

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

IN THE MATTER OF)	1977 Police Officers' and
)	Firefighters' Pension and Disability
)	Fund
ARMAN P. SUMRALL,)	
)	
Petitioner.)	

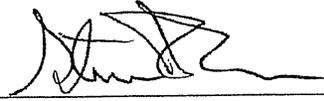
FINAL ORDER

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 Firefighters' Pension and Disability Fund ("77 Fund") under IC 4-21.5-3-28 and 35 IAC 2-5-9. 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 Findings of Fact, Conclusions of Law and Recommended Decision in this matter on March 24, 2014.
2. Copies of the Order have been served upon the parties.
3. Pursuant to IC 4-21.5-3-29(d)(2), 35 IAC 1.2-7-3(b)(7), 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.
4. No objections to the Order have been filed.

NOW THEREFORE the Findings of Fact, Conclusions of Law and Recommended Decision of the Administrative Law Judge is affirmed.

DATED April 21st, 2014.



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

CERTIFICATE OF SERVICE

I certify that on the 21st day of April, 2014, 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.

Distribution:

Arman P. Sumrall



Wayne E. Uhl
Administrative Law Judge
Stephenson Morow & Semler
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A handwritten signature in black ink, appearing to read "Steve Russo", written over a horizontal line.

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(317) 232-3868

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

IN THE MATTER OF)	1977 POLICE OFFICERS' AND
ARMAN P. SUMRALL,)	FIREFIGHTERS' PENSION AND
)	DISABILITY FUND
Petitioner.)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
RECOMMENDED DECISION**

This case was assigned to the ALJ for determination of the appeal of Arman P. Sumrall from the initial determination of the Director of the 1977 Fund on [REDACTED] finding that Sumrall is eligible for disability benefits, his class of impairment is [REDACTED], and his degree of impairment is [REDACTED]. Sumrall timely objected to the initial determination and requested a hearing. He challenges both the class of impairment and the degree of impairment.

A hearing was held on [REDACTED]. Sumrall represented himself. The INPRS Board as administrator of the 1977 Fund was represented by attorney Lindsay Knowles.

Sumrall called [REDACTED], and himself as witnesses. The INPRS Board called Omkar Markand, M.D. The parties were given the right to cross-examine and Sumrall was given the opportunity to present rebuttal evidence. The following exhibits were introduced by Sumrall without objection by INPRS:

- A. Incident Report from Lt. [REDACTED] [REDACTED]
- B. Incident Report from F.F. Arman Sumrall, [REDACTED]
- C. Note from [REDACTED] re Arman Sumrall, [REDACTED]
- D. Note from [REDACTED] re Arman Sumrall, [REDACTED]
- E. [REDACTED] medical notes for Arman Sumrall, [REDACTED] through [REDACTED]
- F. [REDACTED] Services invoices

The following exhibit was offered by Sumrall but INPRS's objection was sustained and it will not be considered:

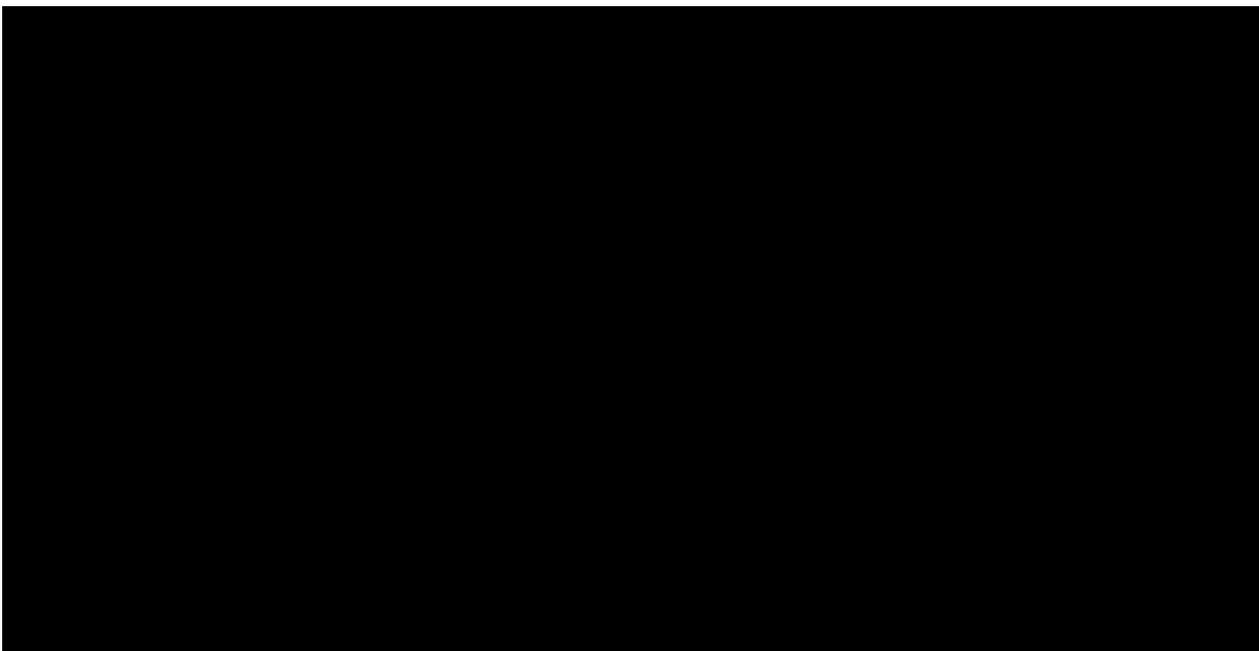
- G. Determination letter of Dr. Markand with handwritten notes, [REDACTED]

