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# HIDDEN ILLNESS, CHRONIC PAIN: THE PROBLEMS OF TREATMENT AND RECOGNITION OF FIBROMYALGIA IN THE MEDICAL COMMUNITY

*Gené Stephens Connolly\**

## INTRODUCTION

Fibromyalgia is an undetectable, and often unexplainable illness.<sup>1</sup> It has become an increasing epidemic in recent years, causing musculoskeletal pain, decreased range of joint motions, and fatigue.<sup>2</sup> Aside from physical pain, fibromyalgia often leaves its sufferers with both psychological and emotional disorders stemming from a condition of constant and continuous pain.<sup>3</sup>

Between 10% and 12% of the American population suffers from widespread pain, and the percentages increase with age.<sup>4</sup> Fibromyalgia is also most common in women between the ages of 20 and 55.<sup>5</sup>

Despite over ten years of investigation, research, and news reports, fibromyalgia continues to be a source of both medical and legal controversy.<sup>6</sup> Since there are no apparent causes of the illness, as well as no objective or visible signs of disease, many doctors either

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\*Executive Text Editor, DEPAUL JOURNAL OF HEALTH CARE LAW. B.A., University of Michigan, Ann Arbor, 1993; J.D. (Cand.) DePaul University College of Law, 2003. This article is dedicated to fibromyalgia sufferers, R. Sue Connolly and Darlene Holmes.

<sup>1</sup>See William B. Salt, II, M.D. & Edwin H. Season, M.D., FIBROMYALGIA AND THE MINDBODYSPIRIT CONNECTION xv (Parkview Publishing 2000).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.* at xiv.

<sup>4</sup>Don L. Goldenberg, *Fibromyalgia syndrome a decade later: What have we learned?*, 159 ARCH. INTERN. MED. 777, 777 (1999).

<sup>5</sup>Salt & Season, *supra* note 1, at xiii.

<sup>6</sup>*Id.* at 246; see also Goldenberg, *supra* note 4, at 777.

challenge its existence or dismiss a fibromyalgia sufferer's symptoms as merely psychosomatic.<sup>7</sup> The continuing debate over fibromyalgia's existence in the medical community makes post-traumatic fibromyalgia claims difficult to litigate and even harder to prove.<sup>8</sup> As with most injury cases, a successful claim depends largely upon a clear and established medical diagnosis.<sup>9</sup> Fibromyalgia claims, however, are often trivialized since most medical testing (blood tests, x-rays, endoscopic examinations, and biopsy results) provides a normal analysis of the patient's medical and physical condition.<sup>10</sup> In light of these difficulties, courts and juries are reluctant to provide favorable verdicts to plaintiffs who claim fibromyalgia symptoms as a result of post-traumatic accidents or injuries.<sup>11</sup>

Workers compensation and social security claims involving fibromyalgia are equally as difficult to prove, since documentation of the existence of the illness and the degree of disability are key to a successful claim.<sup>12</sup> While some fibromyalgia workers' compensation claims have been successfully litigated, the plaintiffs are often offered temporary disability or impairment awards due to the continual inconsistencies in medical testimony regarding the recognition and existence of the illness.<sup>13</sup>

This article focuses on the continuing inconsistencies in recognition of fibromyalgia within the medical community; inconsistencies that, unfortunately, affect the court holdings and

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<sup>7</sup>Salt & Season, *supra* note 1, at xvi.

<sup>8</sup>*Id.* at 246.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at xv.

<sup>11</sup>*See* Crocetti v. Ottenbacher, RR Cook County Jury Verdict Reporter, (Law Bulletin Publ'g Co.) No.25/10 (March 31, 2000). The plaintiff, a part-time real estate agent, claimed aggravation of pre-existing fibromyalgia after being rear-ended in a McDonald's drive-through lane by a Tribune account executive. While the defendant admitted negligence, she denied any injury to the plaintiff. *Id.* The jury verdict was \$0.00 for the plaintiff's pain, suffering, and disability claim and \$5,337 for medical liability (the plaintiff had \$10,673.00 in medical bills; plaintiff's insurance company (State Farm) made no offer of an original settlement amount). *Id.*

<sup>12</sup>Salt & Season, *supra* note 1, at 249.

<sup>13</sup>*See* Johnson v. North Park Hosp., No. 03501-9803-CH-00031, 1999 Tenn. LEXIS 391, \*10 (Tenn. Aug. 19, 1999). In this case, one of the doctors testifying to the workers' compensation board regarding the plaintiff's condition admitted that the *AMA* guidelines did not specifically cover fibromyalgia. *Id.* As a result, the doctor used the pain and loss of range of motion sections of the *AMA Guides* to make an impairment determination. *Id.*

compensation board findings of soft-tissue and fibromyalgia related claims. The background information discusses the common definitions and symptoms of fibromyalgia. It further discusses the standards used for determining permanent impairment awards as outlined in the *AMA Guides to the Evaluation of Permanent Impairment (AMA Guides)*, as well as reviews the current controversies and recommendations for revising the *AMA Guides*. Additionally, the background section discusses the cost of diagnosis to both patients and doctors, as illustrated through various clinical trials and tests for treatment of fibromyalgia. The causation and standard of review section includes a discussion of four cases involving workers' compensation claims: 1) *In The Matter of The Worker's Compensation Claim of Gonzales v. State of Wyoming Workers' Compensation Division*<sup>14</sup>; 2) *Appeal of Paul Rainville*<sup>15</sup>; 3) *Whaley v. Hardee's*<sup>16</sup>; and 4) *Johnson v. North Park Hospital*<sup>17</sup>. This section identifies the standard of review used by the courts and workers' compensation boards to assess levels of disability and impairment in patients suffering from fibromyalgia due to work-related injuries. It also suggests that the standard of review employed by the court is overly stringent given the nature of the illness, and makes the suggestion of a standard that combines both objective and subjective evidence in reviewing fibromyalgia work-related claims when medical testing fails to produce quantifiable results. It further suggests the potential advantages of having the American Medical Association (AMA), and not just the American College of Rheumatology, formally recognize fibromyalgia under its pain and impairment rating guidelines. Including fibromyalgia under the AMA guidelines would circumvent the continuing inconsistencies in diagnosis and opinions among medical experts, while providing patients with the needed acknowledgement that their conditions are not "just in their heads." The compensatory awards section discusses the difficulties with obtaining monetary damages for fibromyalgia personal injury cases. This section discusses the ranges in monetary awards as discussed in an interview by a personal injury and plaintiff's attorney,

