

## FIBROMYALGIA AND WORKERS' COMPENSATION: CONTROVERSY, PROBLEMS, AND INJUSTICE

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### INTRODUCTION

Fibromyalgia is an extremely controversial medical condition.<sup>1</sup> This controversy has also spilled over into the legal system, causing fibromyalgia to be “the most prevalent chronic pain syndrome found in litigation today.”<sup>2</sup> This Note seeks to examine the area of fibromyalgia in the context of recovery under workers' compensation statutes.

Part I of this Note addresses current medical knowledge about fibromyalgia. Part II explains the controversy over this mysterious illness. Part III sets forth the basics of recovery under workers' compensation law. Part

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1. Michael Finch, *Law and the Problem of Pain*, 74 U. CIN. L. REV. 285, 287 (2005).

2. *Id.*

IV points out the many problems that arise when workers suffering from fibromyalgia attempt to recover workers' compensation benefits. Finally, Part V offers possible solutions to solve these problems and allow real fibromyalgia sufferers a fair opportunity to be compensated.

## I. OVERVIEW OF FIBROMYALGIA

### A. Symptoms and Problems Associated with Fibromyalgia

Fibromyalgia is a chronic pain syndrome featuring widespread musculoskeletal pain and "generalized tender points."<sup>3</sup> "The word *fibromyalgia* comes from the Latin term for fibrous tissue (*fibro*) and the Greek [terms] for muscle (*myo*) and pain (*algia*)."<sup>4</sup> Unlike arthritis, which causes pain and swelling in the joints, fibromyalgia causes pain in the soft tissues located around joints, in skin, and in organs.<sup>5</sup> The pain is usually a widespread aching or burning sensation that ranges from moderate discomfort to severe, disabling pain and varies from patient-to-patient, day-to-day, and location-to-location.<sup>6</sup> Often, the pain is described by patients as "head-to-toe."<sup>7</sup> It is a syndrome and not a disease.<sup>8</sup> While a disease is linked to a specific cause or causes and identifiable signs and symptoms, a syndrome is a "collection of signs, symptoms, and medical problems that tend to occur together but are not related to a specific, identifiable cause."<sup>9</sup>

In addition to widespread pain and tender points, fibromyalgia is often associated with a wide range of other problems. These problems most commonly include anxiety, fatigue, cognitive and memory difficulties ("fibro fog"),<sup>10</sup> depression, irritable bladder syndrome (frequent and urgent urination), temperature sensitivity, paresthesias (tingling sensation), irritable bowel syndrome, and sleep disorder.<sup>11</sup> More than one-half of fi-

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3. Sangita Chakrabarty & Roger Zoorob, *Fibromyalgia*, 76 AM. FAM. PHYSICIAN 247, 247 (2007).

4. Nat'l Inst. of Arthritis & Musculoskeletal & Skin Diseases, Questions & Answers about Fibromyalgia 1 (2004), available at [http://www.niams.nih.gov/Health\\_Info/Fibromyalgia/default.asp](http://www.niams.nih.gov/Health_Info/Fibromyalgia/default.asp) [hereinafter Q&A about Fibromyalgia].

5. NAT'L FIBROMYALGIA PARTNERSHIP, INC., FIBROMYALGIA: SYMPTOMS, DIAGNOSIS, TREATMENT & RESEARCH 1 (2006), available at <http://www.fmpartnership.org/Files/Website2005/Learn%20About%20Fibromyalgia/FM%20Overview/Monograph-English.pdf> [hereinafter NAT'L FIBROMYALGIA P'SHIP, INC.].

6. *Id.*

7. *Id.*

8. Q&A about Fibromyalgia, *supra* note 4, at 2.

9. *Id.*

10. "Fibro fog" is a state common to fibromyalgia patients in which a person's brain is not fully functioning, and thinking becomes extremely clouded, making it difficult to perform even basic functions. DEVIN J. STARLANYL, THE FIBROMYALGIA ADVOCATE: GETTING THE SUPPORT YOU NEED TO COPE WITH FIBROMYALGIA AND MYOFASCIAL PAIN SYNDROME 14 (1999).

