

**BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE PUBLIC EMPLOYEES' RETIREMENT FUND**

| | | |
|------------------------------|---|---------------------------|
| IN THE MATTER OF |) | 1977 POLICE OFFICERS' AND |
| LANCE CARPENTER. |) | FIREFIGHTERS' PENSION AND |
| |) | DISABILITY FUND |
| DAVID CLENDENEN, CHIEF OF |) | |
| ANDERSON FIRE DEPARTMENT AND |) | |
| PRESIDENT OF ANDERSON |) | |
| FIREFIGHTER'S PENSION BOARD, |) | |
| |) | |
| Petitioner. |) | |

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DECISION

This case was assigned to me for determination of the appeal of Chief David Clendenen from the initial determination of the Director of the 1977 Fund granting firefighter Lance Carpenter disability benefits, finding his disability to fall within Class 2, and finding the degree of impairment to be 60%. Chief Clendenen, as Chief of the Anderson Fire Department and President of the Anderson Firefighters' Pension Board, timely objected and requested a hearing.

A hearing was held on September 22, 2009. Chief Clendenen was represented by attorney Stephen Hardacre. The PERF Board as administrator of the 1977 Fund was represented by attorneys Kathryn Cimera and Allison Murphy.

The parties stipulated at the hearing that firefighter Carpenter's degree of impairment is 100% of the whole person. Therefore, the sole issue for resolution is the class of disability under Ind. Code § 36-8-8-12.5.

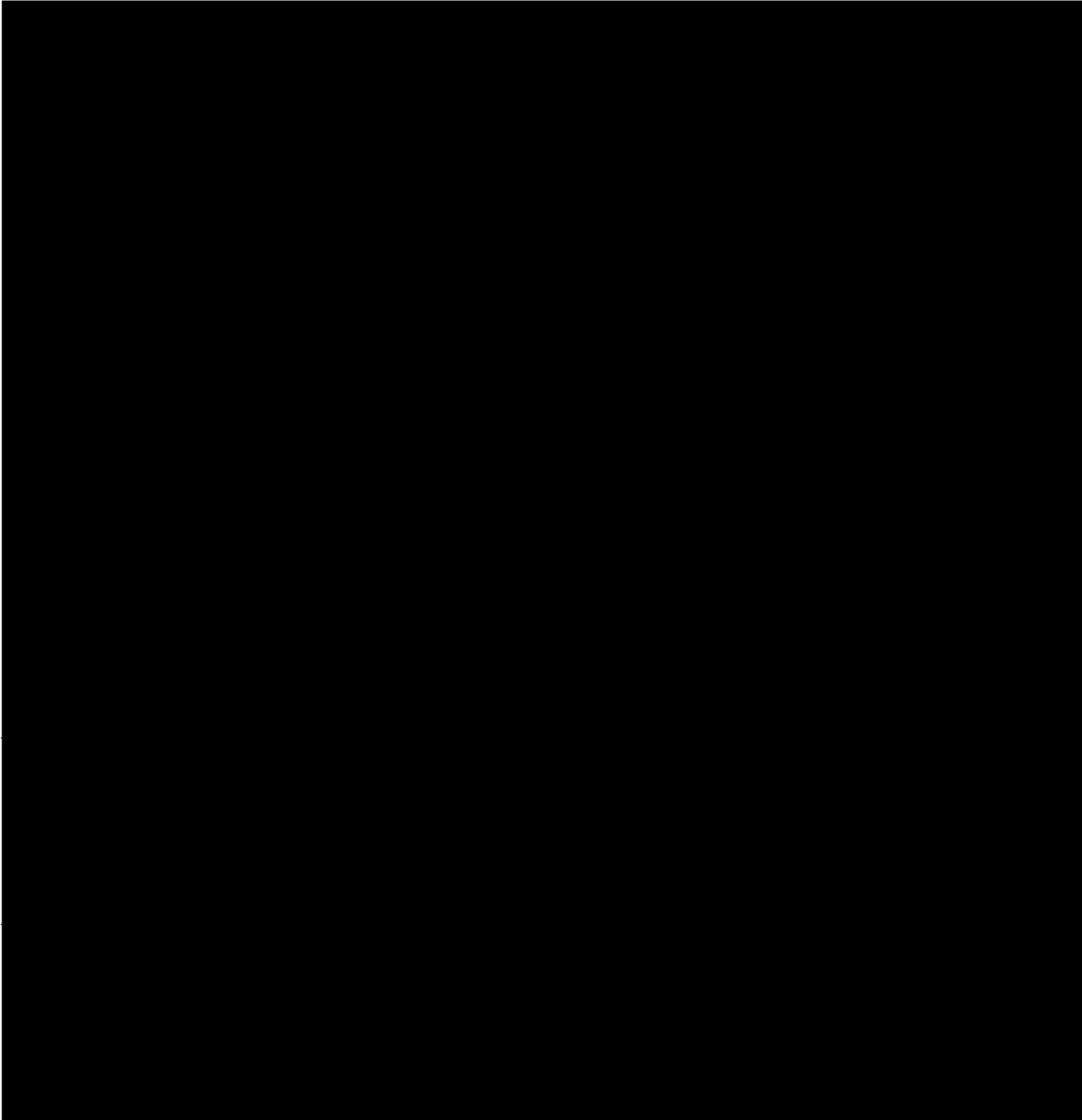
The parties stipulated to the authenticity and admissibility of Exhibits P-1 through P-19 (listed in a document entitled Summary of Petitioner's Tendered Exhibits), and during the hearing PERF introduced Exhibits 20 (curriculum vitae of Dr. Omkar Markand) and 21 (Application for Disability Benefits) without objection.

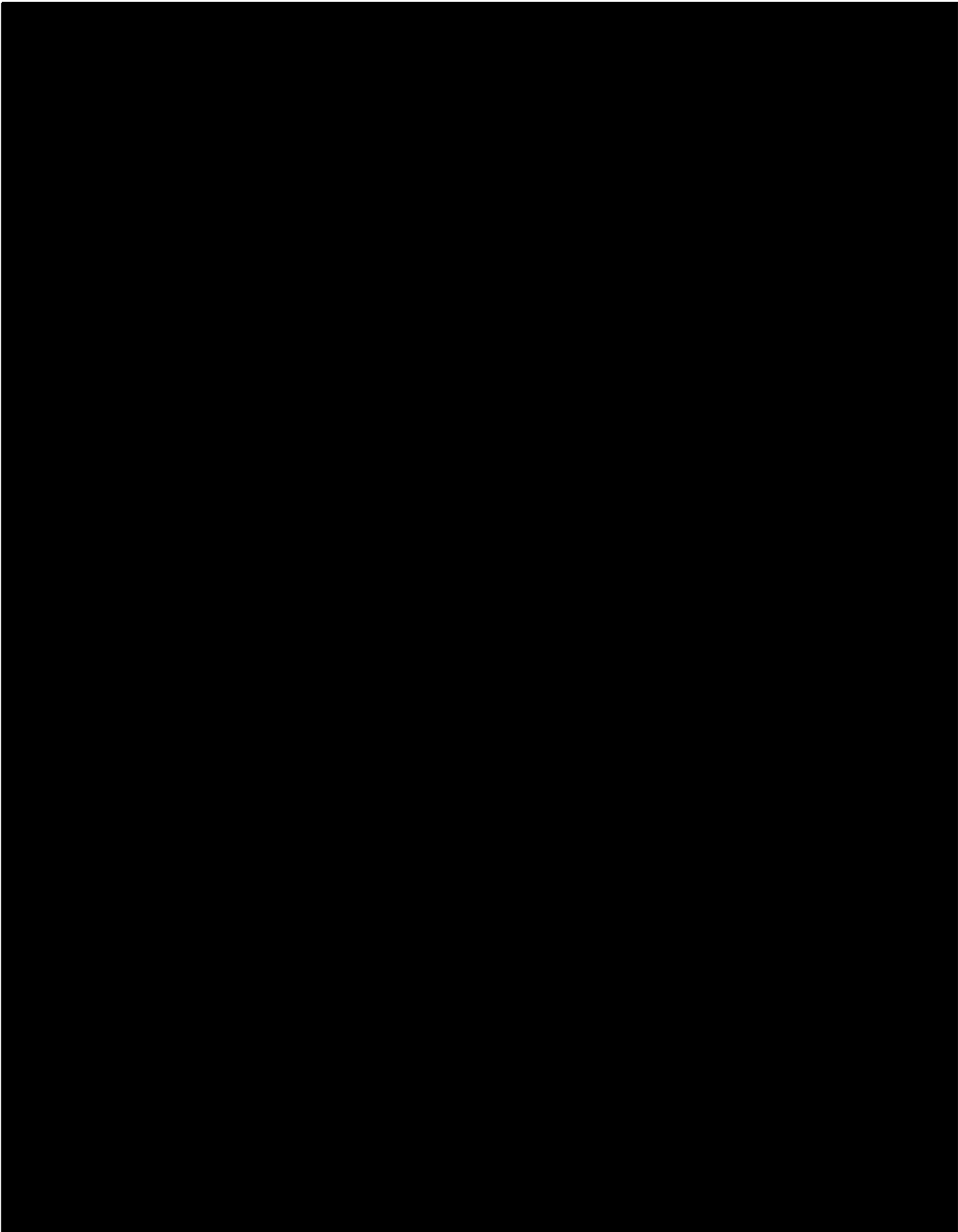
Petitioner called the following witnesses: Chief David Clendenen, Jared Taylor, Lance Carpenter, Yolanda Carpenter, and Dr. Steven Moffatt (by deposition). Respondent called Dr. Omkar Markand.