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<sup>14</sup>*In re Worker's Compensation Claim of Gonzales v. State of Wyo. Workers' Compensation Div.*, 970 P.2d 865 (Wyo. 1998).

<sup>15</sup>*Appeal of Paul Rainville*, No. 97-269, 1999 N.H. LEXIS 6 (N.H. 1999).

<sup>16</sup>*Whaley v. Hardee's*, 912 S.W.2d 14 (Ark. Ct. App. 1995).

<sup>17</sup>*See Johnson v. North Park Hosp.*, 1999 Tenn. LEXIS 391.

as well as examines the Chicago, Cook County, Illinois case of *Bajoras v. Village Pantry*<sup>18</sup>. Finally, suggested recommendations for plaintiff-patients regarding the documentation necessary to assist in a successful claim are explored.

## BACKGROUND

### Fibromyalgia: Common Definitions and Symptoms

Fibromyalgia is associated with widespread muscular pain, aching, stiffness, and tenderness.<sup>19</sup> These symptoms most often appear in what are commonly known as trigger points.<sup>20</sup> While there are an increasing number of women who suffer from the illness, fibromyalgia does not appear to be related to ethnicity.<sup>21</sup> Besides the constant muscular pain, fibromyalgia patients also suffer from extreme fatigue, low energy, headache, and dizziness, all of which can eventually lead to difficulties in one's interpersonal relationships and work ability.<sup>22</sup>

Because these symptoms mimic other diseases like lupus and rheumatoid arthritis, patients are often misdiagnosed.<sup>23</sup> Medical testing of fibromyalgia symptoms usually yields negative or inconclusive results, leaving most doctors to make general assumptions about the sufferer's psychiatric health, which only further disables the patient.<sup>24</sup> "Clinical studies by leading rheumatologists using a group of fibromyalgia patients indicated that symptoms of widespread pain and tenderness in a least 11 of 18 specified tender points on digital palpation provided a sensitivity rating of 88% in distinguishing fibromyalgia from other causes of chronic musculoskeletal pain."<sup>25</sup>

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<sup>18</sup>*Bajoras v. Village Pantry*, NN Cook County Jury Verdict Rep. (Law Bulletin Publ'g Co.) No.50/3 (1997).

<sup>19</sup>Salt & Season, *supra* note 1, at xi.

<sup>20</sup>*Id.* There are between 11-18 trigger points according to the American College of Rheumatology. See Mari Skelly and Andrea Helm, ALTERNATIVE TREATMENTS FOR FIBROMYALGIA & CHRONIC FATIGUE SYNDROME, 17 (Hunter House Inc. Publishers 1999). Nine common trigger points include: 1) the base of the skull; 2) chest; 3) leg; 4) neck; 5) back; 6) buttocks; 7) shoulders; 8) arms; and 9) hips. See Salt & Season, *supra* note 1, at xii.

<sup>21</sup>Salt & Season, *supra* note 1, at xiii.

<sup>22</sup>*Id.* at xv.

<sup>23</sup>See Michele Wick, *Fibromyalgia: Finally, a Diagnosis*, CBSHealthWatch, (July, 2000), at <http://healthwatch.medscape.com/cx/viewarticle/219447> (last visited Nov. 17, 2001).

<sup>24</sup>*Id.* at 1.

<sup>25</sup>Goldenberg, *supra* note 4, at 777-785.

While these and other studies have assisted in proving the seriousness of fibromyalgia symptoms, debate continues over how to define the illness in the absence of objective markers.<sup>26</sup> Additionally, patients usually suffer from fibromyalgia symptoms for five to seven years before a diagnosis is made.<sup>27</sup> Even with formal recognition of the illness by the American College of Rheumatology in 1990, patients continue to have difficulty with diagnosis and treatment.<sup>28</sup>

### **The AMA Guides: Is It An Effective Tool for Determining Permanent Impairment?**

In order to understand the problems of diagnosis, treatment, and compensation for fibromyalgia cases, one must begin with a description of the guidelines for evaluating impairment in these cases. The *AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition* (*AMA Guides*) are used as a tool for rating permanent impairment in patients suffering from work-related or personal injuries.<sup>29</sup> The *AMA Guides* provide physicians in all specialties with guidelines for evaluating a patient's qualification for disability benefits by converting medical information into numerical values.<sup>30</sup> Chapters of the *AMA Guides* focus on individual organs and systems and provide a description of the evaluative and diagnostic methods for assessing certain impairments.<sup>31</sup> The impairments are assigned a rating as a percentage of loss of function for that organ or system and later translated into impairment ratings for the whole person.<sup>32</sup> Since the *AMA Guides* are used in over forty state workers compensation programs and provide a medically standardized and objective method

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<sup>26</sup> Goldenberg, *supra* note 4, at 782. Dr. Goldenberg explains that the absence of any objective markers is considered to be functional, rather than organic, leading to the implication for some doctors that the patient's physical symptoms are manifestations of an emotional disorder. *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Salt & Season, *supra* note 1, at 247.

