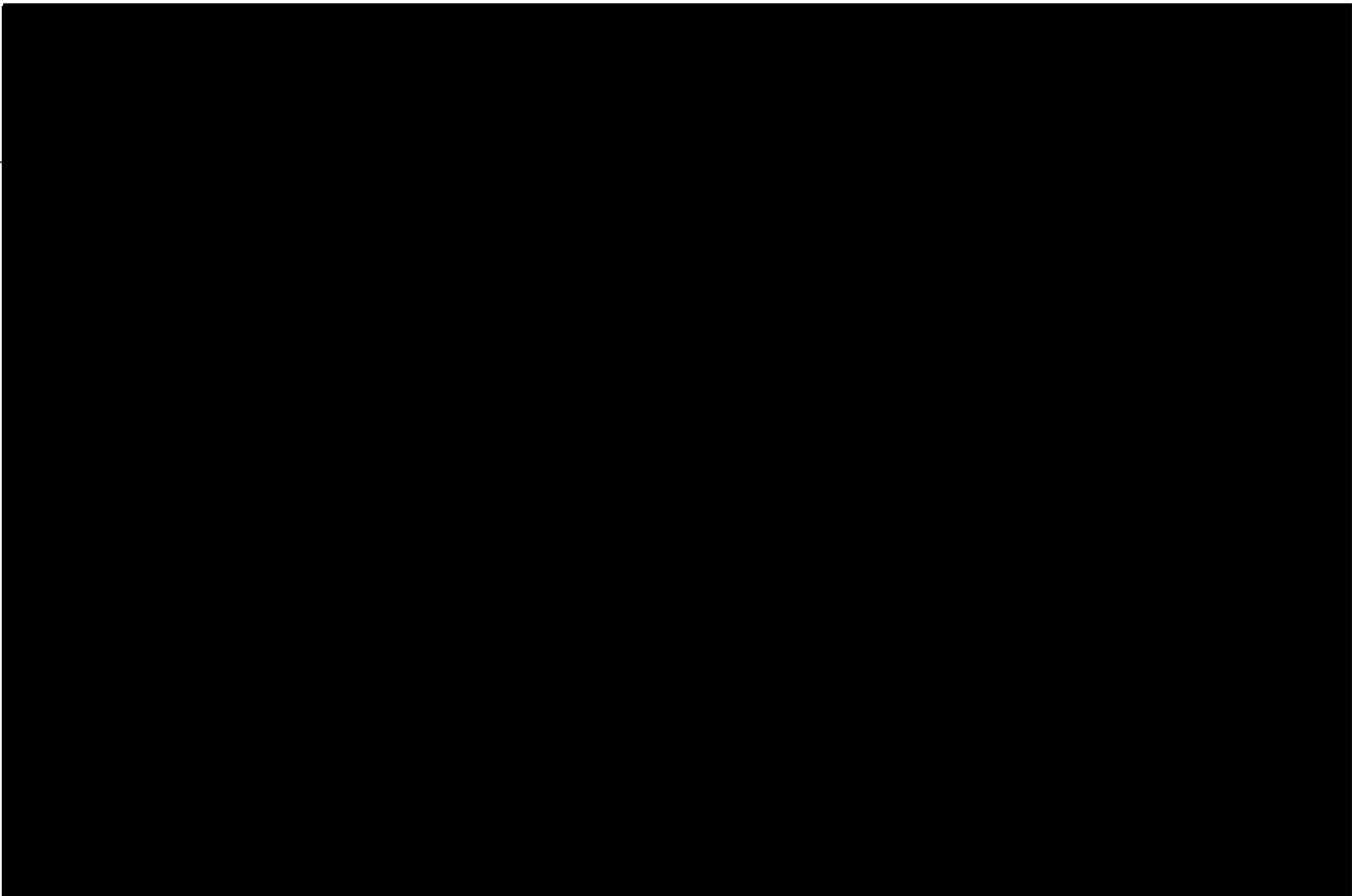
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