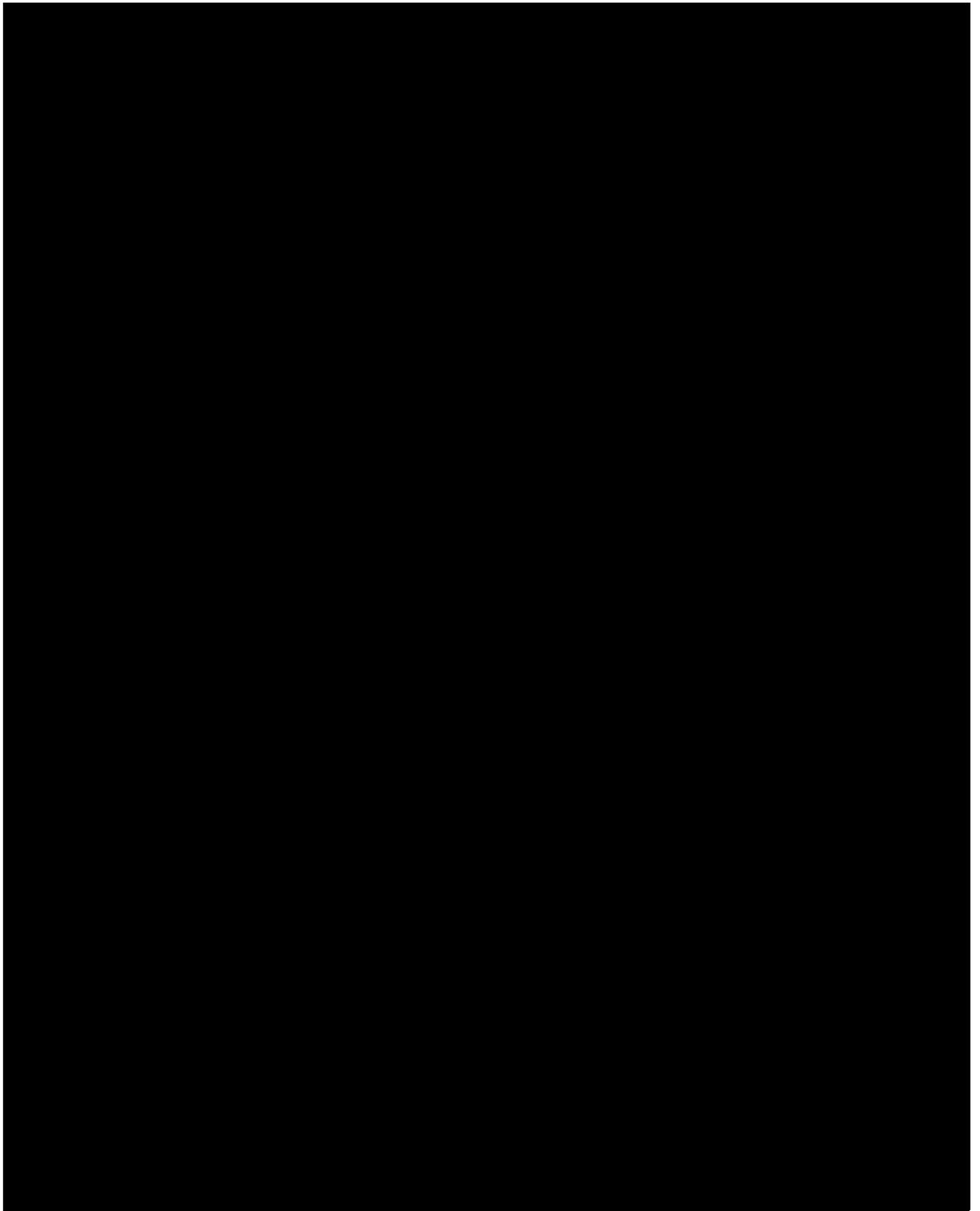
Findings of Fact

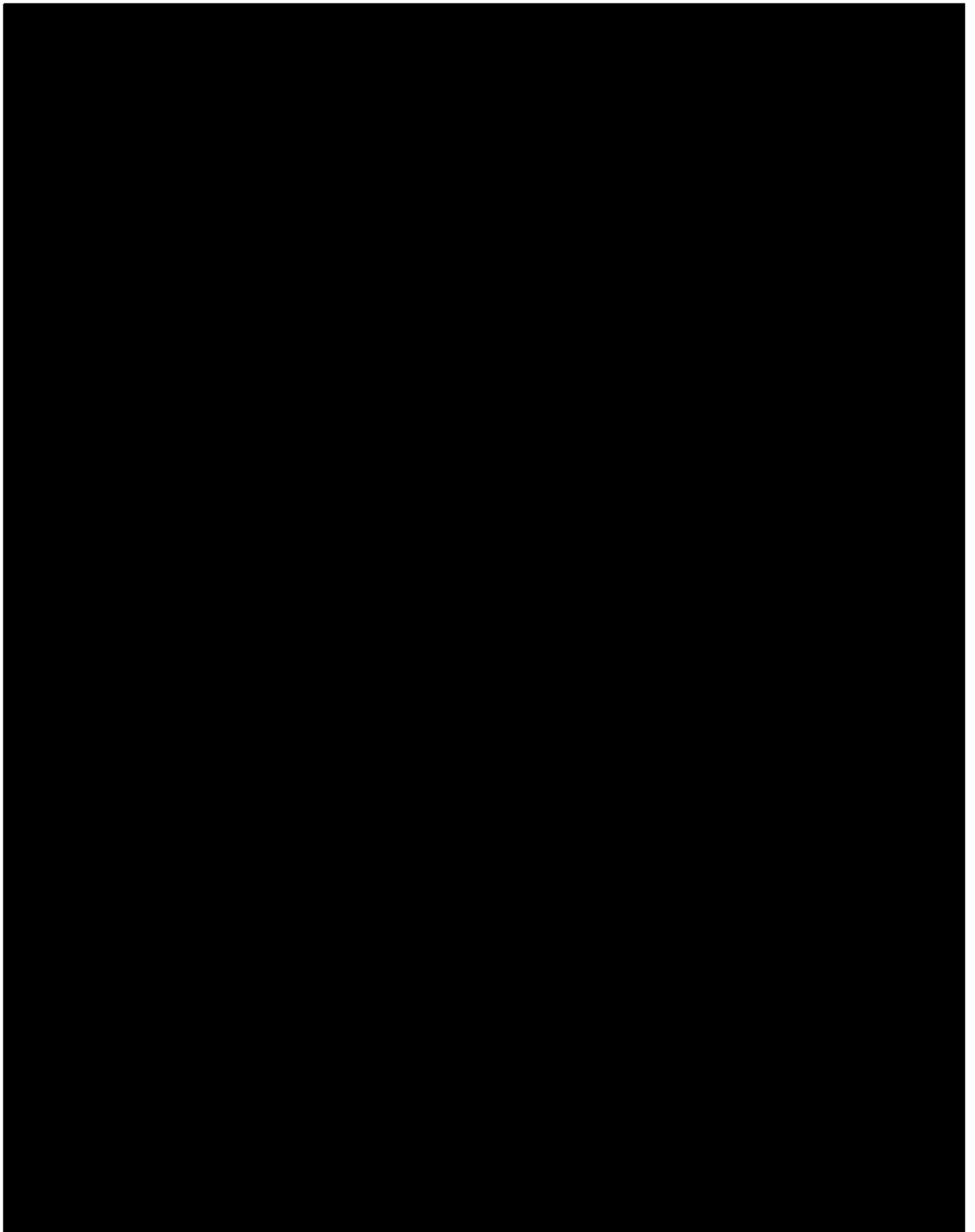
A. Background and pre-employment examination

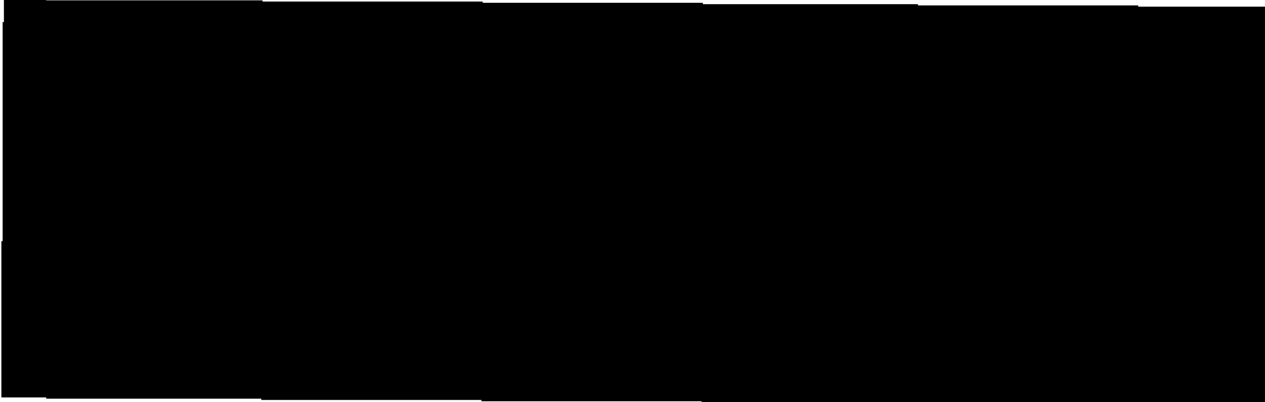
1. Lance Carpenter was employed by the