11. See Chakrabarty & Zoorob, *supra* note 3, at 247; Q&A about Fibromyalgia, *supra* note 4, at 2.

bromyalgia patients also suffer from migraine headaches.<sup>12</sup> While depression and anxiety are two common conditions found in fibromyalgia patients,<sup>13</sup> “research has repeatedly shown that fibromyalgia is not a form of depression or hypochondriasis.”<sup>14</sup>

Sleep disorders and resulting fatigue are another common condition in fibromyalgia patients.<sup>15</sup> More than 90% of fibromyalgia patients report problems sleeping.<sup>16</sup> Studies have revealed increased stage-one sleep (“light sleep”), decreased delta sleep (“deep sleep”), and an increase in arousals.<sup>17</sup> Thus, even a full eight hours of sleep may often leave a fibromyalgia patient feeling as though they have not slept at all.<sup>18</sup>

New research has also uncovered accelerated gray matter loss in the brains of fibromyalgia patients.<sup>19</sup> A study revealed that fibromyalgia patients demonstrated a yearly decrease in gray matter volume at a rate more than three times that of the control group.<sup>20</sup> Interestingly, the fibromyalgia patients’ gray matter loss occurred mainly in regions of the brain dealing with stress and pain processing.<sup>21</sup> The structural changes may contribute to the maintenance of pain symptoms in fibromyalgia patients.<sup>22</sup> These structural changes might also be a cause of the “fibro fog” many patients experience.<sup>23</sup> A longitudinal study is necessary to discover whether the gray matter loss is a cause or consequence of fibromyalgia.<sup>24</sup>

Research has also shown that fibromyalgia patients have significant abnormalities in the manner in which they process pain. Substance P, a chemical that aids in amplifying and transmitting pain signals to and from the brain, has been found at abnormally high levels in the spinal fluid of fibromyalgia patients.<sup>25</sup> One study showed Substance P levels in fibromyalgia patients that were three times higher than that of the control group.<sup>26</sup> Fibromyalgia patients also appear to have deficient levels of sero-

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12. Chakrabarty & Zoorob, *supra* note 3, at 250.

13. *Id.*

14. NAT’L FIBROMYALGIA P’SHIP, INC., *supra* note 5, at 2.

15. Chakrabarty & Zoorob, *supra* note 3, at 250.

16. Emma K. Guymier & Geoffrey O. Littlejohn, *Fibromyalgia: Top Down or Bottom Up?*, 10 APLAR J. RHEUMATOLOGY 174, 176 (2007).

17. Chakrabarty & Zoorob, *supra* note 3, at 250.

18. *See* NAT’L FIBROMYALGIA P’SHIP, INC., *supra* note 5, at 1.

19. *See generally* Anil Kuchinad et al., *Accelerated Brain Gray Matter Loss in Fibromyalgia Patients: Premature Aging of the Brain?*, 27 J. NEUROSCIENCE 4004 (2007).

20. *Id.* at 4006.

21. *Id.*

22. *Id.*

23. *See id.*

24. *Id.*

25. U.S. Food & Drug Admin., *Living with Fibromyalgia, Drugs Approved to Manage Pain*, CONSUMER HEALTH INFO., July 17, 2008, at 2, available at <http://www.fda.gov/consumer/updates/fibromyalgia062107.pdf>.

26. NAT’L FIBROMYALGIA P’SHIP, INC., *supra* note 5, at 4.

tonin, which regulates the intensity of pain signals sent to the brain.<sup>27</sup> Researchers from Georgetown University and the University of Michigan used MRI testing to discover that brain activity was elevated when they applied pressure to the thumbnails of fibromyalgia patients compared to the control group.<sup>28</sup> Another study found that fibromyalgia patients take much longer to recover from pain than control groups.<sup>29</sup> These biological responses are especially important because they differentiate fibromyalgia patients from the general population and may aid doctors and researchers in attempting to form an objective method for diagnosis, which currently does not exist.<sup>30</sup>

The lack of an objective diagnosis results in more problems for those afflicted with fibromyalgia. There are no objective laboratory tests or imaging studies that can confirm the presence of fibromyalgia.<sup>31</sup> Combined with the array of conditions many patients experience that may lead doctors in different directions, this can result in a long delay after the onset of symptoms before a proper diagnosis is made.<sup>32</sup> Some patients are shipped from doctor to doctor for years (all the time suffering with the untreated symptoms) before being diagnosed with fibromyalgia.<sup>33</sup>

The multitude of symptoms and problems associated with fibromyalgia can produce substantial problems for sufferers. Many fibromyalgia patients have difficulty functioning at work and home.<sup>34</sup> In one study, fibromyalgia patients ranked their quality of life as 4.8 out of 10.<sup>35</sup> The same patients, imagining their life without fibromyalgia, scored their future quality of life without the condition as 9.2 out of 10.<sup>36</sup> Clearly, fibromyalgia has taken over the lives of many of its patients.