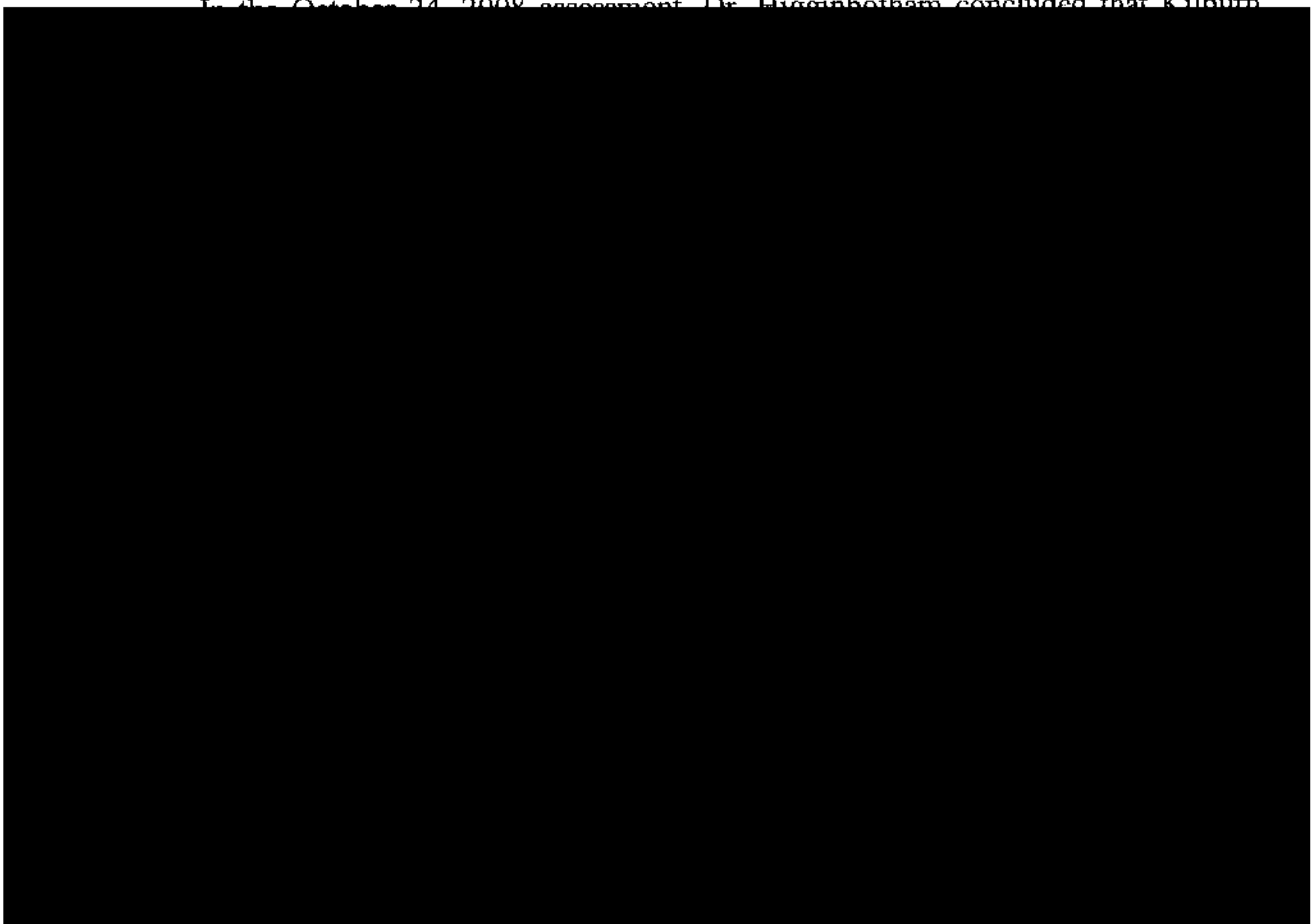
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