Anderson Fire Department on August 1, 1990 as a firefighter.











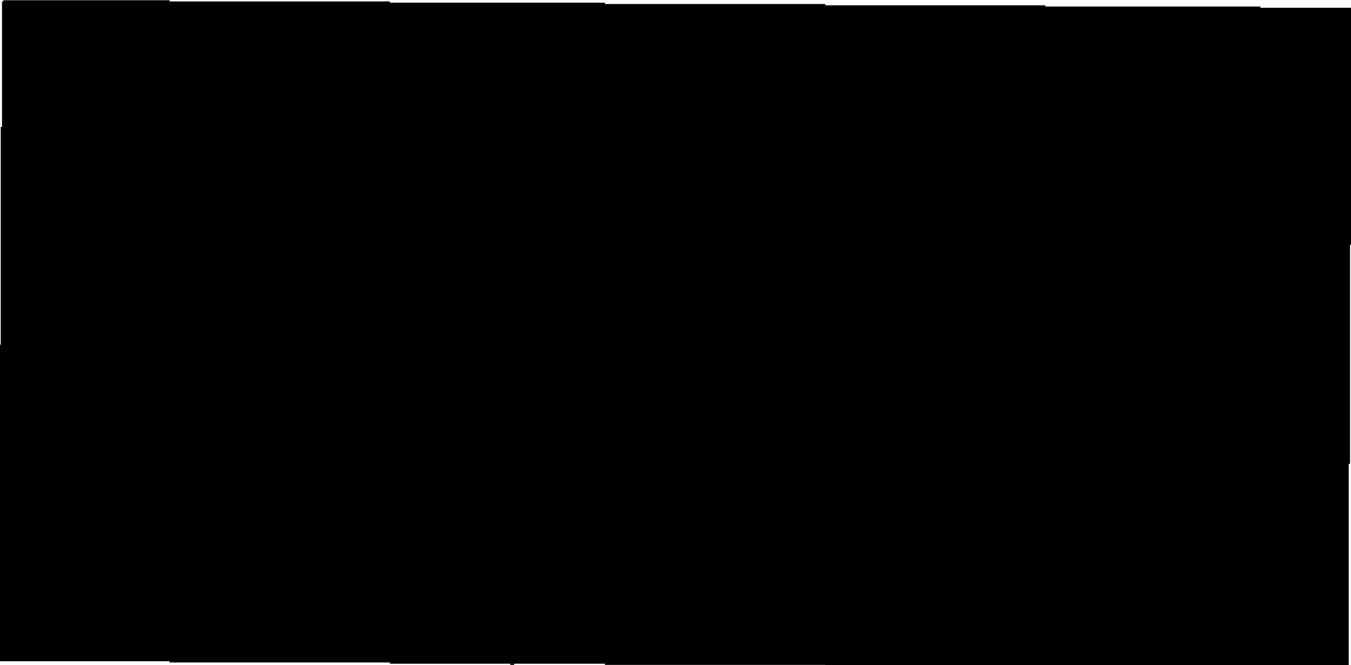
41. The April 4 initial determination included notice of the right to object and request review within 15 days.