### *B. History of Fibromyalgia*

Although some consider it a “fad disease,” fibromyalgia-like symptoms have been described throughout history,<sup>37</sup> even dating back to Bibli-

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27. *Id.*

28. *Id.* at 5.

29. *Id.*

30. See Muhammad B. Yunus et al., *Letter to the Editor*, 4 J. CLINICAL RHEUMATOLOGY 289, 289 (1998).

31. Russell Rothenberg, *Fibromyalgia: Documentation & Treatment*, 15 FIBROMYALGIA FRONTIERS 1, 1 (2007), available at <http://www.fmpartnership.org/Files/Website2005/Learn%20About%20Fibromyalgia/Articles/Rothenberg07.pdf>.

32. See *id.*

33. See *id.* at 2.

34. See STEPHEN J. MOREWITZ, CHRONIC DISEASES AND HEALTH CARE: NEW TRENDS IN DIABETES, ARTHRITIS, OSTEOPOROSIS, FIBROMYALGIA, LOW BACK PAIN, CARDIOVASCULAR DISEASE, AND CANCER 108 (2006).

35. *Id.*

36. *Id.*

37. Karen Lee Richards, *History of Fibromyalgia*, June 15, 2006, <http://chronicfatigue.about.com/od/fibromyalgia/p/historyfm.htm>. But see HARRY COLLINS & TREVOR

cal times.<sup>38</sup> It has been identified through different names including chronic rheumatism, myalgia, and fibrositis.<sup>39</sup> However, it was not until the late twentieth century that fibromyalgia garnered formal recognition.

The American Medical Association identified fibromyalgia as a physical illness and source of disability in 1987.<sup>40</sup> In 1990, the American College of Rheumatology (ACR) set out two criteria that must be met for a diagnosis of fibromyalgia.<sup>41</sup> First, chronic widespread pain, defined as “pain in all four quadrants of the body and the axial skeleton,” must have been present “for at least 3 months.”<sup>42</sup> Second, a finding of pain must exist at a minimum of eleven out of eighteen tender-points sites when four kilograms of pressure (8.8 pounds) is applied.<sup>43</sup> Although fibromyalgia is “not a diagnosis of exclusion and should be identified by its own characteristics,”<sup>44</sup> no laboratory tests exist to confirm its presence.<sup>45</sup> Therefore, a complete medical history and physical exam must be performed to rule out diseases that manifest symptoms similar to fibromyalgia and are more susceptible to an objective diagnosis.<sup>46</sup> Such diseases include systemic lupus, polymyalgia rheumatica, myositis/polymyositis, thyroid disease, rheumatoid arthritis, and multiple sclerosis, among others.<sup>47</sup>

While its exact prevalence is not known, some estimates suggest that fibromyalgia affects between approximately three and six million Americans.<sup>48</sup> To put this into perspective, this is more than four times as many as will develop cancer this year, and six times as many as are living with HIV.<sup>49</sup> Other estimates put the number even higher at around ten million Americans affected by fibromyalgia.<sup>50</sup> Fibromyalgia is also not just an American phenomenon; it affects all races worldwide at rates consistent

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PINCH, DR. GOLEM: HOW TO THINK ABOUT MEDICINE 118 (2005) (describing fibromyalgia as a “new disease” not appearing until the late twentieth century).

38. Job describes his physical suffering from an illness that resembles fibromyalgia:

“I, too, have been assigned months of futility, long and weary nights of misery. When I go to bed, I think, “When will it be morning?” But the night drags on, and I toss till dawn . . . And now my heart is broken. Depression haunts my days. My weary nights are filled with pain as though something were relentlessly gnawing at my bones.”

Richards, *supra* note 37 (alteration in original) (quoting *Job* 7:3–4; 30:16–17).