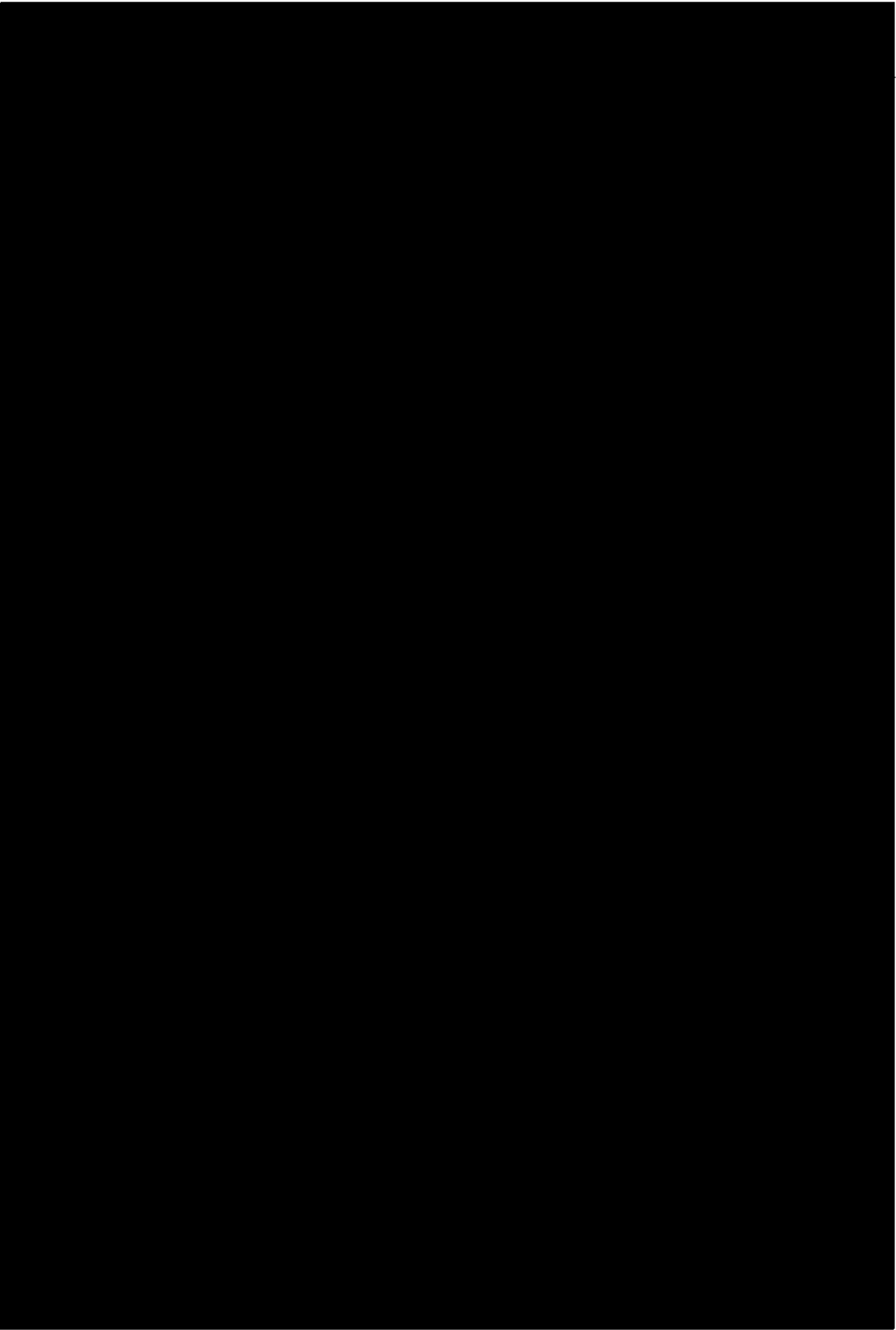