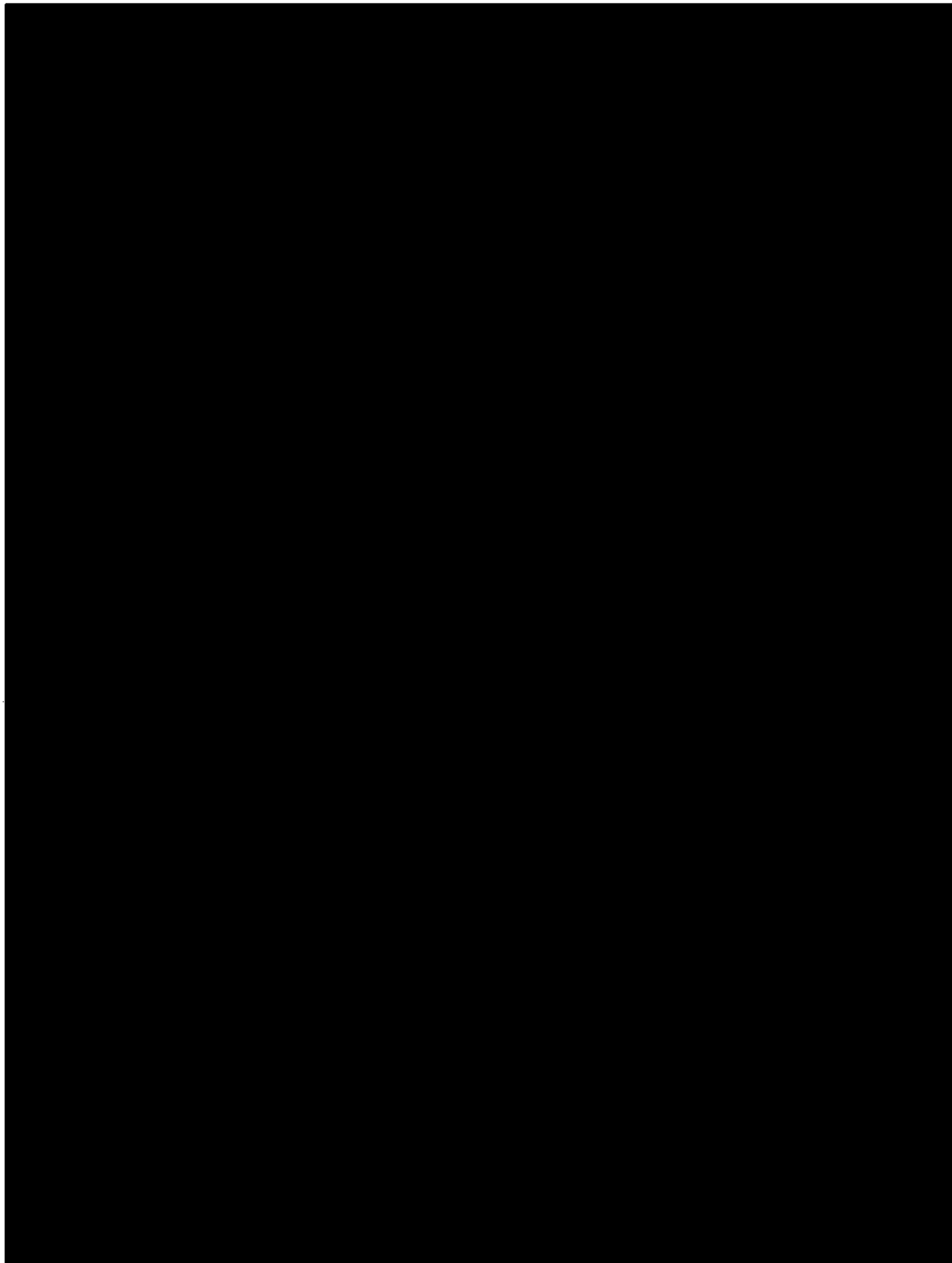
42. On April 28, 2009, Chief Clendenen, as chief and as president of the local board, submitted his objection to the 1977 Fund's initial determination. Chief Clendenen first noted that it was inaccurate to say that the local board had determined that the class of disability was Class 2, because no such determination was made by the local board. The Chief represented that it was the opinion of the local board that Carpenter suffered a Class 1 injury.

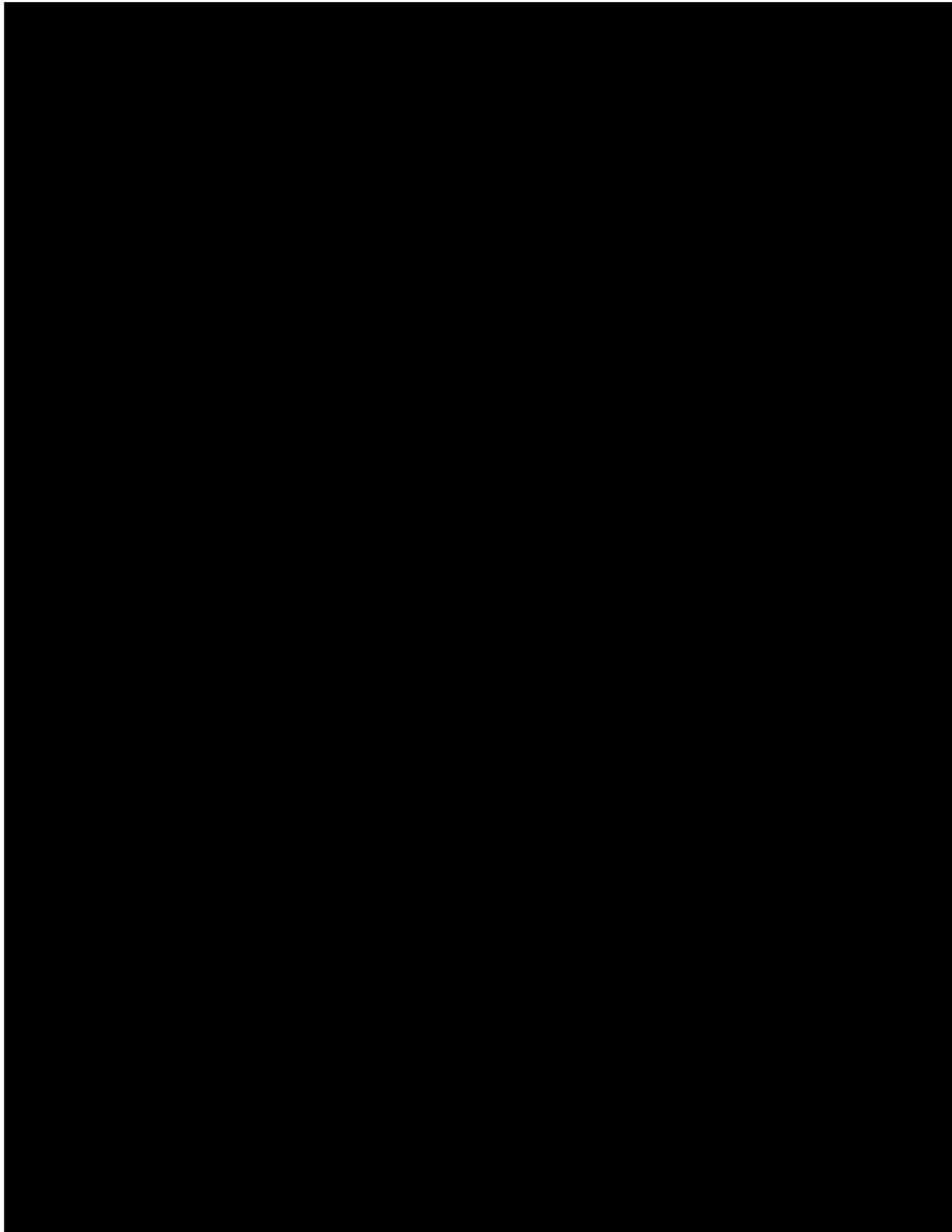
43. On June 4, 2009, the Director issued a revised initial determination, corrected to show that the local board had determined the class of disability to be Class 1, but with no change to the other determinations.