<sup>29</sup> Emily A. Spieler et al., *Recommendations to Guide Revision of the Guides to the Evaluation of Permanent Impairment*, 283 JAMA 519, 519-523 n.4 (2000).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 519.

<sup>32</sup> *Id.* This type of impairment rating is termed "whole person impairment." *Id.* Attorney Spieler's article used the example of amputation, specifically amputation of the index finger. *Id.* The impairment rating provided a 20% impairment for the whole hand and an 11% impairment of the whole person. *Id.*

for evaluating impairment, the presumption is that the ratings are unbiased, reliable, and highly scientific.<sup>33</sup>

Two types of criticisms surround the *AMA Guides*.<sup>34</sup> The first criticism focuses on internal deficiencies in the *AMA Guides*, claiming that it fails to provide "a comprehensive, valid, reliable, unbiased, and evidence-based system" for rating impairments.<sup>35</sup> Critics additionally comment that the *AMA Guides* do not reflect "perceived and actual loss of function and quality of life" and that the numerical ratings represent "legal fiction not medical reality."<sup>36</sup>

A second criticism focuses on how the ratings are used in workers compensation systems.<sup>37</sup> Critics claim that the ratings are "improperly used as a substitute for a full assessment of the impact of impairment on work and non-work capabilities," subsequently causing "inappropriate compensation."<sup>38</sup> When applied to fibromyalgia and other non-quantifiable illnesses, both criticisms support the argument that the *AMA Guides'* impairment ratings do not accurately reflect a patient's true functional limitations.<sup>39</sup> Since the ratings rely on medical expertise and information that is "observable and ascertainable"<sup>40</sup> to determining impairment only, considerations of disability and loss of functional activities are largely ignored.<sup>41</sup> Thus, the *AMA Guides* lack of inclusion of a system to rate disability or functional limitations is particularly problematic for fibromyalgia sufferers.

Critics complain that the *AMA Guides* "blur the line" between impairment and disability by including disability roles in the list of activities related and relevant to impairment.<sup>42</sup> In addition, proponents for revision of the *AMA Guides* suggest that while the *AMA Guides* claim functional loss and capacity are included in the impairment ratings, inconsistencies in the application of the ratings negate this

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<sup>33</sup> Spieler, *supra* note 29, at 519.

<sup>34</sup> *Id.* at 520.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 519. The article comments that the California state workers compensation system has declined to use the *Guides*. *Id.*

<sup>37</sup> *Id.* at 520.

<sup>38</sup> Spieler, *supra* note 29, at 520.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (citing *Guides to the Evaluation of Permanent Impairment, Fourth Edition*, Chicago, Ill., American Medical Assn., 315-317 (1993)).

<sup>41</sup> Spieler, *supra* note 29, at 520.

<sup>42</sup> *Id.*

claim.<sup>43</sup> The critics suggest that the *AMA Guides* should not only include a system to reflect functional loss and impairment, but should also include a “baseline” definition and discussion for what constitutes normal function beyond the simple “consensus” rating guidelines.<sup>44</sup>

Given the magnitude of the above criticisms, it is no wonder that problems exist determining compensation in fibromyalgia cases, where evidence largely functional and subjective, continue to persist.

### The Cost of Diagnosis

In addition to the frequent misdiagnosis and constant pain, patients often bear the costs of any number of medical and experimental treatments.<sup>45</sup> In a multi-center study of 538 patients who were observed for seven consecutive years, fibromyalgia patients averaged ten outpatient medical visits per year and used an average of three fibromyalgia related drugs.<sup>46</sup> The study found the average cost per patient in 1996 was \$2,274.00 with the major contributing costs associated with hospital admissions and drug treatments.<sup>47</sup> For some patients, the costs involved are substantially higher when surgery to help correct spinal cord or brain stem compression is the only hope of relief.<sup>48</sup>

Often the combination of chronic pain and drugs such as anti-inflammatory medications, muscle relaxants, and anti-depressants cause additional symptoms such as irritable bladder and bowel

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<sup>43</sup> Spieler, *supra* note 29, at 520. As an example, Attorney Spieler notes that the spine section of the musculoskeletal chapter of the *Guides* focuses on structure rather than function, and directs doctors to ignore developmental changes in the spine. *Id.* She argues that this omission affects the accuracy of the impairment rating because a full evaluation of the patient's total impairment is lacking. *Id.*

<sup>44</sup>*Id.* at 521. Here Attorney Spieler argues that the ratings are formulated by a consensus within the medical community and do not adequately address functional conditions such as chronic headaches or degenerative and terminal illnesses. *Id.* at 522.

<sup>45</sup>Goldenberg, *supra* note 4, at 781.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>Wick, *supra* note 23. Dr. Dan S. Heffez, director of neurovascular surgery at the Chicago Institute of Neurosurgery and Neuroresearch cautions patients to obtain a neurological examination before choosing to undergo surgery. *Id.* Because fibromyalgia sufferers often live with enormous daily pain, spinal cord and brain stem compression surgeries are two ways of providing some hope of relief. *Id.*



syndrome to name a few.<sup>49</sup> These additional symptoms, of course, lead to additional medications for the fibromyalgia sufferer, as well as additional treatment costs.<sup>50</sup> Still other patients choose to investigate non-medical methods of relief such as exercise, meditation, and other eastern movement therapy techniques.<sup>51</sup> Regardless of the methods used, the cost of treating a chronic illness is expensive.