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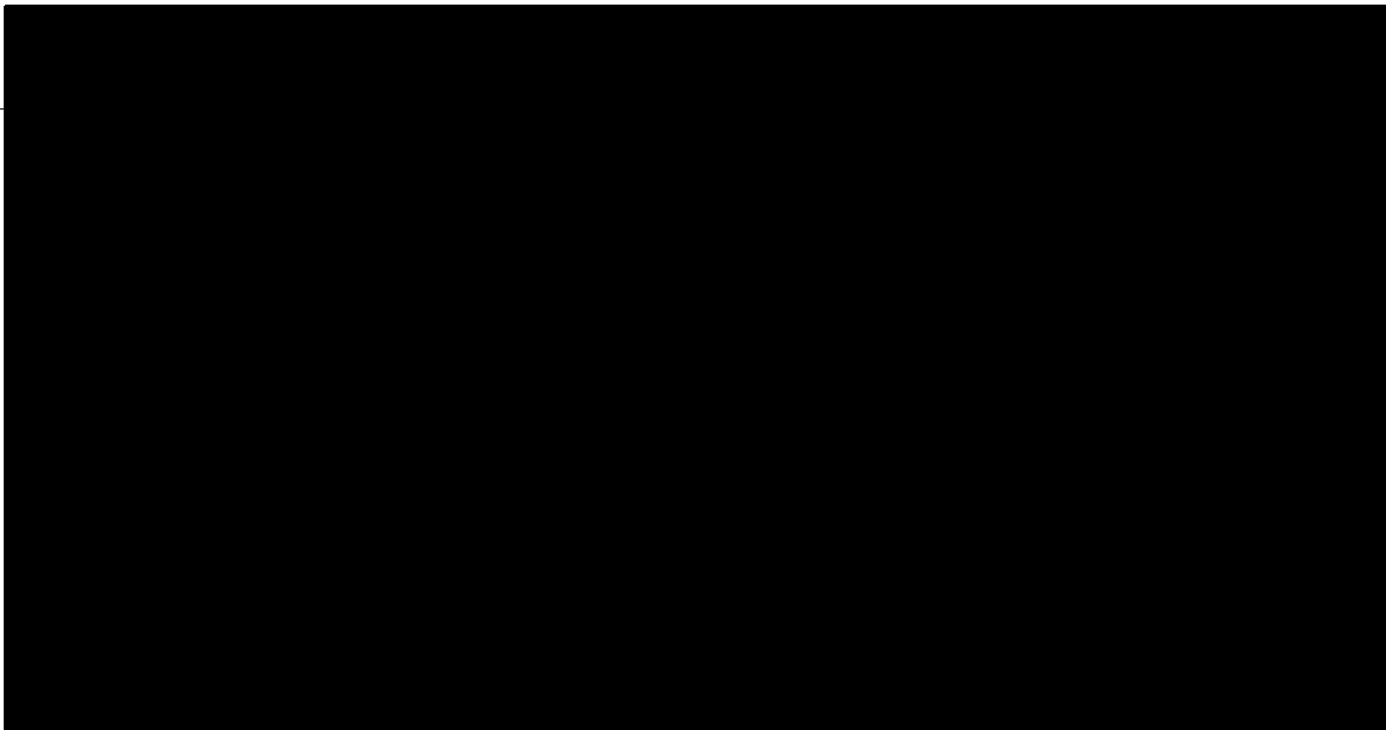