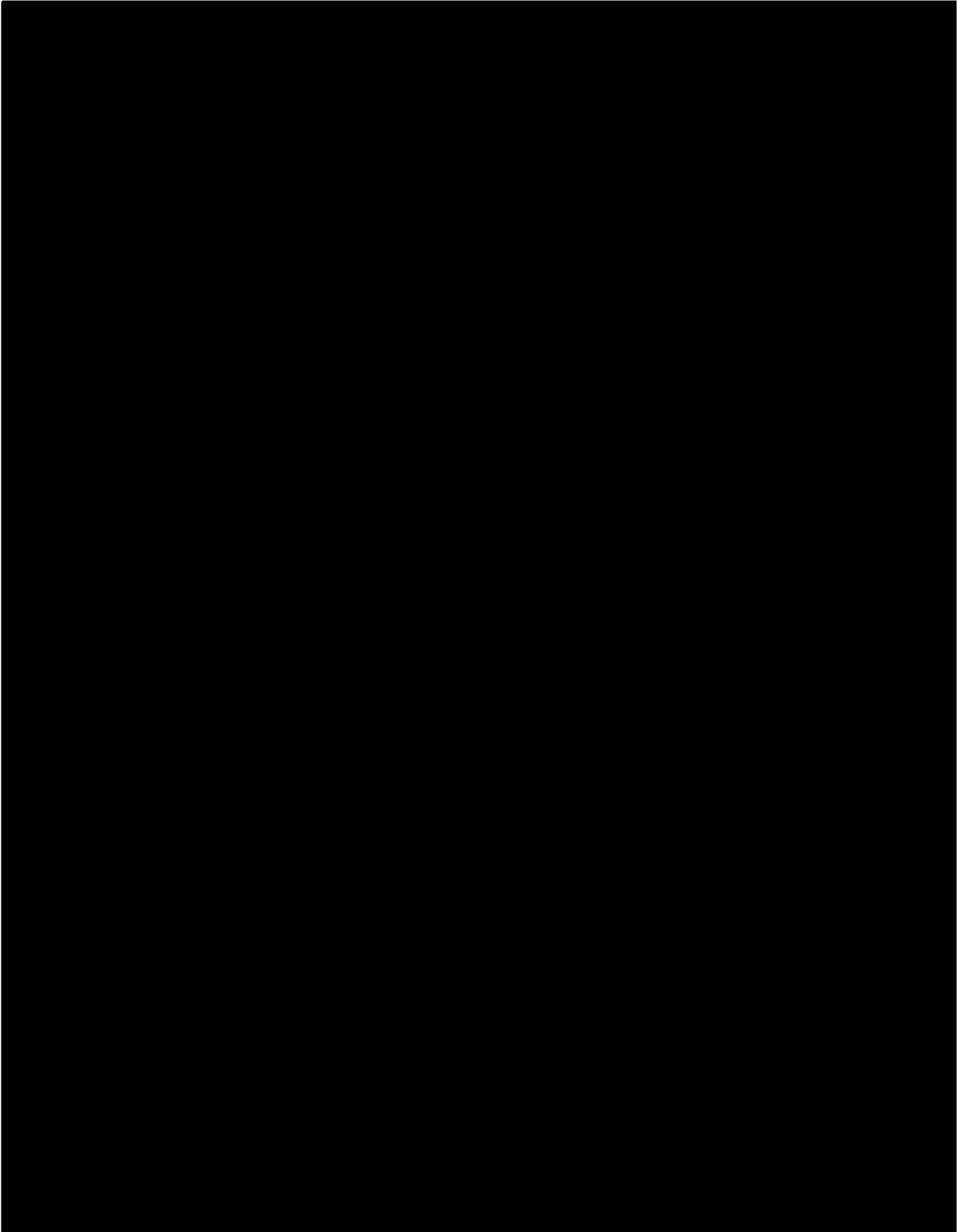
44. The matter was assigned to the ALJ by letter dated June 17, 2009. In that letter, the PERF Board conceded that Chief Clendenen's appeal was timely.

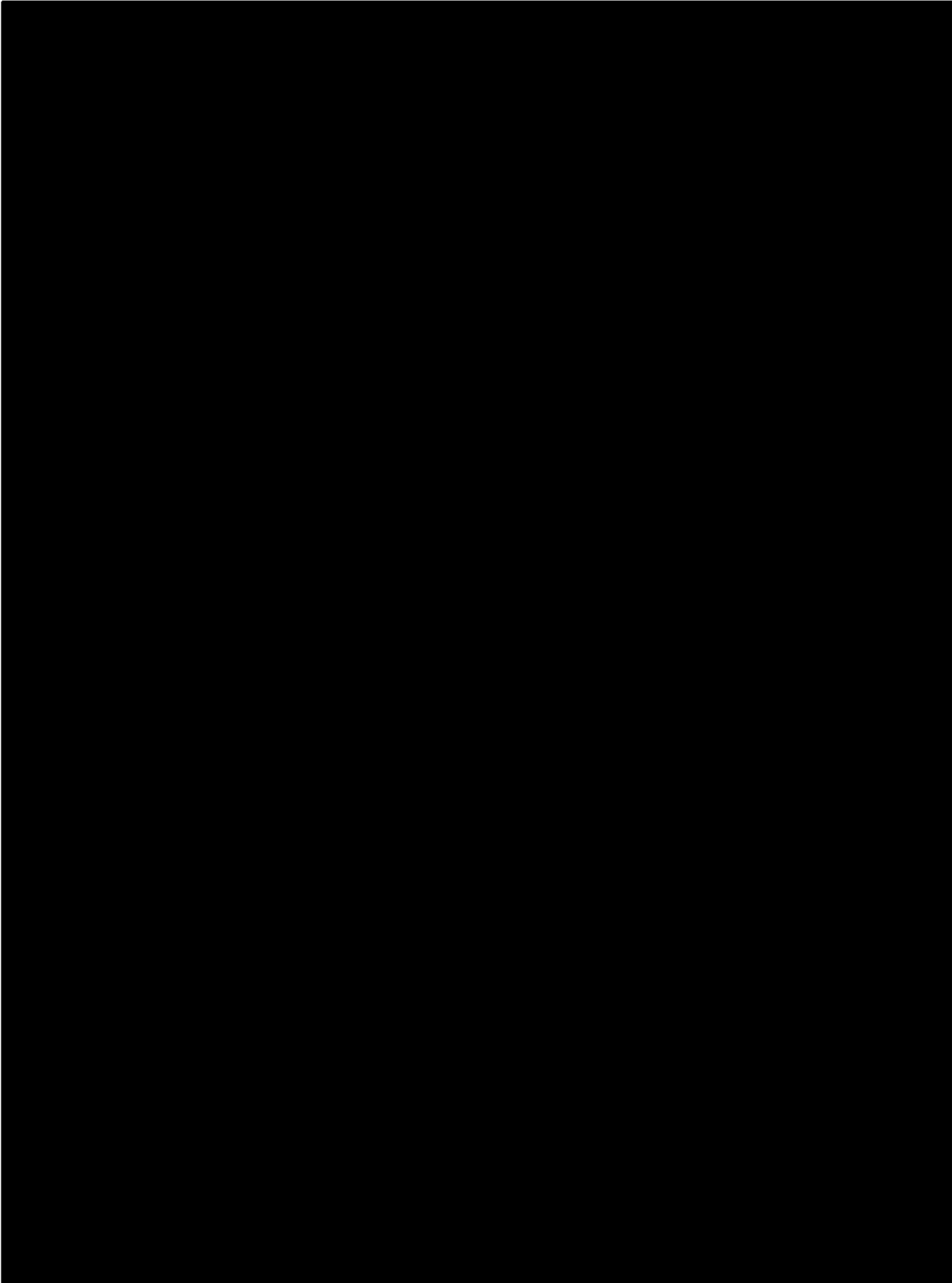
45. On September 4, 2009, the Director issued an amended determination stating that the PERF Medical Authority had determined that Carpenter's degree of impairment was 100%, and that the class of disability remained Class 2.