39. STARLANYL, *supra* note 10, at 7.

40. *Id.*

41. Gerhard K. M. Endresen, *Fibromyalgia: A Rheumatologic Diagnosis?*, 27 RHEUMATOLOGY INT'L 999, 999 (2007).

42. *Id.*

43. *Id.*

44. Chakrabarty & Zoorob, *supra* note 3, at 249.

45. STARLANYL, *supra* note 10, at 8.

46. NAT'L FIBROMYALGIA P'SHIP, INC., *supra* note 5, at 3.

47. *Id.*

48. NAT'L FIBROMYALGIA P'SHIP, INC., *supra* note 5, at 1; *see also* Q&A about Fibromyalgia, *supra* note 4, at 3.

49. Jerome Groopman, *Hurting All Over*, THE NEW YORKER, Nov. 13, 2000, at 78.

50. NAT'L FIBROMYALGIA P'SHIP, INC., *supra* note 5, at 1.

with those found in the United States.<sup>51</sup> Fibromyalgia affects women ten times more often than it does men.<sup>52</sup> However, some believe that at least part of this discrepancy can be attributed to fibromyalgia being underdiagnosed in males.<sup>53</sup> While it mainly affects women aged twenty to fifty, fibromyalgia exists in all types of populations, men and women from young to old.<sup>54</sup>

### C. Causes and Treatments of Fibromyalgia

Fibromyalgia's causes are unknown.<sup>55</sup> Some experts believe it can be caused by a physically or emotionally traumatic event such as a car accident or surgery.<sup>56</sup> Some attribute it to injuries or illness.<sup>57</sup> Others believe it is caused by viruses that alter the perception of pain.<sup>58</sup> In some cases, fibromyalgia occurs spontaneously, with no apparent cause.<sup>59</sup> Genes appear to play some role in causing fibromyalgia. It is more common in family members of fibromyalgia patients<sup>60</sup> and one study showed 28% of children with fibromyalgic mothers developed the syndrome.<sup>61</sup>

Fibromyalgia treatments are as diverse as its symptoms and possible causes. There is no cure for fibromyalgia.<sup>62</sup> Therefore, many patients are prescribed an array of painkillers (i.e., everything from Tylenol to Oxycontin), anti-inflammatories, antidepressants, and benzodiazepines (i.e., Valium or Xanax), sleep aids, muscle relaxants, and a variety of other medications to treat specific comorbid conditions.<sup>63</sup> Studies estimate that patients spend about \$4,570 each year on the direct costs associated with fibromyalgia such as physicians, tests, and medication.<sup>64</sup>

On June 21, 2007, the first drug approved by the FDA specifically for treating fibromyalgia, Lyrica (pregabalin), was released. Lyrica was

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51. *Id.*; Rothenberg, *supra* note 31, at 1–2.

52. Chakrabarty & Zoorob, *supra* note 3, at 247.

53. STARLANYL, *supra* note 10, at 8.

54. Chakrabarty & Zoorob, *supra* note 3, at 247.

55. Q&A about Fibromyalgia, *supra* note 4, at 3.

56. *Id.* at 3–4.

57. *Id.* at 4.

58. U.S. Food & Drug Admin., *supra* note 25, at 2. Viral infections like Hepatitis C and HIV may be causally linked to fibromyalgia. See Aryeh M. Abeles et al., *Narrative Review: The Pathophysiology of Fibromyalgia*, 146 ANNALS OF INTERNAL MED. 726, 731 (2007). One study confirmed blood infections in fibromyalgia patients caused by mycoplasma. NAT'L FIBROMYALGIA P'SHIP, INC., *supra* note 5, at 5. The significance of these findings is not yet clear. *Id.*

59. Q&A about Fibromyalgia, *supra* note 4, at 4.

60. Chakrabarty & Zoorob, *supra* note 3, at 247.

61. Advocates for Fibromyalgia Funding, Treatment, Education and Research, *Facts About FMS*, <http://affter.org/fibro.htm> (last visited June 2, 2009).

62. Robert Hardy-Pickering et al., *The Use of Complementary and Alternative Therapies for Fibromyalgia*, 12 PHYSICAL THERAPY REVS. 249, 250 (2007).