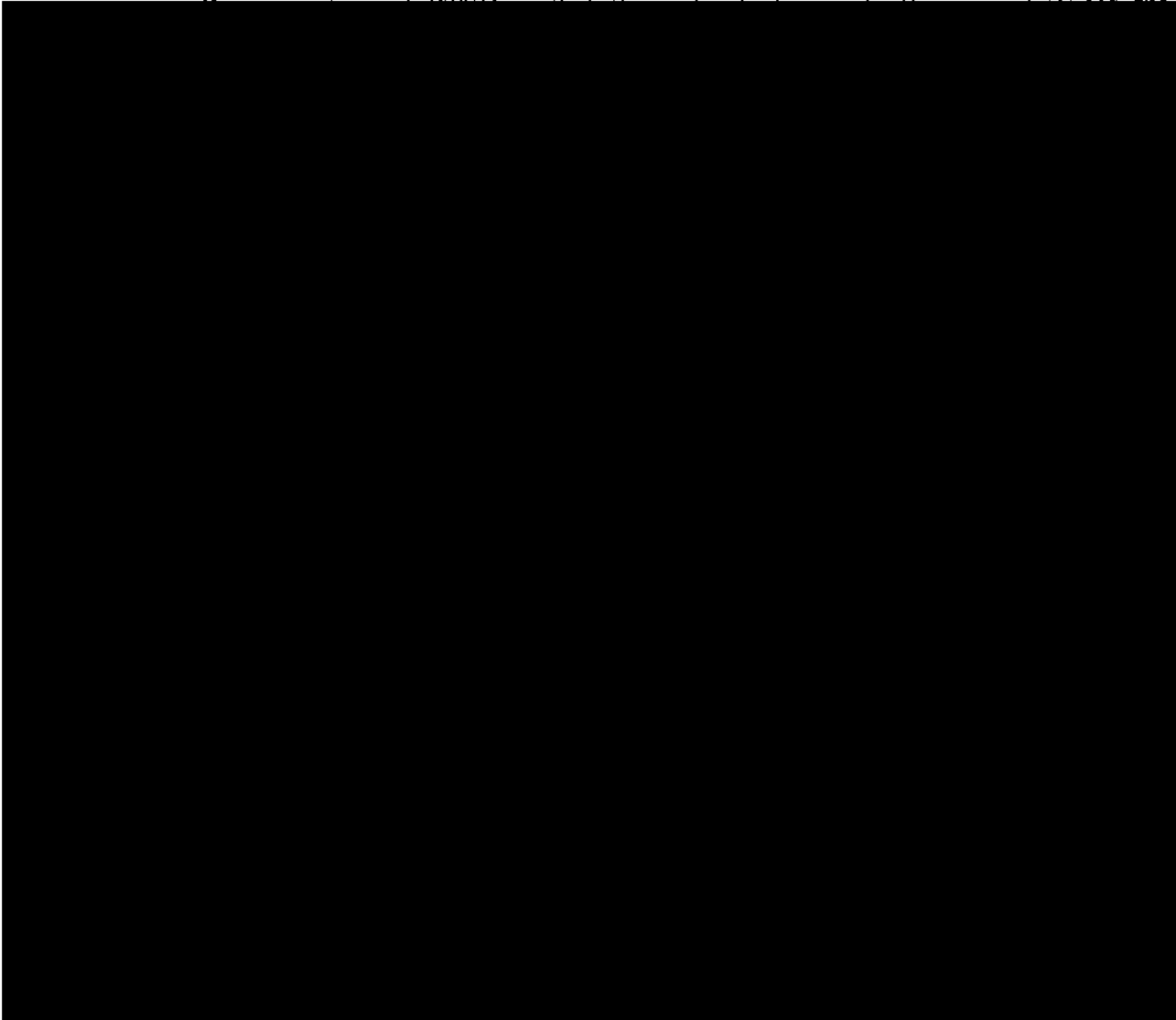
In the October 24, 2008 assessment, Dr. Higginbotham concluded that Kilburn