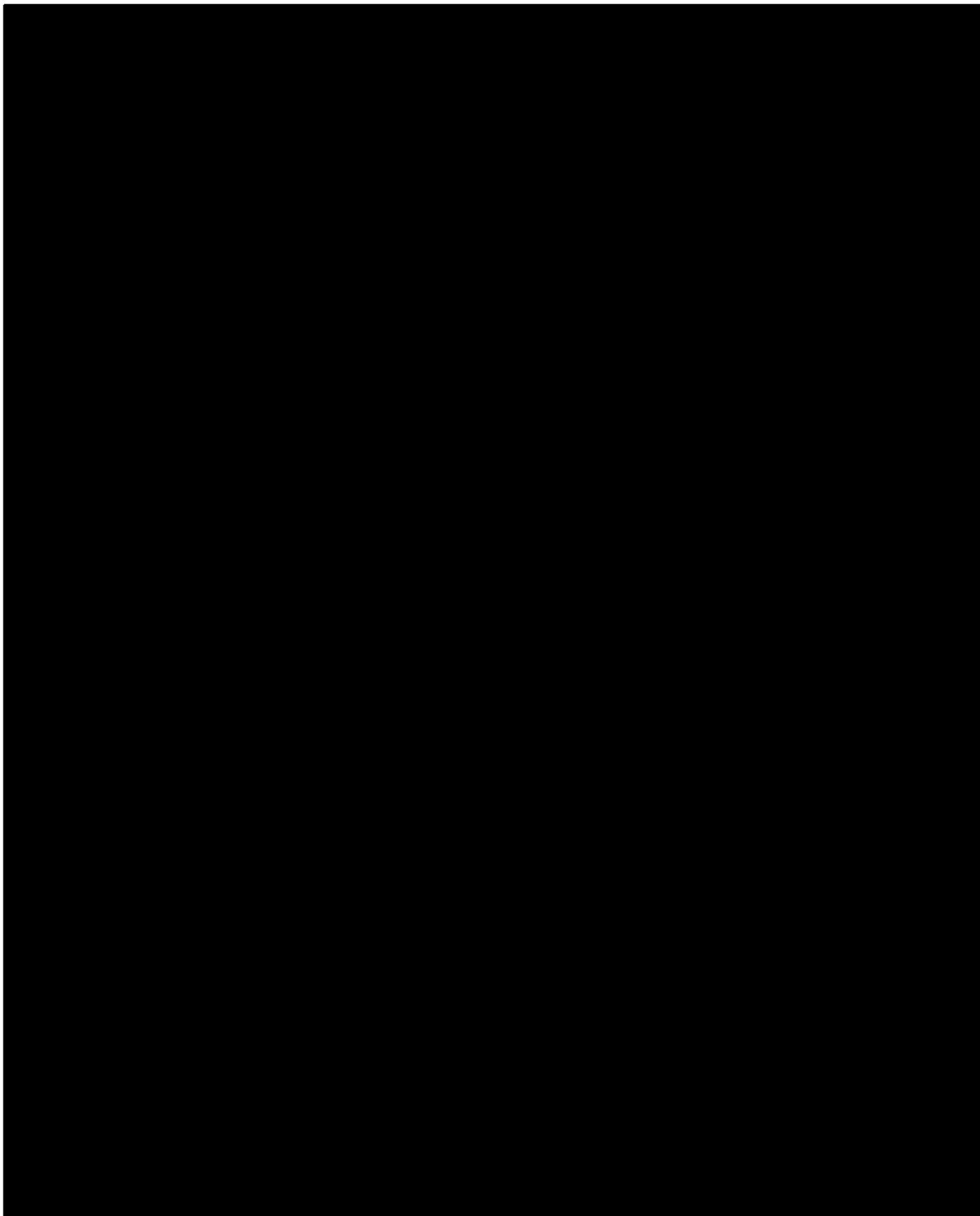


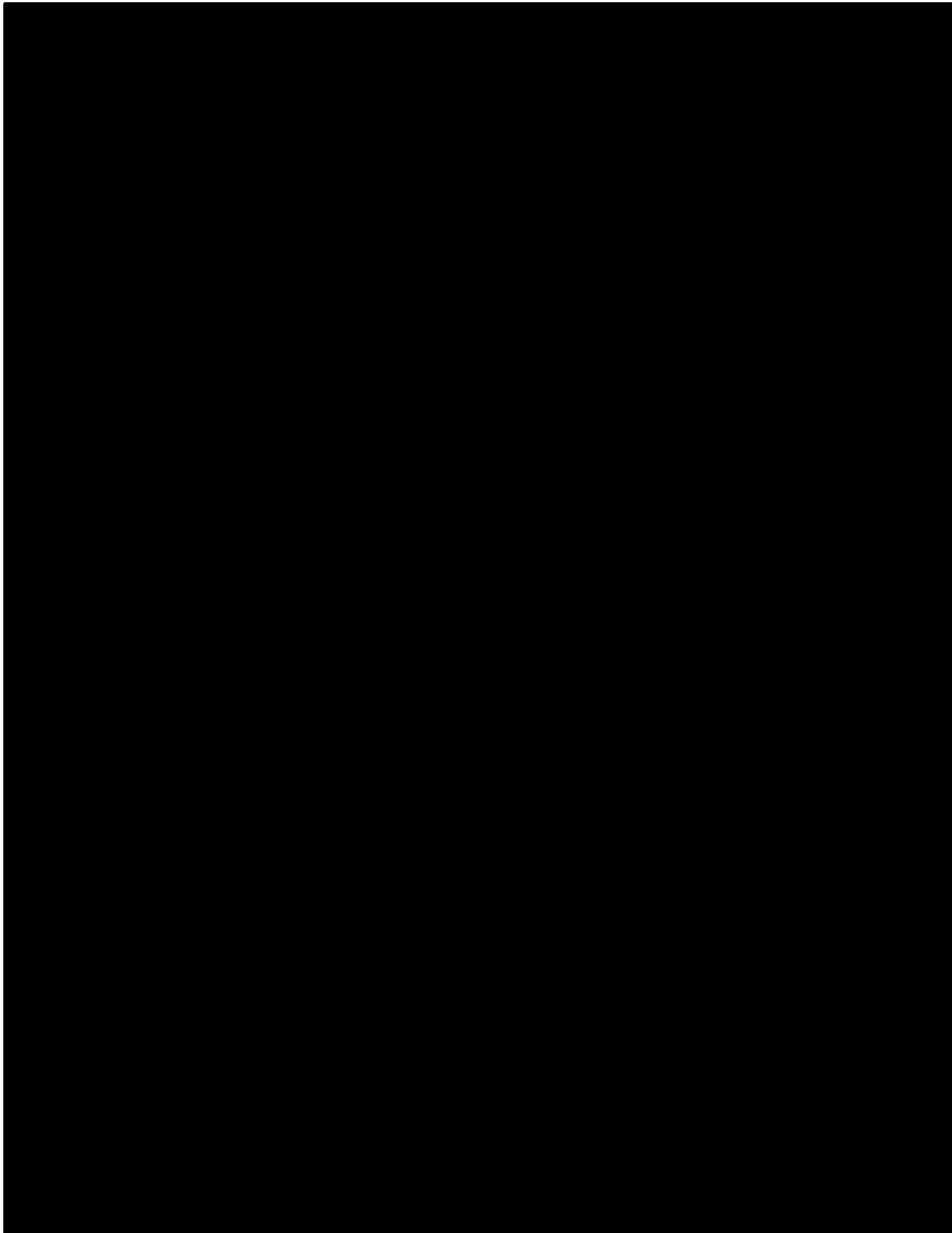







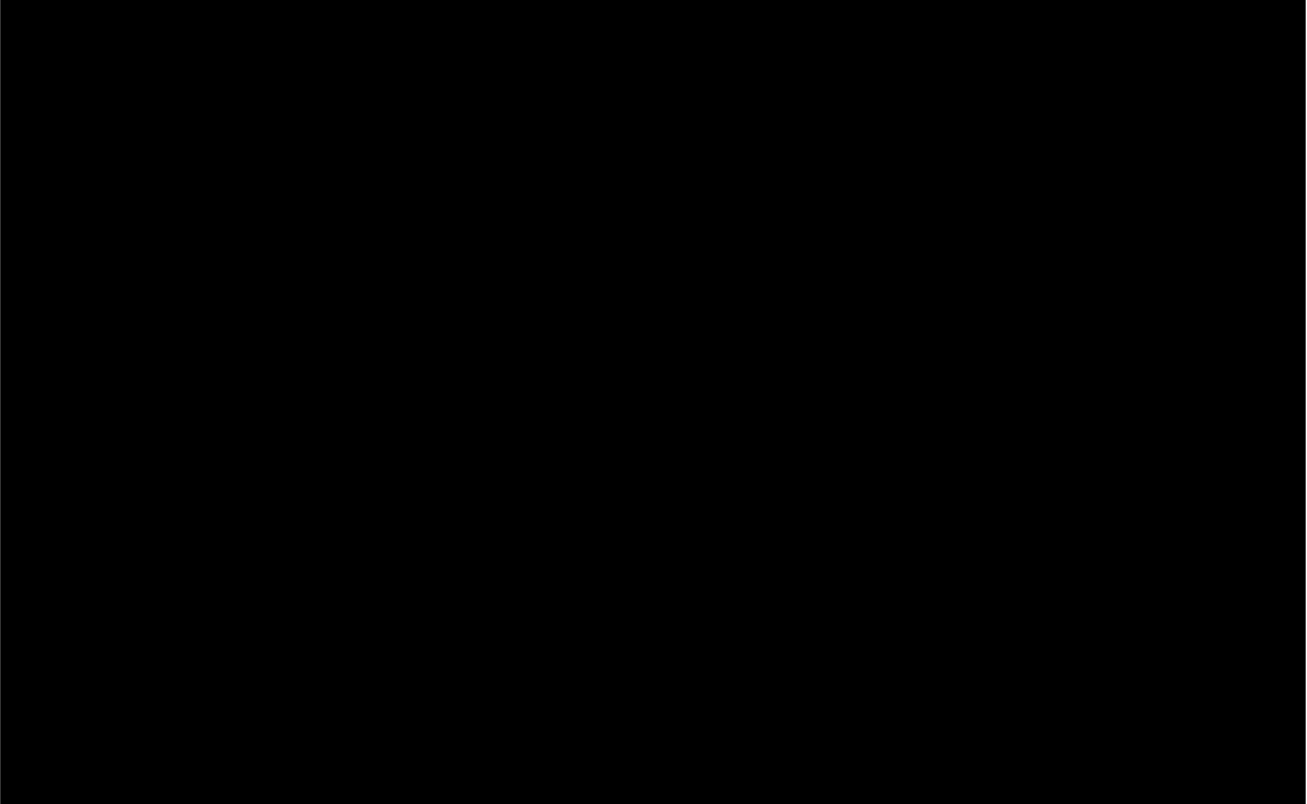








G. Ultimate findings of fact

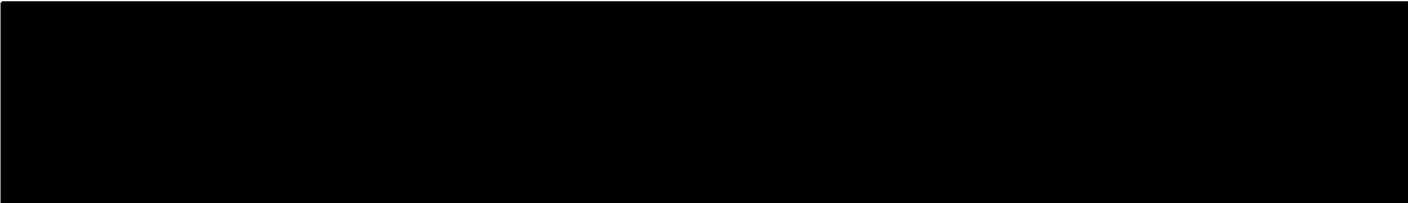


98. Any finding of fact stated in the conclusions of law is incorporated herein.

Conclusions of Law

A. Legal standard

The factual questions presented by this case are reviewed under the preponderance of the evidence standard. *Pendleton v. McCarty*, 747 N.E.2d 56, 64-65 (Ind. App. 2001). The ALJ, even where not the ultimate authority, performs a role similar to that of a trial judge sitting without a jury, and reviews the evidence *de novo* without deference to the agency's initial determination. *Indiana Department of Natural Resources v. United Refuse Company*,



Inc., 615 N.E.2d 100, 103-04 (Ind. 1993); *Branson v. Public Employees' Retirement Fund*, 538 N.E.2d 11, 13 (Ind. App. 1989).

The burden of proof lies with Chief Clendenen, as the party requesting agency benefits on Carpenter's behalf. Ind. Code § 4-21.5-3-14(c); see *Indiana Department of Natural Resources v. Krantz Brothers Construction Corp.*, 581 N.E.2d 935, 938 (Ind. App. 1991) (party seeking exemption from general rule has burden of proof, both under I.C. § 4-21.4-3-14(c) and at common law). Traditionally, an applicant for an administratively granted privilege bears the burden of demonstrating eligibility. *Leventis v. South Carolina Dept. of Health and Environmental Control*, 530 S.E.2d 643, 651 (S.C. App. 2000), citing 73A C.J.S. *Public Administrative Law and Procedure* § 128 at 35 (1983) ("In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof, and the burden of proof rests upon one who files a claim with an administrative agency to establish that required conditions of eligibility have been met. It is also a fundamental principle of administrative proceedings that the burden of proof is on the proponent of a rule or order, or on the party asserting the affirmative of an issue."); *Division of Motor Vehicles v. Granzziel*, 565 A.2d 404, 411 (N.J. Super. 1989).