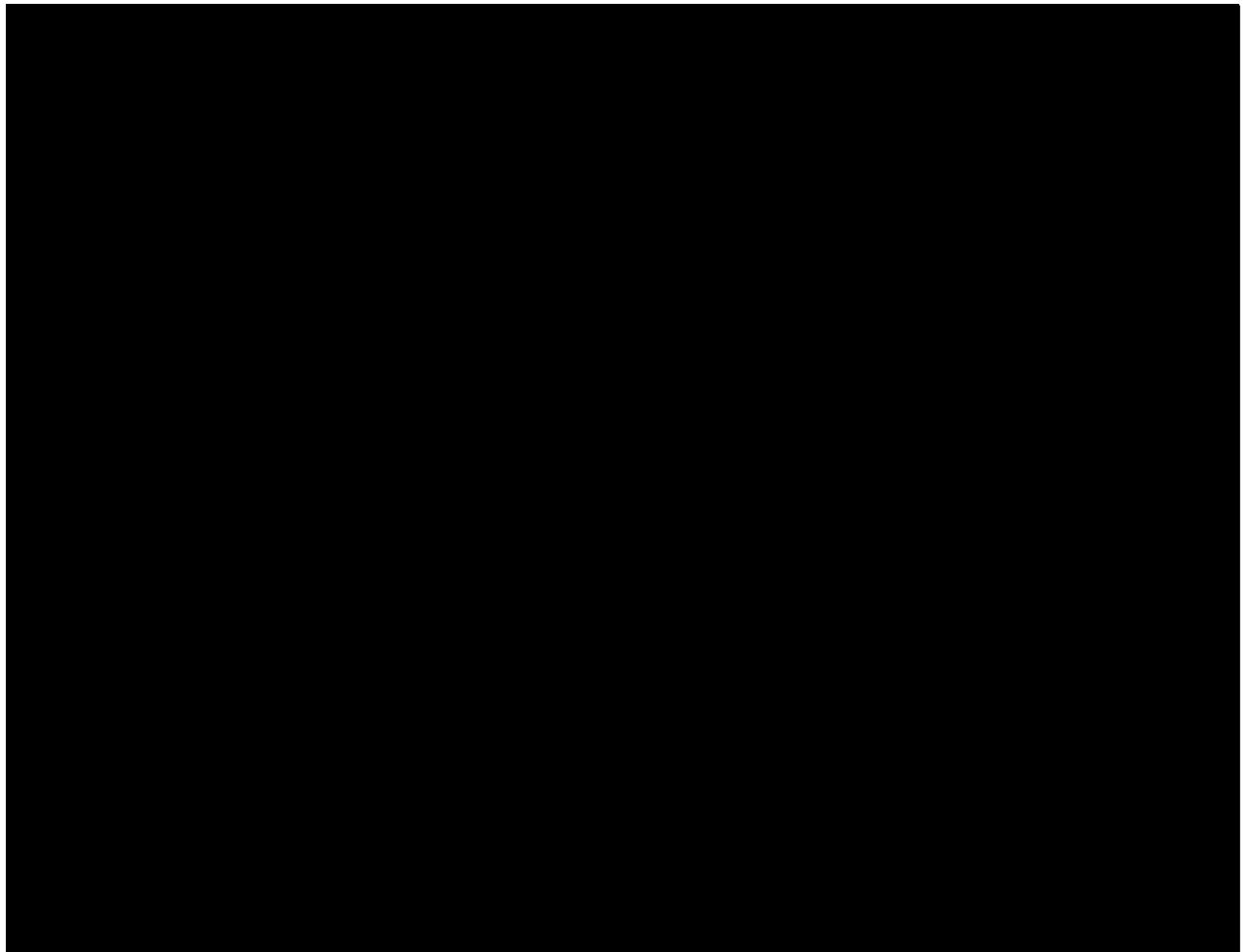
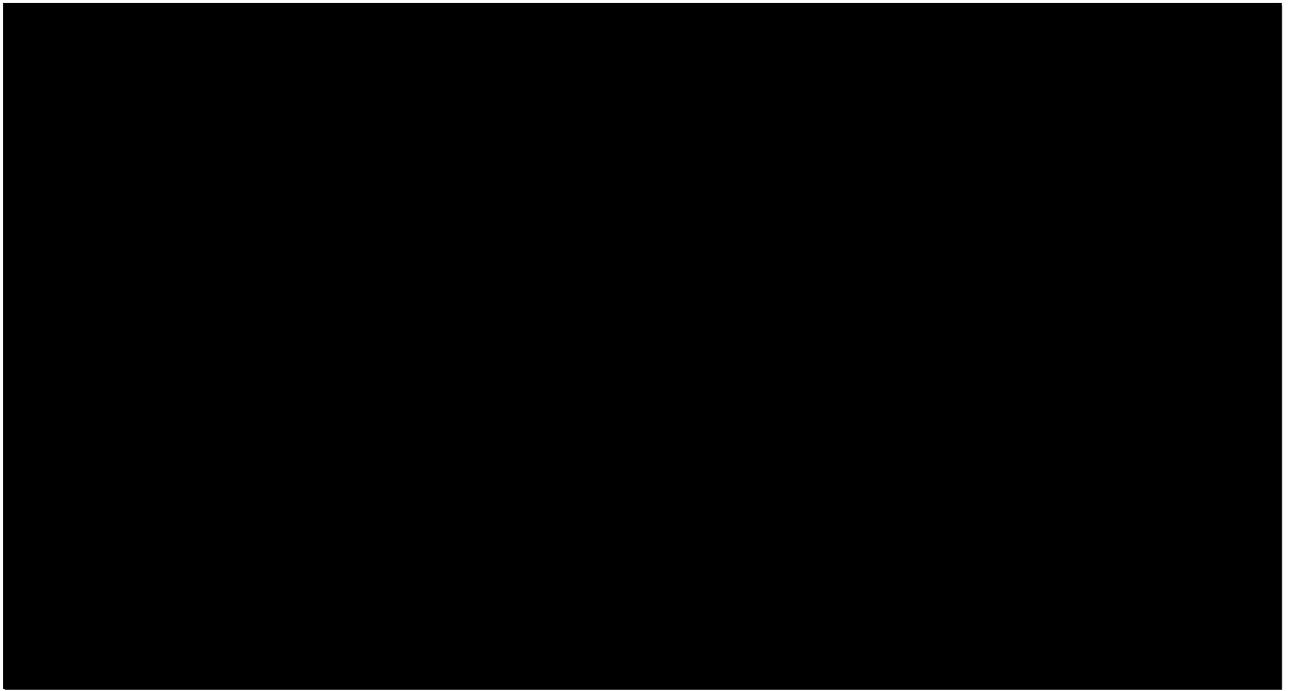
The following exhibits were introduced by INPRS without objection by Sumrall:

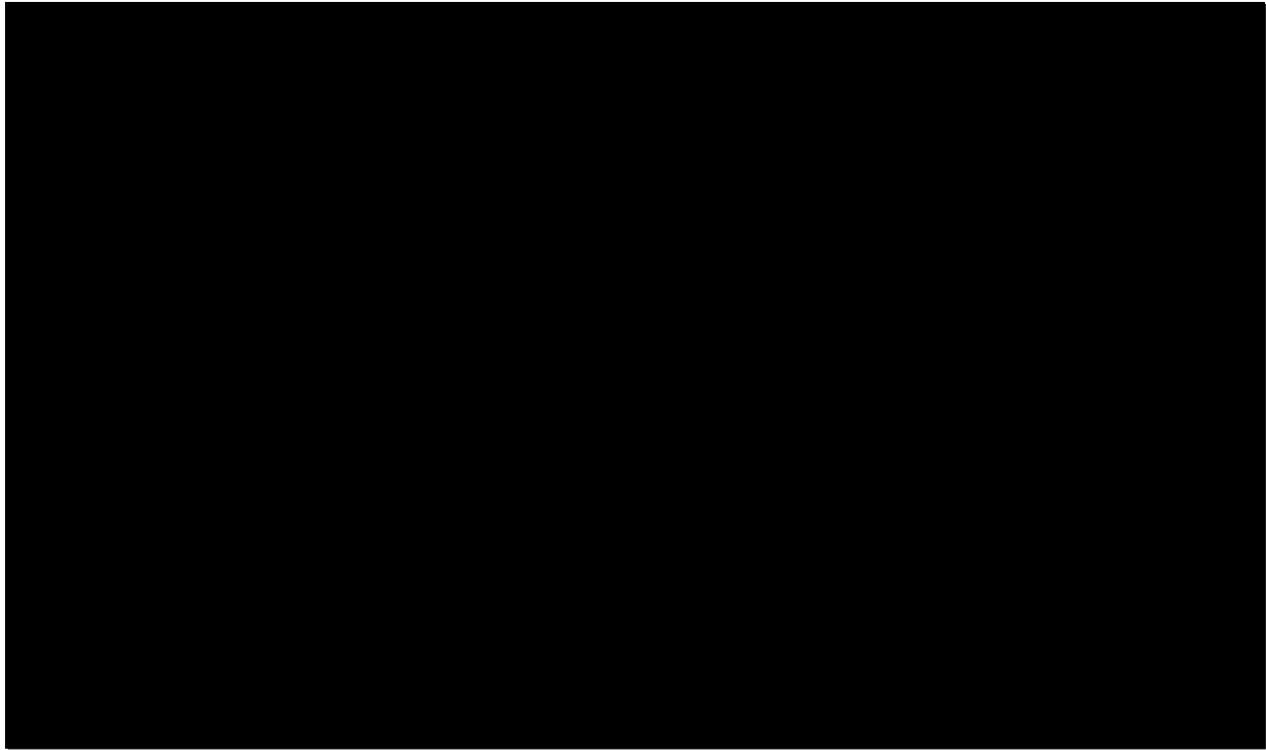
1. Transcript of hearing before [REDACTED] Fire Department Pension Board, In re: Arman Sumrall, [REDACTED] (with only one exhibit)
2. Local Pension Board Determination and some exhibits (most of which are illegible), [REDACTED]
3. Application for Disability Benefits, [REDACTED]
4. Curriculum Vitae, Omkar N. Markand, M.D.
5. *AMA Guides to the Evaluation of Permanent Impairment*, pp. 570-571 (Table 17-4, Lumbar Spine Regional Grid, first two pages)
6. Determination letter of Dr. Markand, [REDACTED]
7. Determination letter of Dr. Markand, [REDACTED]
8. Determination letter of Dr. Markand, [REDACTED]
9. IME report, Bianca S. Ainhorn, M.D., [REDACTED]