### THE PROBLEM OF CAUSATION IN THE ABSENCE OF OBJECTIVE EVIDENCE

#### The Standards of Review for Determining Disability and Physical Impairment Levels

Fibromyalgia presents the obvious question of how pain is measured for with an illness that has no quantifiable or objective criteria.<sup>52</sup> This problem causes particular difficulties for plaintiffs attempting to establish a causal relationship between work-place injuries and fibromyalgia.<sup>53</sup> In *In The Matter of The Worker's Compensation Claim of Gonzales v. State of Wyoming Workers' Compensation Division*, the plaintiff-employee was a certified nurse's assistant and was injured while moving a patient.<sup>54</sup> After experiencing a sharp pain in her neck accompanied with burning and numbness in her in right shoulder and arm, she filed an injury report specifying injury to her right upper back.<sup>55</sup> After the employee's cervical spine x-rays returned normal, she was diagnosed with fibromyalgia and referred to a neurologist.<sup>56</sup> The neurologist, like the first doctor, could not determine the cause of the

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<sup>49</sup>Mari Skelly and Andrea Helm, *ALTERNATIVE TREATMENTS FOR FIBROMYALGIA AND CHRONIC FATIGUE SYNDROME*, 17 (Hunter House Inc. Publishers 1999).

<sup>50</sup>*Id.* In addition to the typical anti-inflammatory drugs, patients suffering from other fibromyalgia symptoms, such as irritable bowel or bladder syndromes were given Levsinex and Bentyl at one Seattle clinic. *Id.*

<sup>51</sup>*Id.*

<sup>52</sup>Goldenberg, *supra* note 4.

<sup>53</sup>*Id.* Dr. Goldenberg says, "A 'diagnosis' of FM in the workplace may promote disability by fostering the notion of 'soft tissue injury.' Evidence to determine whether there is a causal relationship between trauma and FM is currently inadequate. Until such a relationship is established, the terms 'post-traumatic' or 'secondary' FM should not be used. Goldenberg, *supra* note 20, at 781. This statement suggests, however, that soft-tissue injuries are, or would be, contrived by employees.

<sup>54</sup>*In re Gonzales*, 970 P.2d at 867.

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

employee's shoulder pain.<sup>57</sup> Approximately one year later, and for two subsequent years, the plaintiff-employee saw two orthopedic surgeons and a rheumatologist.<sup>58</sup> Each doctor's report was different, with some tests indicating tears in the employee's thoracic spine, and other reports indicating that her symptoms were inconsistent with a thoracic spine injury.<sup>59</sup>

At the request of the Wyoming Workers Compensation Division (the division), a second orthopedic surgeon conducted an independent medical examination and concluded that the employee's thoracic condition was unrelated to her work-related injury.<sup>60</sup> Specifically, the surgeon testified that he believed the employee's condition was due more to an emotional problem than to "organic pathology."<sup>61</sup>

In the court's holding, the court employed a substantial evidence standard of review.<sup>62</sup> The burden to disprove the division's findings was on the employee, while the court was to determine whether there was substantial evidence to support the hearing examiner's findings.<sup>63</sup>

The court denied the employee's claim, relying on the orthopedic surgeon's testimony that her symptoms came from an emotional condition rather than a work-related injury.<sup>64</sup> The court stated that "[a]n injury 'arises out of,' the employment when a causal connection exists between the injury and the conditions under which the work is required to be performed."<sup>65</sup> The court mentioned that "...under the *AMA Guide to the Evaluation of Permanent Impairment*, the employee was not entitled to a chronic pain impairment rating because she could not produce objective findings to explain her complaints of pain and she could not establish that the pain was related to her original injury."<sup>66</sup> The court here completely rejected any non-objective standard and relied solely on the judgment of the workers'

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<sup>57</sup> *In re Gonzales*, 970 P.2d at 867.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 868.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *In re Gonzales*, 970 P.2d at 869.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 870.

<sup>65</sup> *In re Gonzales*, 970 P.2d at 870, (citing *State ex rel. Wyoming Workers' Safety and Compensation Division v. Bruhn*, 951 P.2d 373, 376-77 (Wyo.1997)).

<sup>66</sup> *Id.* at 871.

compensation hearing examiner.<sup>67</sup> Since the majority of the physicians did not believe that a thoracic tear could create the employee's symptoms, the claim was denied.<sup>68</sup> The court's holding in this case, as well as the majority physician's assessment of the plaintiff-employee's condition appears to uphold the generalization that illnesses lacking objectivity are not genuine.<sup>69</sup>

The heightened standard employed in this case is indicative of the standard of review used in the following three workers' compensation cases. Even in the rare cases where the plaintiff-employee's claim is upheld, the court relies heavily upon the AMA guidelines, which to the misfortune of the patient, does not refer to fibromyalgia or myofascial pain.<sup>70</sup>

### **Case Law Determinations Under The Clear Preponderance of Evidence Standard of Review**

#### *Appeal of Paul Rainville*

In the *Appeal of Paul Rainville*, the Supreme Court of New Hampshire affirmed in part and reversed in part the New Hampshire Compensation Appeals Board's decision to allow the employee's insurance company to suspend payment of his physical therapy expenses and deny his permanent impairment award.<sup>71</sup> The plaintiff-employee was injured while working as a construction worker and operating a jackhammer.<sup>72</sup> "He began experiencing upper body pain, neck pain, tremors, diaphoresis, headaches, anxiety, and numbness in his arms."<sup>73</sup> The employee, as a result of his pain, ceased working and began receiving temporary total disability payments.<sup>74</sup> His primary care physician diagnosed him with myofascial pain syndrome<sup>75</sup> and recommended

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<sup>67</sup> *In re Gonzales*, 970 P.2d at 869.

<sup>68</sup> *Id.* at 871.