Administrative decisions must be supported by "the kind of evidence that is substantial and reliable." I.C. § 4-21.5-3-27(d). In other words, the quality of evidence must be substantial and reliable. If both sides present evidence that is substantial and reliable, Chief Clendenen can prevail only if his evidence preponderates over the evidence submitted by the PERF Board.

Hearsay evidence may be admitted and, if not objected to, may form the basis for an order. I.C. § 4-21.5-3-26(a). However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence. *Id.*

B. Discussion

At the time he applied for disability benefits, Carpenter was an employee of the City of Anderson in its fire department and a member of the 1977 Fund. I.C. § 36-8-8-7(a). His entitlement to disability benefits is governed by I.C. §§ 36-8-8-12, -12.3, and -12.5. A fund member's entitlement is determined by (1) the existence of a covered impairment, (2) the class of impairment, and (3) the degree of impairment.

In this case, it is undisputed that Carpenter has a covered impairment under I.C. § 36-8-8-12.3(b). It is also now undisputed that his degree of impairment is 100% of the whole person. See I.C. § 36-8-8-13.1(c). The only dispute is the class of impairment under I.C. § 36-8-8-12.5(b), which provides in pertinent part:

- (1) . . . A Class 1 impairment is a covered impairment that is *the direct result* of one (1) or more of the following:

(A) A personal injury that occurs while the fund member is on duty.

(B) A personal injury that occurs while the fund member is off duty and is responding to:

(i) an offense or a reported offense, in the case of a police officer; or

(ii) an emergency or reported emergency for which the fund member is trained, in the case of a firefighter.