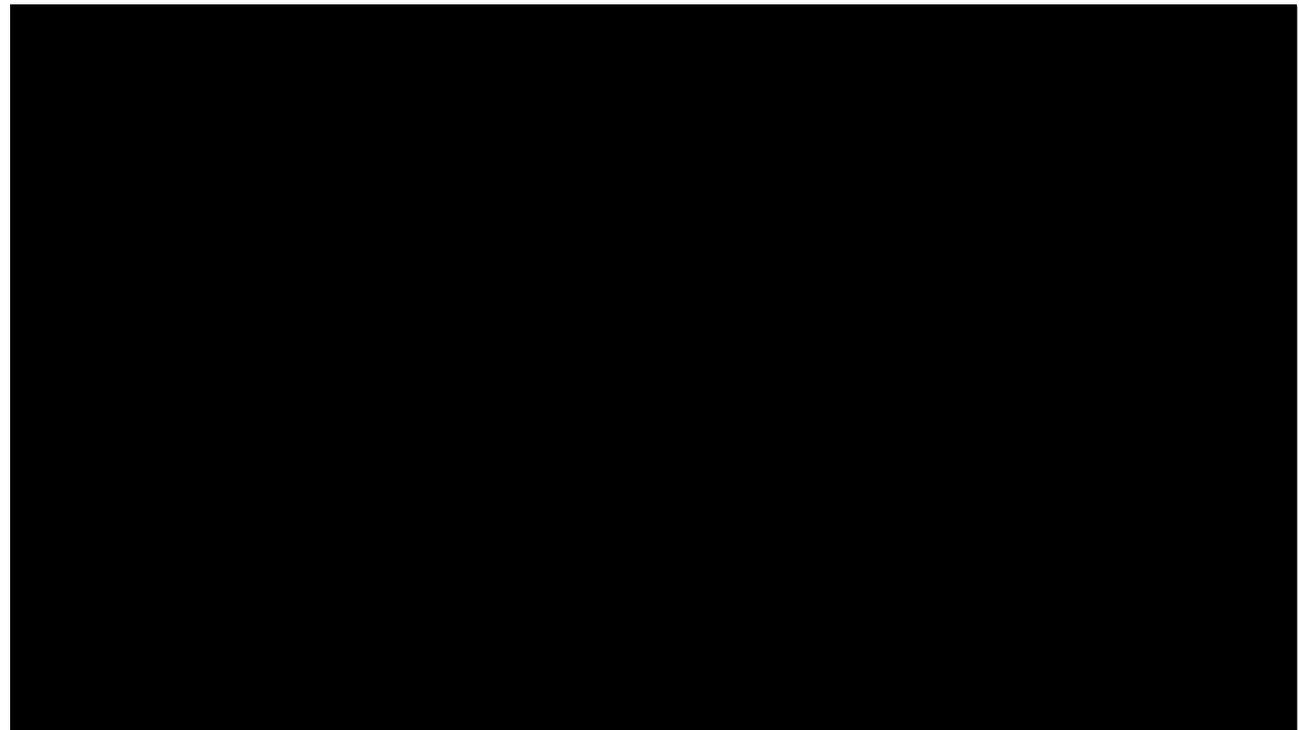
At the conclusion of Dr. Markand's testimony, and by agreement of the parties, Dr. Markand was asked to review Exhibit E reflecting the most recent medical treatment and determine whether any of the information therein would change his determination of the degree of impairment. INPRS was given 14 days to file and serve Dr. Markand's conclusion, and Sumrall was given an additional 14 days to file any response. Dr. Markand's supplemental conclusion was timely filed and Sumrall did not respond.