63. See Q&A about Fibromyalgia, *supra* note 4, at 7–11.

64. See Karen Oliver et al., *Effects of Social Support and Education on Health Care Costs for Patients with Fibromyalgia*, 28 J. RHEUMATOLOGY 2711, 2716 (2001).

shown to reduce pain and improve daily function for some patients.<sup>65</sup> While this is a step forward in the recognition and treatment of fibromyalgia, Lyrica does not appear to be a cure-all. Instead, a multidisciplinary approach to treatment is often utilized to combat the fact that fibromyalgia often manifests itself both physically and psychologically.<sup>66</sup> Therefore, complementary and alternative remedies are often coupled with pharmacological remedies.

Fibromyalgia patients frequently attempt complementary and alternative remedies such as massage, movement therapies, tender-point injections, chiropractic treatments, acupuncture, magnetic therapy, yoga, and various herbs and dietary supplements.<sup>67</sup> One study, based on a sample of 111 fibromyalgia patients, discovered that 98% of the sample had attempted at least one form of alternative treatment during the previous six months.<sup>68</sup> These remedies, as with the medications, are met with varying degrees of success.<sup>69</sup> One non-pharmacological remedy that has proven to be particularly effective is exercise.<sup>70</sup> An exercise program involving multiple dimensions such as strength, aerobic conditioning, flexibility, and balance has been shown to produce positive results, particularly in pain improvement.<sup>71</sup>

The effectiveness of fibromyalgia treatments may be scored by the fibromyalgia impact questionnaire (FIQ),<sup>72</sup> which is a self-administered questionnaire consisting of questions that measure the patient's physical and mental well-being. A high score indicates a high impact of fibromyalgia on the patient. Researchers believe the FIQ score to be a reliable indicator of the health status of fibromyalgia patients.<sup>73</sup>

Fibromyalgia may be categorized as either primary or secondary.<sup>74</sup> Primary fibromyalgia, by far the most common, is the traditional form in which no trigger may be definitively established.<sup>75</sup> Secondary fibromyalgia, however, is associated with an underlying disease that may be easily diagnosed.<sup>76</sup> Some researchers have attempted to further classify primary

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65. U.S. Food and Drug Admin., *supra* note 25, at 1.

66. Hardy-Pickering et al., *supra* note 62, at 251.

67. Q&A about Fibromyalgia, *supra* note 4, at 11; *see also* Chakrabarty & Zoorob, *supra* note 3, at 253.

68. MOREWITZ, *supra* note 34, at 113.

69. Q&A about Fibromyalgia, *supra* note 4, at 11.

70. Chakrabarty & Zoorob, *supra* note 3, at 252.

71. *Id.*

72. J.G. McVeigh et al., *Tender Point Count and Total Myalgic Score in Fibromyalgia: Changes Over a 28-Day Period*, 27 RHEUMATOLOGY INT'L 1011, 1012 (2007). The FIQ may be accessed online at <http://www.myalgia.com/FIQ/fiq.pdf>.

73. *Id.*

74. W. Müller et al., *The Classification of Fibromyalgia Syndrome*, 27 RHEUMATOLOGY INT'L 1005, 1006 (2007).

75. *Id.*

76. *Id.*

fibromyalgia into four categories: “1. fibromyalgia with extreme sensitivity to pain but no associated psychiatric conditions, 2. fibromyalgia and comorbid, pain-related depression, 3. depression with concomitant fibromyalgia syndrome, and 4. fibromyalgia due to somatization.”<sup>77</sup> These subgroups may aid in developing more individualized and effective treatment programs for fibromyalgia sufferers.<sup>78</sup>

Although there is no cure or guaranteed method of treatment, fibromyalgia is not progressive.<sup>79</sup> It is not fatal<sup>80</sup> and has not been shown to decrease life expectancy.<sup>81</sup> It does not damage joints, muscles, or organs.<sup>82</sup> While it is chronic, and therefore may last a patient’s entire life, fibromyalgia improves in many patients with time.<sup>83</sup>

## II. CONTROVERSY SURROUNDING FIBROMYALGIA

The controversy over fibromyalgia is perhaps best embodied by the fact that one of the men who helped bring the term “fibromyalgia” into existence, Dr. Frederick Wolfe, now disputes his own creation. Dr. Wolfe now believes:

For a moment in time, we thought we had discovered a new physical disease . . . But it was the emperor’s new clothes. When we started out, in the eighties, we saw patients going from doctor to doctor with pain. We believed that by telling them they had fibromyalgia we reduced stress and reduced medical utilization. This idea, a great, humane idea that we can interpret their distress as fibromyalgia and help them—it didn’t turn out that way. My view now is that we are creating an illness rather than curing one.<sup>84</sup>

Dr. Wolfe is not the only one with a differing view on fibromyalgia. In fact, “[h]ardly any other clinical entity is currently drawing as much criticism as fibromyalgia.”<sup>85</sup> One major recipient of criticism is the diagnostic criteria set forth by the ACR.<sup>86</sup>

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77. *Id.*

78. *Id.* at 1008.