CONFIDENTIAL - SECURITY INFORMATION





Conclusions of Law

Indiana Code Chapter 36-8-8 establishes and governs the 1977 Fund. The parties agreed that Kilburn was unable to work. There are three classes of impairment. Indiana Code § 36-8-8-12.5. An individual's class of impairment determines, in part, the amount of the individual's monthly disability benefit. The parties agreed that Kilburn did not have a Class 1 impairment. The dispute concerned whether Kilburn's impairment was Class 2 or Class 3. Kilburn asserted that he had a Class 2 impairment, while the 1977 Fund asserted that Kilburn had a Class 3 impairment.

A Class 3 impairment is defined simply as anything that is not a Class 1 or Class 2 impairment. Thus, the analysis below addresses whether Kilburn's condition constituted a Class 2 impairment.

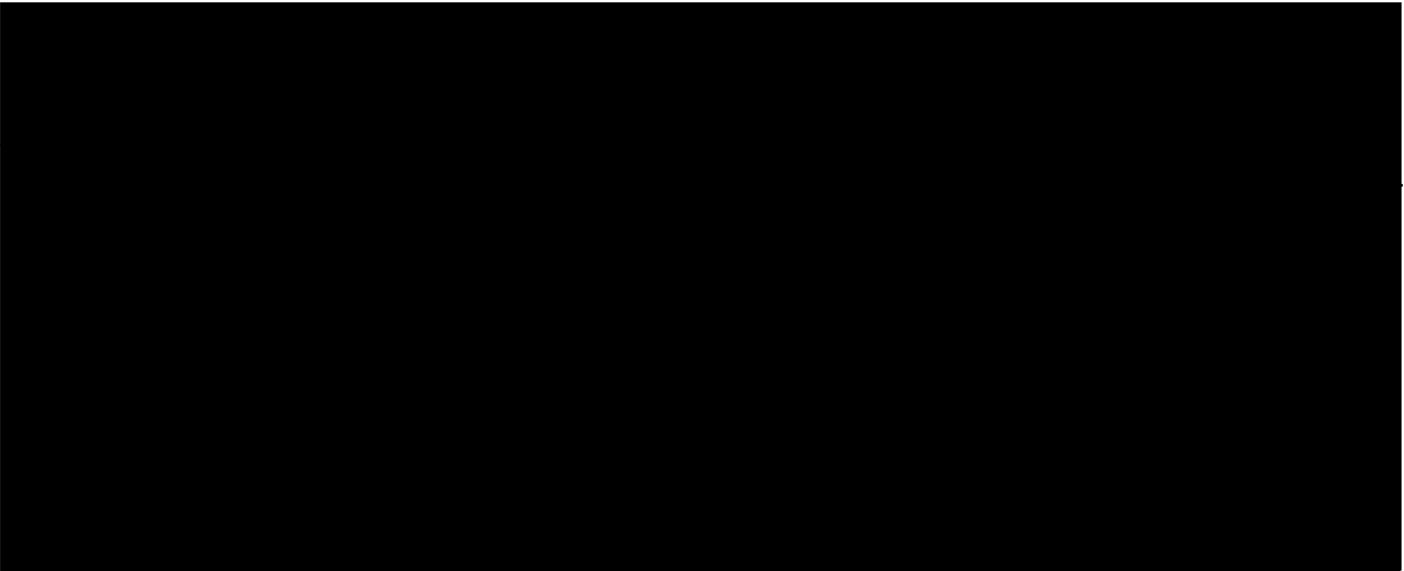
A condition is a Class 2 impairment if, upon consideration of all of the circumstances, it meets all three of the following criteria:

there is a connection between the conditions under which the fund member's duties are performed and the disease;

the disease can be seen to have followed as a natural incident of the fund member's duties as a result of the exposure occasioned by the nature of the fund member's duties; and

the disease can be traced to the fund member's employment as the proximate cause.


I.C. § 36-8-8-12.5(b)(2).



The third step in the statutory analysis is to assess whether the condition “can be traced to the fund member’s employment as the proximate cause.” *Id.* By comparison, to analyze the issue of proximate cause in negligence cases, Indiana courts implement the following analysis:

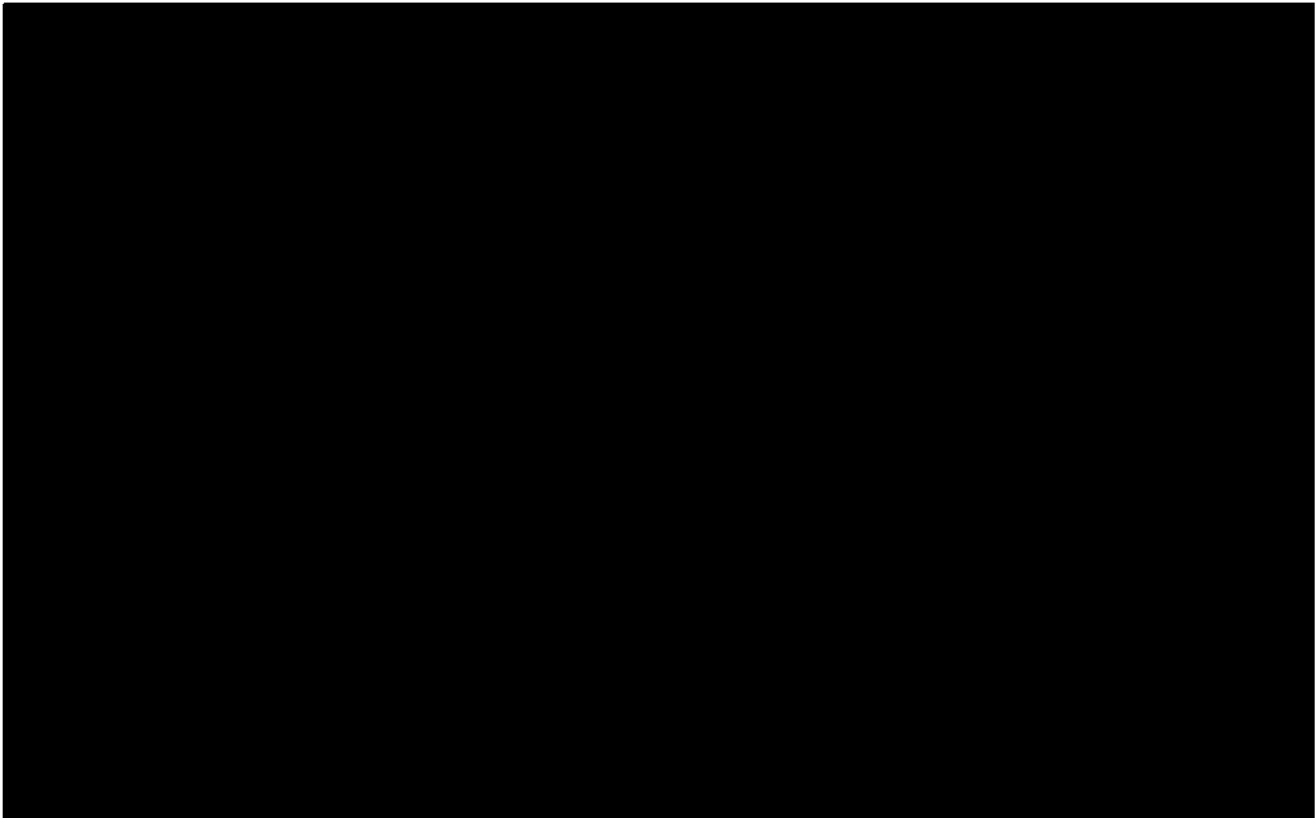
[W]e consider whether the injury was a natural and probable consequence of the negligent act, which, in light of the attending circumstances, could have been reasonably foreseen or anticipated. Thus, to be considered a proximate cause, the negligent act must have set in motion a chain of circumstances that in natural and continuous sequence [led] to the resulting injury. Proximate cause requires, at a minimum, that the harm would not have occurred but for the defendant’s conduct. The defendant’s act need not be the sole cause of the plaintiff’s injuries; it needs to be only one of the proximate causes rather than a remote cause.

Carey v. Ind. Phys. Therapy, Inc., 926 N.E.2d 1126, 1128-29 (Ind. Ct. App. 2010) (citing Dughaish ex rel. Dughaish v. Cobb, 729 N.E.2d 159, 164 (Ind. Ct. App. 2000), trans. denied and Hamilton v. Ashton, 846 N.E.2d 309, 316 (Ind. Ct. App. 2006), clarified on reh’g on other grounds, trans. denied), trans. denied.





had worked in a job involving physical activity.



Kilburn's condition met all three criteria set forth in Indiana Code Section 36-8-8-

12.5(b)(2). Kilburn had a Class 2 impairment.

Conclusion

~~Kilburn had a covered impairment that was a Class 2 disability. Effective at the~~
time Kilburn began receiving disability benefits, his benefits should be calculated based
upon a Class 2 impairment.

Ordered on December 31, 2011.



Daniel J. Mathis
Administrative Law Judge
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