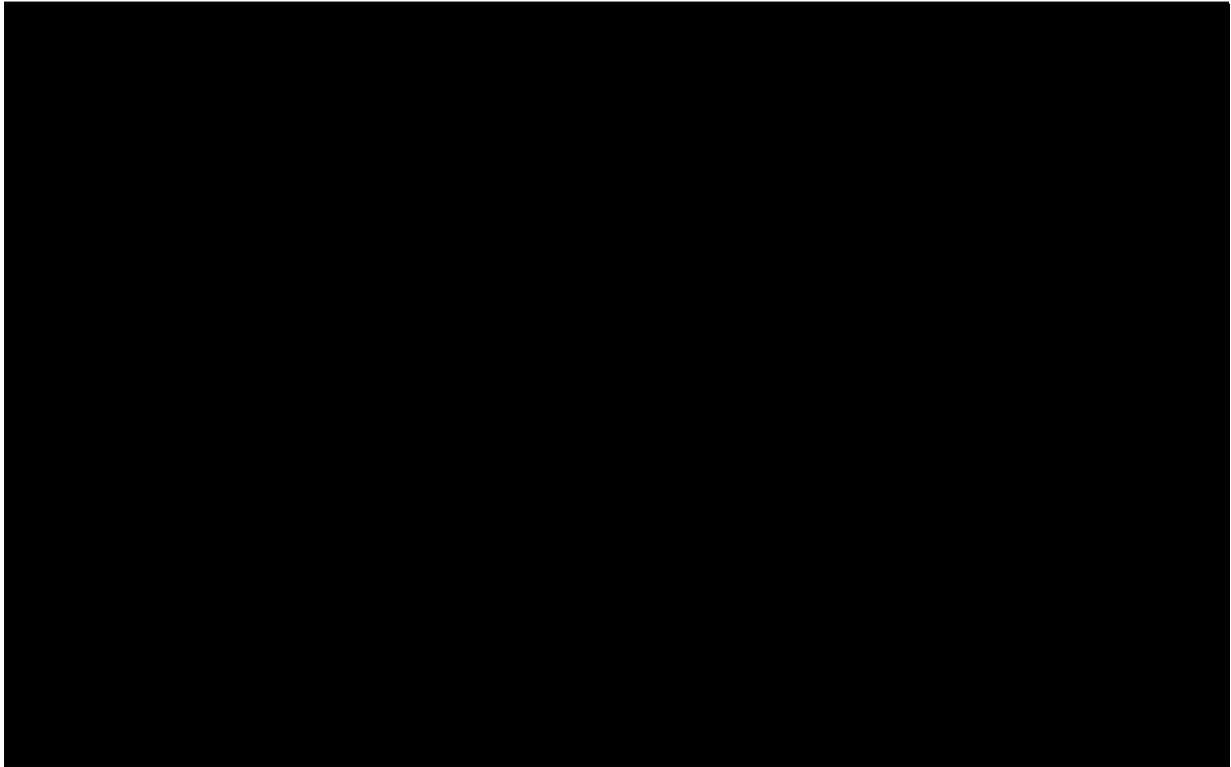
Findings of Fact

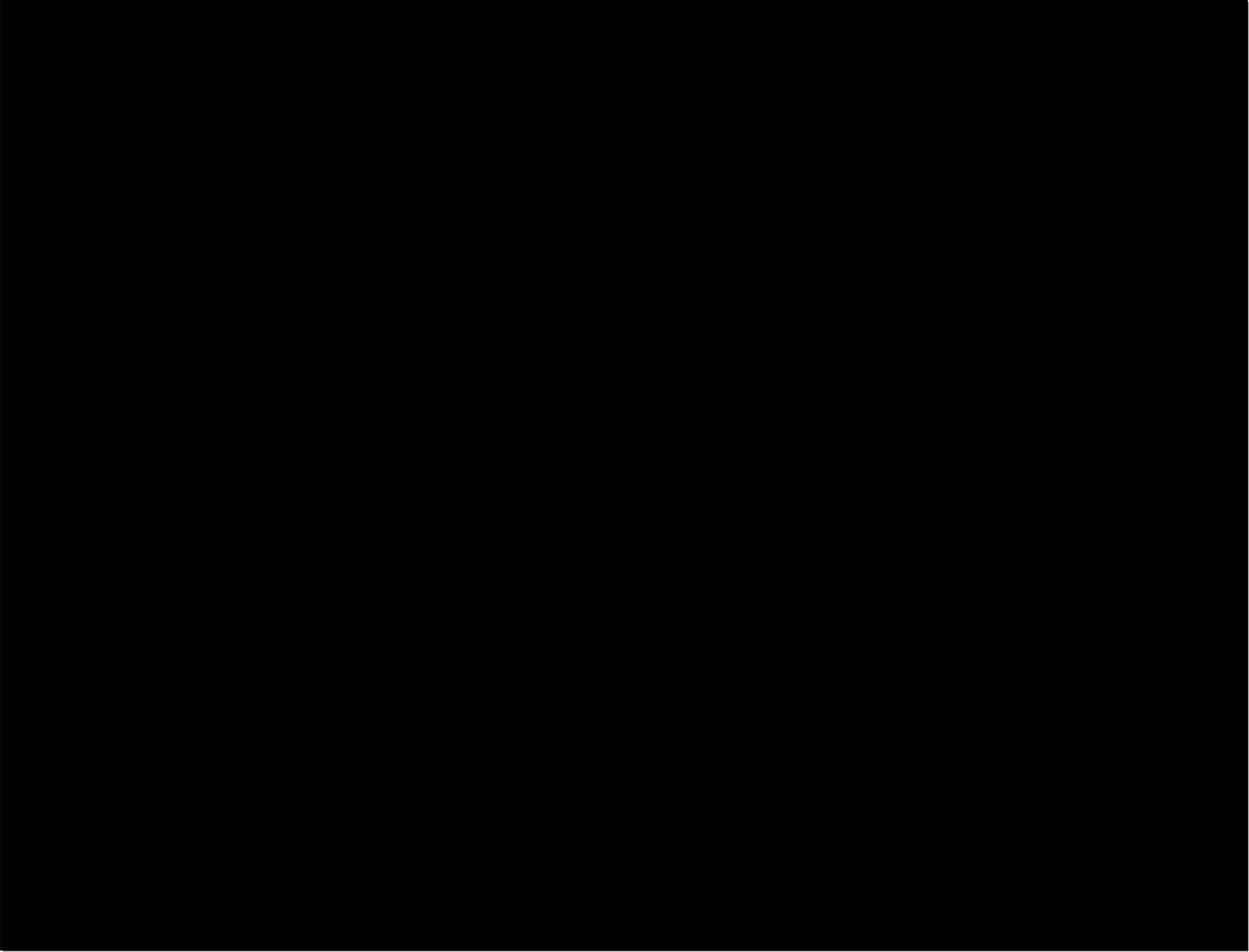