79. Q&A about Fibromyalgia, *supra* note 4, at 12.

80. *Id.*

81. NAT’L FIBROMYALGIA P’SHIP, INC., *supra* note 5, at 1.

82. Q&A about Fibromyalgia, *supra* note 4, at 12.

83. *Id.*

84. Groopman, *supra* note 49, at 89.

85. Müller et al., *supra* note 74, at 1005.

86. *See id.*



*A. Criticism of the Tender Points Test*

The diagnostic criteria for fibromyalgia first set forth in 1990 are 1) at least three months of chronic widespread pain, and 2) pain at a minimum of eleven out of eighteen tender points sites when four kilograms of pressure (8.8 pounds) is applied.<sup>87</sup> Critics have identified several problems with these criteria.

First, the tender points requirement suggests that fibromyalgia patients experience pain only at the eighteen specified locations.<sup>88</sup> However, studies suggest that fibromyalgia patients are sensitive to pain throughout the body.<sup>89</sup> Second, the pain associated with fibromyalgia varies from day-to-day.<sup>90</sup> Thus, a patient might experience pain at the required eleven tender points on one day and not the next.<sup>91</sup> Third, the diagnostic criteria focus only on pain and ignore the myriad of other symptoms associated with fibromyalgia.<sup>92</sup> In so doing, “the criteria ‘fail to capture the essence of the FM syndrome.’”<sup>93</sup> Fourth, the tender points examination does not differentiate between men and women.<sup>94</sup> Pain threshold is lower in women than in men; therefore, the pressure applied during the tender points examination will result in a disproportionate number of women diagnosed than men.<sup>95</sup> Fifth, the tender points examination requires the hand of a skilled physician to apply the exact amount of pressure to the correct tender points sites.<sup>96</sup> This process is susceptible to human error and may result in an erroneous diagnosis by a physician who either applies an incorrect amount of pressure or applies the pressure to an incorrect location.<sup>97</sup> Finally, the lack of a truly objective diagnosis forces doctors to rely on self-reporting, which makes validation “difficult or impossible.”<sup>98</sup> The limitations of the diagnostic criteria lead to bigger concerns for some critics: “These purely subjective criteria, which are of little help in establishing an

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87. Endresen, *supra* note 41, at 999.

88. NAT'L FIBROMYALGIA P'SHIP, INC., *supra* note 5, at 3.

89. *Id.*

90. *Id.*

91. *Id.* In *Gleason v. Samaritan Home*, 926 P.2d 1349, 1354 (Kan. 1996), Dr. Frederick Wolfe found that the claimant had eleven tender points in first visit but only one tender point in the subsequent visit. Dr. Wolfe retracted his fibromyalgia diagnosis, and the court held that the claimant was not entitled to compensation.

92. NAT'L FIBROMYALGIA P'SHIP, INC., *supra* note 5, at 4.

93. *Id.* (quoting L.J. Crofford & D.J. Claww, *Fibromyalgia: Where Are We a Decade After the American College of Rheumatology Criteria Were Developed?*, 46 ARTHRITIS & RHEUMATISM 1136, 1136-37 (2002)).

94. *See* Endresen, *supra* note 41, at 999.

95. *Id.* at 1000. This is consistent with findings of approximately ten times more women than men diagnosed with fibromyalgia. *Id.*

96. NAT'L FIBROMYALGIA P'SHIP, INC., *supra* note 5, at 3.

97. *Id.* at 4.