<sup>69</sup> Goldenberg, *supra* note 4, at 782.

<sup>70</sup> *Rainville*, 1999 N.H. LEXIS at \*17.

<sup>71</sup> *Id.* at \*1.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at \*2.

<sup>74</sup> *Id.*

<sup>75</sup> Fibromyalgia is often interchanged with myofascial pain syndrome, although the two syndromes are slightly different. Skelly & Helm, *supra* note 25, at 22, 23. Myofascial pain syndrome is described as a condition of body-wide trigger points that are maintained by certain perpetuating factors; the body's reaction to pain causes a protective covering over the muscles

physical therapy.<sup>76</sup> After a little over a year of physical therapy, the doctor concluded the employee reached a plateau concerning his maximum medical improvement he would reach and it was unlikely that any further improvement would be seen.<sup>77</sup>

At the insurance company's request, the employee was examined by an independent medical examiner who disagreed with the primary care physician's impairment rating (the first doctor calculated an 18% impairment rating) and further found physical therapy to be unnecessary.<sup>78</sup> Shortly after the independent examiner's findings, a hearing was called to determine the employee's eligibility for disability benefits.<sup>79</sup> The hearing officer determined that the employee's injuries were directly related to his previous work injury, and that physical therapy treatments were both reasonable and necessary.<sup>80</sup> However, due to the primary care physician's failure to explain the employee's impairment rating, a permanent impairment award was denied.<sup>81</sup> While appealing the ruling concerning the permanent impairment award, the insurance company refused to pay the employee's physical therapy expenses.<sup>82</sup> A subsequent hearing reversed the ruling of the reasonableness and necessity of the employee's physical therapy.<sup>83</sup>

On appeal, the court vacated and remanded the compensation board's previous rejection of the employee's claim of necessity for physical therapy, as well as its' denial of his request for a permanent impairment award.<sup>84</sup> The court, however, remarked that it would not set aside or vacate decisions of the compensation board unless there was a clear preponderance of the evidence that the order was unjust or unreasonable.<sup>85</sup> While the court does not provide clear answers on the outcome of the case, it does establish what appears to be an intermediate standard of review for chronic pain cases that allow

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that eventually forms a sort of splint. *Id.* The "splint" causes further tightness and hardness of the muscles, which in turn causes additional pain. *Id.*

<sup>76</sup>*Rainville*, 1999 N.H. LEXIS, at \*2.

<sup>77</sup>*Id.*

<sup>78</sup>*Id.* at \* 3.

<sup>79</sup>*Id.*

<sup>80</sup>*Id.* at \*3.

<sup>81</sup>*Rainville*, 1999 N.H. LEXIS at \*4.

<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

<sup>84</sup>*Id.* at \*14, \*21.

<sup>85</sup>*Id.* at \*11.

alternative methods of treatment so long as the alternative methods are grounded in adequate clinical information about the patient's condition.<sup>86</sup> Again, objective, clinical information appears to be the central theme to a successful claim. The question remains, how one goes about providing objective evidence for a hidden illness.

*Whaley v. Hardee's*

The court returned to the substantial evidence standard of review in *Whaley v. Hardees*.<sup>87</sup> In *Whaley*, the Court of Appeals of Arkansas denied an employee's claim for permanent disability benefits after she developed inflammation and pain in her right elbow from her job as a biscuit maker.<sup>88</sup> After filing a workers compensation claim, the employee was initially awarded permanent partial disability benefits based upon a 5% permanent physical impairment rating.<sup>89</sup> On de novo review, the compensation Commission found that the employee failed to prove by a preponderance of evidence that she was entitled to compensation for permanent physical impairment, and the employee appealed.<sup>90</sup>

Reviewing the evidence in a light most favorable to the Commission's findings, the court explained that the substantial evidence standard required any relevant evidence that a reasonable mind might accept to adequately support a Commission's impairment conclusion.<sup>91</sup> The examinations and testimonies of two doctors reported the plaintiff-employee's injury and inflammation was not permanent.<sup>92</sup> The second doctor's report further concluded that the employee was not entitled to a 5% impairment rating because there were no objective, physical abnormalities in her right elbow.<sup>93</sup> Instead, the doctor found the tenderness and inflammation in the employees elbow was the result of an underlying soft tissue abnormality.<sup>94</sup> Despite the employee's continued experiences of pain, tenderness, and inflammation, the court

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<sup>86</sup>Rainville, 1999 N.H. LEXIS at \*18.

<sup>87</sup>Whaley v. Hardee's, 912 S.W.2d 14.

<sup>88</sup>*Id.* at 15, 16.

<sup>89</sup>*Id.* at 15.

<sup>90</sup>*Id.*

<sup>91</sup>*Id.*

<sup>92</sup>Whaley v. Hardee's, 912 S.W.2d at 15.

<sup>93</sup>*Id.*

<sup>94</sup>*Id.* at 16.

found these findings did not indicate the presence of scar tissue or any other permanent impairment, particularly given the lack of objective physical evidence.<sup>95</sup>

In a dissenting opinion, Judge Melvin Mayfield disagreed with both the majority court and the Commission, stating that the plaintiff's claim was rejected merely because her complaints of pain might not be true.<sup>96</sup> The dissent further remarked that the Commission erred in holding that a finding of inflammation could not support an award of permanent wage loss.<sup>97</sup> The dissent's opinion illustrates the difficulties faced by plaintiff-patients suffering from "soft-tissue" injuries and chronic pain. Without substantial objective evidence, a plaintiff's claim, and often a doctor's diagnosis, is viewed as one of speculation and conjecture.<sup>98</sup>

Doctors William Salt, II and Edward Season explain that from the patient's perspective, terms like "functional" (i.e. symptoms that cannot be explained), psychosomatic, and somatization are often understood to mean that doctors do not believe their symptoms are real, attribute their symptoms to stress, or suspect a mental illness or other serious psychological problem.<sup>99</sup> Rheumatologist studies also indicate that a number of independent factors were found to be associated with impairment.<sup>100</sup> These factors, however, do not survive the substantial evidence standard of review, particularly when court's place great weight on the workers' compensation commission findings.<sup>101</sup>

### *Johnson v. North Park Hospital*

In cases where courts have affirmed the permanent disability awards for employee work related injuries involving fibromyalgia, the decision is determined, as in most injury cases, through a battle of the experts on

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<sup>95</sup> Whaley v. Hardee's, 912 S.W.2d at 15.