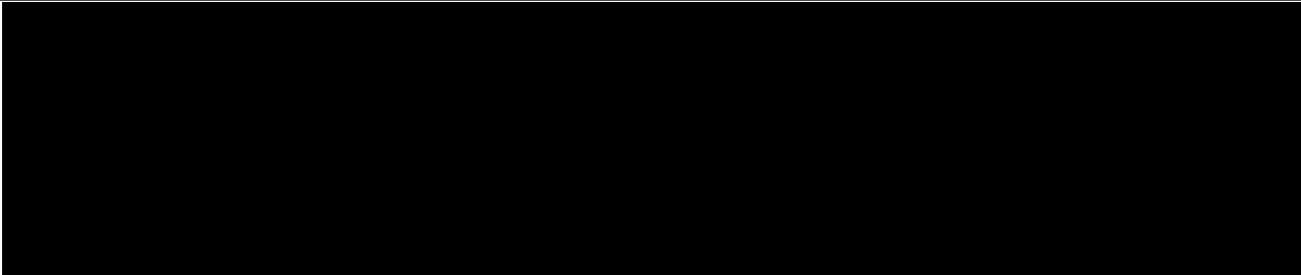
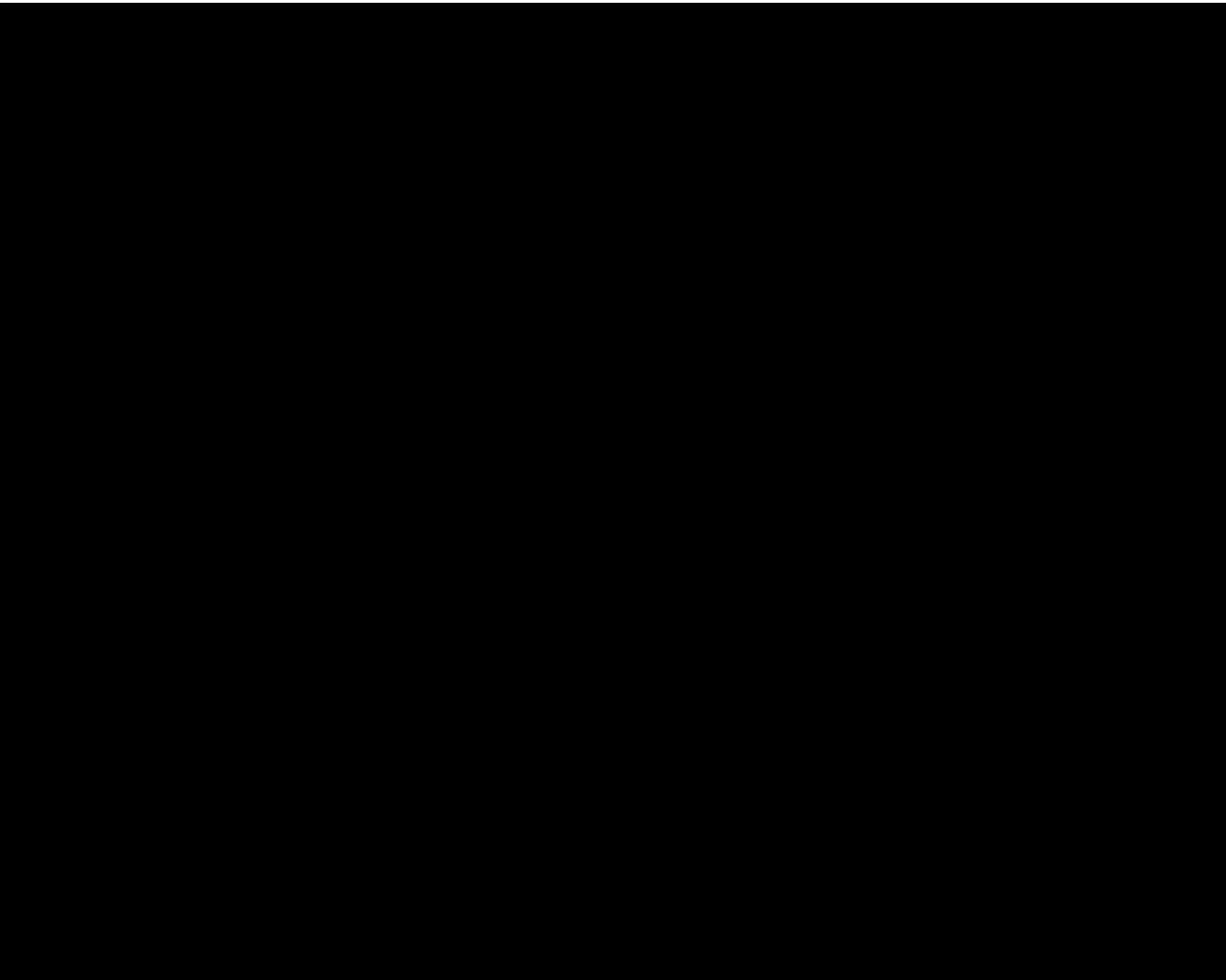