(C) An occupational disease (as defined in IC 22-3-7-10). A covered impairment that is included within this clause and subdivision (2) shall be considered a Class 1 impairment.

(D) A health condition caused by an exposure risk disease that results in a presumption of disability or death incurred in the line of duty under IC 5-10-13.

(2) . . . A Class 2 impairment is a covered impairment that is a *duty related disease*. A duty related disease means a disease *arising out of* the fund member's employment. A disease shall be considered to arise out of the fund member's employment if it is apparent to the rational mind, upon consideration of all of the circumstances, that:

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

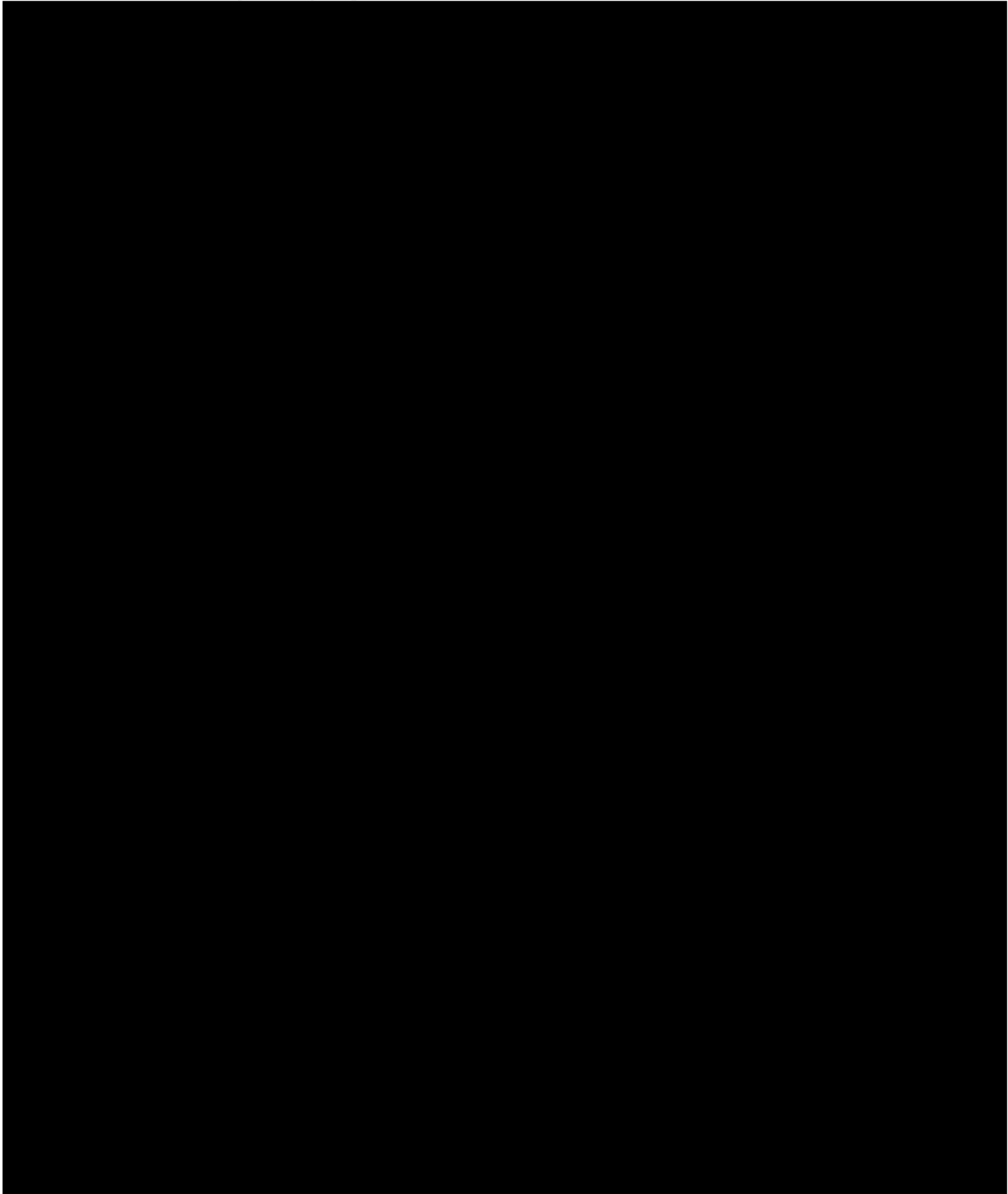
(B) the disease can be seen to have followed as a natural incident of the fund member's duties as a result of the exposure occasioned by the nature of the fund member's duties; and

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

(3) . . . A Class 3 impairment is a covered impairment that is not a Class 1 impairment or a Class 2 impairment.

(Emphasis added.) Thus, both Class 1 and Class 2 require that the disability be caused by or related to the performance of the member's duties, with Class 1 being "the direct result" and Class 2 being "duty related" and "arising out of" the member's employment. A Class 3 impairment is everything else, including conditions caused by factors unrelated to duty.

Causation is generally a question of fact. *Peters v. Forster*, 804 N.E.2d 736, 743 (Ind.



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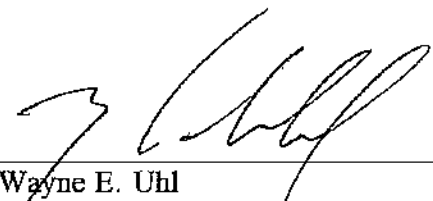
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Conclusion

Based on the foregoing findings of fact and conclusions of law, it is recommended that the initial determination of the 1977 Fund be **modified** to provide that firefighter Carpenter has a covered impairment, that the impairment falls into Class 1, and that the degree of impairment is 100% of the whole person. His benefit shall be recalculated and paid retroactively to the date when he was first entitled to a disability benefit.

Dated: November 24, 2009.



Wayne E. Uhl
Administrative Law Judge
8710 North Meridian Street, Suite 200
Indianapolis, Indiana 46260-5388
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STATEMENT OF AVAILABLE PROCEDURES FOR REVIEW

The undersigned administrative law judge is not the ultimate authority, but was designated by the PERF Board to hear this matter pursuant to I.C. § 4-21.5-3-9(a). Under I.C. § 4-21.5-3-27(a), this order becomes a final order when affirmed under I.C. § 4-21.5-3-29, which provides, in pertinent part:

(b) After an administrative law judge issues an order under section 27 of this chapter, the ultimate authority or its designee shall issue a final order:

- (1) affirming;
- (2) modifying; or
- (3) dissolving;

the administrative law judge's order. The ultimate authority or its designee may remand the matter, with or without instructions, to an administrative law judge for further proceedings.

(c) In the absence of an objection or notice under subsection (d) or (e), the ultimate authority or its designee shall affirm the order.

(d) To preserve an objection to an order of an administrative law judge for judicial review, a party must not be in default under this chapter and must object to the order in a writing that:

- (1) identifies the basis of the objection with reasonable particularity; and
- (2) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner.

(e) Without an objection under subsection (d), the ultimate authority or its designee may serve written notice of its intent to review any issue related to the order. The notice shall be served on all parties and all other persons described by section 5(d) of this chapter. The notice must identify the issues that the ultimate authority or its designee intends to review.

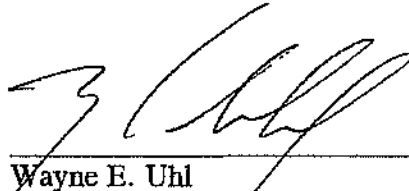
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this document on the following persons, by U.S. Postal Service first-class mail, **certified mail, return receipt requested**, postage prepaid, on November 24, 2009:

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