<sup>96</sup> *Id.* at 18.

<sup>97</sup> *Id.* at 18.

<sup>98</sup> *Id.* at 16.

<sup>99</sup> Salt & Season, *supra* note 1, at 44.

<sup>100</sup> Dr. Goldenberg explains that "A number of factors were found to be independently associated with impaired function including pain levels, self assessed disability, pending litigation, education, a sense of helplessness and coping ability, and psychological distress." Goldenberg, *supra* note 4, at 781.

<sup>101</sup> See Whaley v. Hardee's, 912 S.W.2d at 16. The court remarked, "when the Commission chooses to accept the testimony one physician over another...we are powerless to reverse the decision." *Id.*

causation grounds.<sup>102</sup> In *Johnson v. North Park Hospital*, the plaintiff-employee, a 55 year-old home health care nurse, developed muscular pain after having a car accident shortly after leaving a patient's home.<sup>103</sup> The night after the car accident, the employee began experiencing tremendous pain in her knees, feet, hands, shoulders, and other trigger points.<sup>104</sup> Prior to the accident, the employee was active in sports, worked in her garden, and was able to perform typical household chores.<sup>105</sup> In addition to muscular pain, the plaintiff developed sleep problems, felt depressed, and was generally less outgoing.<sup>106</sup>

As in the previous cases, the employee received opinions from several doctors.<sup>107</sup> The first two doctors the employee saw diagnosed her with fibromyalgia. One doctor in particular explained, "to a reasonable degree of medical certainty...the trauma of the auto accident caused the plaintiff to have fibromyalgia."<sup>108</sup> A spine specialist reviewing the employee's bone scan determined the presence of a degenerative/arthritis spur and a small disc herniation.<sup>109</sup> He noted, however, that the spur would have developed prior to the auto accident, but agreed to her continued treatment for fibromyalgia because of her continuing complaints of pain.<sup>110</sup>

A rheumatologist prescribed muscle relaxants and antidepressant medication to the employee, defining her symptoms as consistent with fibromyalgia or "soft-tissue rheumatism."<sup>111</sup> While he did not give the employee formal work restrictions, he recommended that she do as much as possible while setting her own limits.<sup>112</sup> Finally, an eighth doctor confirmed the employee's fibromyalgia and determined that she

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<sup>102</sup>Johnson v. North Park Hospital, 1999 Tenn. LEXIS 392, \*1.

<sup>103</sup>*Id.* at \*3.

<sup>104</sup>*Id.* at \*4. See *supra* note 20 and accompanying text.

<sup>105</sup>*Id.* at \*4.

<sup>106</sup>*Id.*

<sup>107</sup>Johnson v. North Park Hospital, 1999 Tenn. LEXIS 392, at \*3.

<sup>108</sup>*Id.* at \*4-5.

<sup>109</sup>*Id.* at \*5.

<sup>110</sup>*Id.* at \*6.

<sup>111</sup>*Id.* at \*7-8.

<sup>112</sup>Johnson v. North Park Hospital, 1999 Tenn. LEXIS 392, at \*8. See also Goldenberg, *supra* note 4, at 781. Dr. Goldenberg suggests that job dissatisfaction, work disability, and litigation have an adverse effect on the outcome studies of fibromyalgia. *Id.* Consequently, he recommends that health care professionals minimize disability in fibromyalgia cases by encouraging the patients to continue to be as active as possible. *Id.*

suffered a 21% whole body impairment.<sup>113</sup> The doctor further explained that because fibromyalgia is not specifically covered by the *AMA Guides*, his impairment rating referred to the pain and loss of range of motion sections in the *AMA Guides*.<sup>114</sup>

The court held the record supported the findings of the trial court on the matter of causation relating to the employee's total permanent disability.<sup>115</sup> The court further determined that despite the differences in medical opinion regarding the employee's impairment rating,<sup>116</sup> the findings in general illustrated a causal connection between the employee's condition, fibromyalgia, and her car accident.<sup>117</sup>

While the *Johnson* case was a victory for fibromyalgia sufferers, particularly those developing fibromyalgia symptoms from work related injuries, legal victories for the patients are few and medical victories are even fewer. According to Dr. Goldenberg, patients who identify trauma as a cause of their symptoms experience greater levels of pain, more interference with daily activities, and greater disability.<sup>118</sup> He further explains that patients who meet the criteria for both chronic fatigue syndrome and fibromyalgia have particularly high rates of unemployment.<sup>119</sup> While these studies may assist doctors in assessing patient treatment needs for their own purposes, they do not provide a simple solution for someone who has suddenly been "sapped" of energy from the illness' symptoms. Inactivity may cause greater harm than good, but each case of fibromyalgia has to be reviewed on an individual basis, working within the common causal markers of the disease.

Given that typical medical testing does not provide objective evidence, courts and doctors alike would be wise to include a standard of review in fibromyalgia and soft-tissue cases that also considered subjective evidence and patient history. Acknowledging that not all

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<sup>113</sup>Johnson v. North Park Hospital, 1999 Tenn. LEXIS 392, at \*10.