Conclusions of Law

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. Ct. 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 Sumrall, as the person requesting agency benefits. I.C. § 4-21.5-3-14(c); see *Indiana Department of Natural Resources v. Krantz Brothers Construction Corp.*, 581 N.E.2d 935, 938 (Ind. Ct. 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). 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. Ct. 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. Granzel*, 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, Sumrall can prevail only if his evidence preponderates over the evidence submitted by the INPRS 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.*

Discussion

At the time of his injury, Sumrall was an employee of the City of ██████ 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 Indiana Code §§ 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.

It is undisputed, and Dr. Markand testified, that Sumrall's lower back pain is a covered impairment under I.C. § 36-8-8-12.3(b). The dispute is the class of impairment under § 36-8-8-12.5(b), and the degree of impairment under § 36-8-8-13.1(c).

Class of Impairment

Indiana Code § 36-8-8-12.5(b) 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.

The term “direct result” required for a Class 1 impairment is broadly interpreted to mean an injury incurred on the job that disabled an employee who was previously able to perform the job.

We conclude that a fund member who was able to perform his job duties before an on-duty injury despite having a pre-existing condition or health issue that preceded the on-duty injury, and who becomes unable to perform his job duties only after sustaining an on-duty injury, has an impairment that is the “direct result” of the physical injury or injuries sustained while on duty. This is so even if the on-duty injury created an impairment by exacerbating a preexisting condition, so long as the pre-existing condition did not previously prevent the fund member from performing his or her job duties.

Indiana Public Employee Retirement Fund v. Bryson, 977 N.E.2d 374, 379 (Ind. Ct. App.), *aff’d on reh’g*, 983 N.E.2d 172 (2012), *trans. denied*. *Bryson* involved exacerbation of a pre-existing condition, but the above definition of “direct result” dictates the same classification in cases where there was no pre-existing condition. Indeed, the outcome is even clearer in a case without pre-existing conditions.

Application of this test to the facts of this case is straightforward. Sumrall was fully able to perform his job duties before [REDACTED], and he sustained an on-duty injury to his lower back while fighting a fire. It is uncontested that Sumrall has a “covered impairment” that makes him unable to perform the functions of his job, and the impairment is lower back pain. There was no evidence that the lower back pain was caused by anything other than the on-duty injury. Therefore, Sumrall’s impairment was the “direct result” of an injury sustained while on duty, and his impairment is Class [REDACTED].

Dr. Markand based his conclusion of a Class [REDACTED] impairment on the facts that Sumrall did not seek immediate medical attention and his complaints of pain are “out of proportion” to the physical evidence—or to put it more bluntly, that Sumrall’s pain is not as severe as he says it is. But Dr. Markand agrees (and the evidence shows) that Sumrall’s lower back pain is disabling. The relative severity of an on-duty injury speaks to whether it is sufficiently severe to disable the member (conceded in this case), or to the degree of impairment (see below), but not the class of impairment.