98. Frederick Wolfe, *The Fibromyalgia Syndrome: A Consensus Report on Fibromyalgia and Disability*, 23 J. RHEUMATOLOGY 534, 535 (1996).

exact diagnosis, have again and again raised doubts about the very existence of fibromyalgia.”<sup>99</sup>

### *B. A Purely Psychological Condition?*

Leading practitioners and academics believe that labeling symptoms as fibromyalgia often does more harm than good.<sup>100</sup> They believe that the symptoms of fibromyalgia are real but that they originate in the mind and not in the body.<sup>101</sup> Dr. Arthur Barsky argues that fibromyalgia patients “become trapped in the belief that their symptoms are due to disease, with future expectations of debility and doom. This enhances their vigilance about their body, and thus the intensity of their symptoms.”<sup>102</sup> Barsky also points out the existence of “powerful groups with vested interests in the perpetuation of [fibromyalgia], including doctors and other practitioners who run clinics, lawyers involved in disability litigation, and drug companies marketing treatments of unsubstantiated benefit. This locks the patient into a closed circle of belief.”<sup>103</sup> Some experts believe that fibromyalgia is nothing more than a person overwhelmed with psycho-social stress manifesting that stress in what is perceived as a more socially acceptable manner—via physical symptoms.<sup>104</sup>

### *C. Can Physical Trauma Cause Fibromyalgia?*

Other experts, while conceding that fibromyalgia does exist, believe that “[o]verall, . . . data from the literature are insufficient to indicate whether causal relationships exist between trauma and fibromyalgia.”<sup>105</sup> However, as with most areas of fibromyalgia, the relationship between physical trauma and fibromyalgia is disputed.<sup>106</sup> Many studies have shown that fibromyalgia can be caused by physical trauma.<sup>107</sup> One study found that 39% of patients suffered a physical trauma before the onset of fibro-

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99. Müller et al., *supra* note 74, at 1005.

100. Groopman, *supra* note 49, at 86.

101. *Id.*

102. *Id.*

103. *Id.* at 87.

104. Karen Capen, *The Courts, Expert Witnesses and Fibromyalgia*, 153 CAN. MED. ASS'N J. 206, 207 (1995).

105. Wolfe, *supra* note 98, at 535.

106. *Id.*

107. See, e.g., A.W. Al-Allaf et al., *A Case-Control Study Examining the Role of Physical Trauma in the Onset of Fibromyalgia Syndrome*, 41 RHEUMATOLOGY 450, 452 (2002); Dan Buskila et al., *Increased Rates of Fibromyalgia Following Cervical Spine Injury*, 40 ARTHRITIS & RHEUMATISM 446, 446 (1997); Stuart Greenfield et al., *Reactive Fibromyalgia Syndrome*, 35 ARTHRITIS & RHEUMATISM 678, 678 (1992).

myalgia.<sup>108</sup> Despite new studies showing a link between physical trauma and fibromyalgia, controversy remains.<sup>109</sup>

#### *D. Malingering and Fibromyalgia*

Critics also point out that malingering is a major problem in the realm of fibromyalgia. Some critics believe that, in addition to other concerns, fibromyalgia is “further complicated by the potential influence of the availability of compensation for the syndrome. In settings where compensation is widely available, illnesses similar to fibromyalgia have been shown to increase in apparent prevalence . . . then to fall when compensation availability declines.”<sup>110</sup> These critics point out that the lack of an objective diagnosis makes it easier for patients to malingering effectively.<sup>111</sup>

Some liken fibromyalgia to the mysterious epidemic of forearm pain that arose in Australia in the mid-1980s.<sup>112</sup> When courts began to require objective evidence of the condition and compensation rules became more stringent, the claims suddenly disappeared.<sup>113</sup> However, a recent study has found that fibromyalgia is more prevalent in Amish populations than non-Amish populations.<sup>114</sup> This counters the idea that fibromyalgia patients are motivated by financial incentives because the Amish seek no compensation.<sup>115</sup>

The lack of an objective diagnosis, the possibility that it is a purely psychological illness, the possibility that physical trauma cannot cause it, and malingering all cause substantial problems for fibromyalgia sufferers in the context of workers' compensation recovery. Before examining the interplay between these problems and those caused by the requirements of workers' compensation laws, a brief overview of the history and current state of workers' compensation may be helpful.

### III. OVERVIEW OF WORKERS' COMPENSATION

In 1884, Germany became the first country to enact a workers' compensation statute.<sup>116</sup> By the end of the nineteenth century, all the industria-

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108. Al-Allaf et al., *supra* note 107, at 452.