<sup>114</sup>*Id.*

<sup>115</sup>*Id.* at \*12.

<sup>116</sup>*Id.* at \*11. One of the doctors found that the employee had a 5% partial impairment of the whole body. *Id.* Another doctor testified that while the car accident may have been the precipitating factor that unmasked the employee's symptoms, fibromyalgia did not cause impairment. *Id.*

<sup>117</sup>*Id.* at \*12.

<sup>118</sup>Goldenberg, *supra* note 4, at 781.

<sup>119</sup>*Id.* Dr. Goldenberg states, "Patients who met criteria for CFS and FM had particularly high rates (51%) of unemployment." *Id.*



illnesses show objective signs of disease is an important part of the patient's initial road to recovery and rehabilitation.<sup>120</sup> Furthermore, creating an intermediate standard of review eliminates the need for "substantial evidence" or a "clear preponderance of the evidence" because it makes the presumption that quantifiable evidence, due to the nature of the illness, is easily obtainable or completely unattainable.

The obvious criticism is that in an increasing litigious society, ferreting out legitimate claims becomes increasingly difficult. Yet, legitimizing fibromyalgia claims might begin with something as simple as recognition of the illness in the *AMA Guides* and creating a succinct and consistent standard of testing for patients where objective medical testing fails. Given the continuous debate and conflicting views on fibromyalgia, recognition of the disease by the American College of Rheumatology in 1990 appears to have done little to unify the medical community on this subject. Until general practitioners acknowledge that fibromyalgia is a hidden illness with real symptoms, not all of which are merely psychological, and courts are willing to lower the standards of reviewing these types of cases, patients will continue to suffer an uphill battle.

### Compensatory Damages

Compensatory damages in fibromyalgia cases are just as inconsistent as the medical opinions concerning the illness. The range of monetary damages in fibromyalgia cases is relatively small. Additionally the costs of litigating fibromyalgia cases can become enormous and dependent upon the number of doctors and expert witnesses that testify.<sup>121</sup> When doctors testify that fibromyalgia does not exist or that a patient's condition is simply a soft tissue injury, it diminishes the level of medical certainty needed to prove the causal link between the patient's injury and the actual symptoms.<sup>122</sup> By the time a damages award is granted, if at all, the billable hours, witness, and deposition costs have often far surpassed the original amount of the claim.<sup>123</sup> Still,

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<sup>120</sup>Salt & Season, *supra* note 1, at 7, 8. Doctors Salt and Season discuss the differences between illness and disease. *Id.*

<sup>121</sup>Interview with Victoria Vhrel, Attorney, Corbett and Matthews in Chicago, Ill. (Nov., 2000).

<sup>122</sup>*Id.*

<sup>123</sup>*Id.*

damages awarded in fibromyalgia cases are highly unpredictable, as illustrated by the next case.

*Bajoras v. Village Pantry*

In *Bajoras v. Village Pantry*, the plaintiff slipped and fell on a freshly mopped floor at a River Forest, Illinois market, landing on her tailbone.<sup>124</sup> After the accident, the plaintiff was found to have sustained a T-12 compression fracture, severe fibromyalgia, chronic pain, and clinical depression.<sup>125</sup> The plaintiff, who previously worked as a salesperson, became unemployed and disabled.<sup>126</sup>

The defense contended the plaintiff contributed to her injuries by rushing to buy items in the store just before closing, and that her condition was, in fact, a pre-existing psychosomatic disorder, which was the cause of her chronic pain.<sup>127</sup> In addition, an orthopedist testifying for the defense stated that fibromyalgia does not exist as a disease.<sup>128</sup>

The jury awarded the plaintiff a total of \$376,000, which included \$100,000 for loss of normal life; \$50,000 for past pain and suffering; \$200,000 for future pain and suffering; \$13,000 for medical liability (bills); and \$13,000 for lost work time.<sup>129</sup> While at first blush, the plaintiff's award appears to be a monetary windfall for an illness with no objective evidence, awards of this magnitude are exceptions. It should be noted that the defense doctor's testimony clearly dismissed the idea that fibromyalgia could be the cause of the plaintiff's chronic pain symptoms. There are far more cases where the plaintiff's damage awards are between \$2,000 and \$12,000 on average for both soft-tissue and fibromyalgia cases.<sup>130</sup>

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<sup>124</sup>*Bajoras v. Village Pantry*, NN Cook County Jury Verdict Rep. No.50/3.

<sup>125</sup>*Id.*

<sup>126</sup>*Id.*

<sup>127</sup>*Id.*

<sup>128</sup>*Id.*

<sup>129</sup>*Bajoras*, NN Cook County Jury Verdict Rep. (Law Bulletin Publ'g Co.) 50/3 (1997).

<sup>130</sup>Interview Victoria Vhrel, Attorney, Corbett and Matthews, in Chicago, Ill. (Nov., 2000).

## Recommendations For Assisting Patients In Successful Claim Awards

### *Workers' Compensation Claims*

Most physicians strongly advocate that patients continue to work, particularly in light of evidence indicating disability in fibromyalgia adversely affects long-term outcome.<sup>131</sup> As illustrated by the four cases reviewed in this article, workers compensation claims can be difficult to both litigate and prove. Doctors recommend that fibromyalgia claimants document several facts, including: 1) a diagnosis from a qualified physician; 2) the date that the fibromyalgia was established; 3) whether the onset of symptoms is specific to a work-related accident or traumatic event; 4) the degree to which fibromyalgia has caused disability versus disability caused by any pre-existing conditions; and 5) a prognosis (best estimate) by a qualified physician of how much ability may be recovered through proper treatment.<sup>132</sup> While this is by no means a complete list, nor a guarantee for successful litigation, fibromyalgia claimants should at least have some basic information regarding their condition and prognosis.