There is evidence that Sumrall’s back pain has been exacerbated (or exaggerated) due to his dependence on narcotic pain relievers. It is certainly troubling that multiple doctors have agreed that Sumrall’s symptoms are out of proportion to the physical condition of his back, have advised Sumrall that chronic pain should not be addressed with narcotics which might actually begin a cycle of dependence, and that Sumrall should engage in physical therapy instead. It is especially troubling that Sumrall has been buying oxycodone on the street after

his doctors gave him limited doses. But as long as he remains disabled from an on-duty injury, and even if his disability was prolonged or worsened by his own conduct, his impairment falls into Class [REDACTED]²

When presented with evidence previously unavailable to him regarding the incident and chain of events, Dr. Markand indicated that he might raise the class of impairment to Class [REDACTED]. But in light of the interpretation of “direct result” in *Bryson*, an on-duty injury that disables a previously able firefighter falls within Class [REDACTED].

Degree of Impairment

The degree of impairment is determined by the 1977 Fund’s medical authority based on a standard adopted by the INPRS Board. I.C. § 36-8-8-13.1(c). The INPRS Board has adopted the American Medical Association: Guidelines of Disability Ratings, using the edition or version in effect at the time of the disability application. 35 IAC 2-5-5.1. This book is actually titled *Guides to the Evaluation of Permanent Impairment*, and the current edition is the Sixth Edition which was issued in 2007.

Dr. Markand used Table 17-4 of the *Guides* to determine Sumrall’s degree of impairment from his lower back injury. He placed Sumrall’s condition into the class of soft tissue and non-specific conditions, defined as “Non-specific chronic, or chronic recurrent low back pain (also known as: chronic sprain/strain, symptomatic degenerative disc disease, facet joint pain, SI joint dysfunction, etc).”

On a classification scale of 0 (zero) to 4, the *Guides* place such conditions either in Class 0 (“Documented history of sprain/strain-type injury, now resolved, or occasional complaints of back pain with no objective findings on examination”) or Class 1 (“Documented history of sprain/strain type injury with continued complaints of axial and/or non-verifiable radicular complaints and similar findings on multiple occasions (see Sec. 17.2, General Considerations)”). A Class 0 condition receives an impairment rating of 0%, while a Class 1 condition receives an impairment rating of 1% to 9%. Dr. Markand generously gave Sumrall the [REDACTED] possible rating of [REDACTED] and then rounded it up to [REDACTED].

With respect to other conditions Sumrall is suffering from at present, the first question is whether they should be considered because they have not been determined to be covered impairments. But that need not be decided, because Dr. Markand has reviewed the more recent medical records and concluded that none of the other conditions changes the degree of impairment.

The ALJ finds that Dr. Markand’s expert determination of a [REDACTED] degree of impairment is well supported by the evidence, and in fact is probably more generous than strict application of the *Guides* would permit.

² Sumrall’s impairment is subject to annual review. I.C. § 36-8-8-13.7.

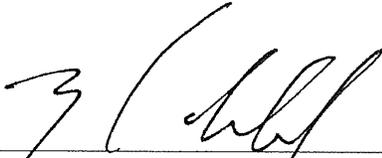
Sumrall's lay opinion that he is [REDACTED] disabled carries little if any evidentiary weight. As a rule, expert testimony is required on medical or scientific matters, unless they are matters within the common knowledge of a lay person. *Johnson v. Bender*, 369 N.E.2d 936, 940 (Ind. Ct. App. 1977); *see, e.g., Fall v. White*, 449 N.E.2d 628, 636 (Ind. Ct. App. 1983) (omission of expert evidence on whether drug caused heart attack was legally fatal to plaintiff's malpractice claim). "When the issue of cause is not within the understanding of a lay person, testimony of an expert witness on the issue is necessary." *Daub v. Daub*, 629 N.E.2d 823, 878 (Ind. Ct. App. 1994). On this mixed question of fact and law, the ALJ finds that Dr. Markand's determination of degree of impairment is supported by substantial and reliable evidence, and is not rebutted by any evidence or argument tendered by Sumrall.

Therefore, the ALJ concludes that Sumrall's degree of impairment is [REDACTED]

Recommended Decision

Based on the foregoing findings of fact and conclusions of law, the initial determination is reversed in part and affirmed in part. Arman Sumrall suffers from a covered impairment (lower back pain). His impairment class is Class [REDACTED]. His degree of impairment is [REDACTED]. INPRS shall recalculate Sumrall's benefit based on this revised determination, and pay him retroactive benefits in accordance with his new benefit.

DATED: March 24, 2014.



Wayne E. Uhl
Administrative Law Judge
3077 East 98th Street, Suite 240
Indianapolis, Indiana 46280
(317) 844-3830

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.

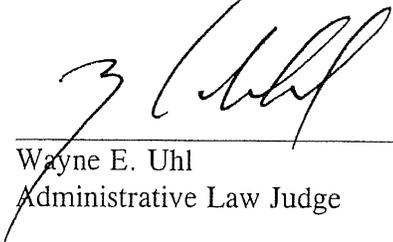
CERTIFICATE OF SERVICE

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 March 24, 2014:

Arman P. Sumrall


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200 E. 5th Ave.
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Wayne E. Uhl
Administrative Law Judge