### *Waldorf Corp. v. Industrial Comm'n*

In *Waldorf Corp. v. Industrial Comm'n*, the claimant filed an application for workers compensation after she sustained injuries while working as a "catcher" for the Waldorf Corporation.<sup>133</sup> The claimant later developed fibromyalgia and sought permanent and total disability benefits, which was awarded by the circuit court of Cook County.<sup>134</sup> The employer appealed claiming that the lower court's findings were against the manifest weight of the evidence and that fibromyalgia was not a "compensable" injury as a matter of law given its subjective character.<sup>135</sup>

The court held that there was sufficient medical evidence to support a finding that the employee's fibromyalgia was causally

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<sup>131</sup>Salt & Season, *supra* note 1, at 247.

<sup>132</sup>*Id.* at 248.

<sup>133</sup>*Waldorf Corp. v. Industrial Comm'n*, 708 N.E.2d 476, 478 (Ill. App. 1999).

<sup>134</sup>*Id.*

<sup>135</sup>*Id.* at 479-481.

connected to her work-related injury.<sup>136</sup> The court, quoting a workers compensation treatise, further stated that while the "etiology" of fibromyalgia is unknown, a reversal is unwarranted where the claimant is capable of proving a causal connection between her injury and the illness.<sup>137</sup>

*Waldorf* is an additional illustration of the importance of documentation and evidence relating to a claimant's functional capacity before and after the injury. Thus, a patient's documentation and record of the onset of symptoms is crucial to successfully hurdling issues of causation and damages determinations.

### *Social Security Claims*

Patients seeking to make social security claims should gather the same facts, as noted for workers' compensation claims and seek legal advice in the event that claims are denied.<sup>138</sup> Most attorneys will not accept a case until the fibromyalgia patient has been denied once.<sup>139</sup> Documentation, including a detailed description of a sufferer's daily activities and limitations is key to the petition of benefits.<sup>140</sup> In April 1999, the Social Security Administration issued Ruling 99-2p, which officially recognizes both chronic fatigue syndrome and fibromyalgia as medically determinable impairments.<sup>141</sup> Yet, even recognition by the Social Security Administration does not solve the constant debate over the lack of objective medical evidence in fibromyalgia.

### *Insurance Companies And The Battle of the Experts*

Fibromyalgia also affects insurance companies, particularly as the number of work-related injuries increase. Since the goal of most insurance companies is to pay out the smallest claim amounts possible, claims quickly become a battle of experts.<sup>142</sup> Typically, insurance

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<sup>136</sup>*Id.* at 482.

<sup>137</sup> *Waldorf*, 708 N.E.2d at 483. The court quotes a treatise by Professor A. Larson, which states: "A finding that a disease is work-connected will not be reversed as being based on speculation and conjecture merely because the medical profession does not fully understand the etiology of the disease." A. Larson, *Workmen's Compensation*, sec. 80.31(c)(1983). *Id.* at 482.

<sup>138</sup> Salt & Season, *supra* note 1, at 249.

<sup>139</sup> Skelly & Helm, *supra* note 49, at 218.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 219.

<sup>142</sup> *Id.* at 224.

companies react with great skepticism to assertions that plaintiffs have developed fibromyalgia from an injury or accident.<sup>143</sup> Aside from the plaintiff's own medical doctors, insurance adjusters and medical examiners hired by the insurance companies question the reliability of reports by other health care providers, and tend to believe that most patients are simply looking for easy money.<sup>144</sup> In personal injury cases where fibromyalgia is diagnosed after a car accident, the insurance companies attempt to convince juries that the plaintiff's medical difficulties predicated the accident.<sup>145</sup> It is also not uncommon for insurance companies to send a plaintiff to a medical examiner who does not believe in the existence of fibromyalgia, which begins the battle of the experts.<sup>146</sup>

Some attorneys have suggested that the reason insurance companies tend to offer such small and modest amounts in fibromyalgia cases is because of the continuing controversy surrounding the illness in the medical community.<sup>147</sup> As research and testing continues in the development of consistent standards and treatment, the need for formal recognition of fibromyalgia by the *AMA Guides* becomes all the more important.

## CONCLUSION

In the advent of media headlines regarding personal injury awards and increasing medical and insurance costs, the people who suffer most are those patients who are legitimately injured and ignored.<sup>148</sup> Including subjective and intermediate standards of review, formal recognition by the AMA, and public support for the illness are needed tools for combating this fast growing syndrome. Certainly, not all claims will be legitimate. Yet, the medical and legal community, by setting consistent and realistic standards that meet both the patient's needs and the insurance companies' bottom line, can help turn what can often become a debilitating illness into a controlled and systemic one.

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<sup>143</sup>*Id.*

<sup>144</sup>Skelly & Helm, *supra* note 49, at 224.

<sup>145</sup>*Id.* at 225.

<sup>146</sup>*Id.*

<sup>147</sup>*Id.*

<sup>148</sup>*Id.* at 227.

Acknowledging, rather than ignoring, patient complaints of chronic muscular pain may also help reduce the chances of depression among fibromyalgia sufferers. Until the medical community arrives at a unified set of rules relating to the assessment of illnesses that are more functionally and subjectively measured than illnesses traceable by objective medical testing, inconsistencies in legal standards of review and monetary awards will persist.

For insurance companies, doctors, and the legal community, the cost of litigating and treating the illness is high. For a fibromyalgia sufferer living with daily pain and diminished capacity, the cost is even greater because it involves their quality of life, both now and for the future.