109. Moshe Tishler et al., *Neck Injury and Fibromyalgia—Are They Really Associated?*, 33 J. RHEUMATOLOGY 1183, 1184 (2006).

110. Wolfe, *supra* note 98, at 534–35.

111. *See id.* at 535.

112. *See* Gregory C. Gardner, *Fibromyalgia Following Trauma: Psychology or Biology?*, 4 CURRENT REV. OF PAIN 295, 298 (2000).

113. *Id.*

114. Kevin P. White, Editorial, *Fibromyalgia: The Answer is Blowin' in the Wind*, 31 J. RHEUMATOLOGY 636, 638 (2004).

115. This study may also lend support to the idea that fibromyalgia can be the result of physical stimulus because the Amish are noted for their long hours of manual labor.

116. ALBERT J. MILLUS & WILLARD J. GENTILE, WORKERS' COMPENSATION LAW AND

lized nations of Europe had passed their own statutes mandating workers' compensation.<sup>117</sup> Although it was clear that the system of employer liability in place in the United States at that time was in desperate need of reform, the birth of workers' compensation law came about at a slower pace.<sup>118</sup> Powerful defenses to the common law duties of employers made recovery for injured workers extremely difficult.<sup>119</sup> Legislatures first responded to this inequity by passing so-called Employer Liability Acts.<sup>120</sup> However, these proved unsuccessful in allowing fair recovery for injured workers.<sup>121</sup> Thus, during the early years of the twentieth century, many states began investigating the workers' compensation problem.<sup>122</sup> Maryland enacted the first workers' compensation statute in 1902.<sup>123</sup> Other states then began to pass and refine increasingly sophisticated statutes dealing with workers' compensation in an attempt to create a workable system that would stand up to constitutional scrutiny.<sup>124</sup> States became more and more successful in this endeavor as time passed (most states ended up adopting specific constitutional amendments to allow for workers' compensation legislation),<sup>125</sup> and Mississippi became the final state then in the union to enact such legislation in 1949.<sup>126</sup>

Modern workers' compensation legislation requires almost all employers to carry insurance or to qualify as self-insurers.<sup>127</sup> Its purpose is to provide guaranteed monetary benefits, including medical expenses, to disabled employees.<sup>128</sup> Workers' compensation operates on a "no fault" basis.<sup>129</sup> Therefore, benefits are provided to the employee regardless of any fault on behalf of the employee that may have contributed to the disablement.<sup>130</sup>

Although each state has its own, somewhat unique, version of workers' compensation legislation, the basic requirements are largely the

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INSURANCE 5 (1976).

117. *See id.*

118. *See id.* at 19.

119. *See id.* at 9–12.

120. *Id.* at 12–15.

121. *See id.* at 15.

122. *Id.* at 19.

123. *Id.* This act was very limited in scope and duration, "deal[ing] only with mining, quarrying, steam or street railroads, and the municipal construction or excavation of sewers and other physical structures." *See id.* at 19–20. It was voluntary for employers to join and only applied in the case of death. *Id.* at 20. This act was in effect for only two years before being declared unconstitutional by a Maryland court. *Id.*

124. *See id.* at 21–32.

125. JACK B. HOOD ET AL., WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS: IN A NUTSHELL 24 (2d ed. 1990).

126. MILLUS & GENTILE, *supra* note 116, at 31.

127. *See id.* at 46.

128. *See id.*

129. *See id.*

130. *Id.*

same.<sup>131</sup> The first requirement is that the disablement must be the result of an injury by accident or an occupational disease.<sup>132</sup> An injury is “accidental” within the meaning of workers’ compensation statutes when it “occurs unexpectedly and without affirmative act or design by the employee.”<sup>133</sup> “The mere apprehension that an injury [that] did occur was likely to occur [sometime] in the future does not deprive” the injury of its accidental nature as long as the worker did not intend or expect that the injury would result on that particular occasion.<sup>134</sup> Many courts interpret the term “injury by accident” liberally in favor of the injured employee.<sup>135</sup>

A worker may also recover workers’ compensation benefits if the disablement is a result of an occupational disease.<sup>136</sup> An occupational disease is “[a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.”<sup>137</sup>

In addition to the requirement that the worker’s disablement be the result of an injury by accident or an occupational disease, the disablement must also “arise out of and be in the course of employment.”<sup>138</sup> This requirement is a two-part test—the injury must arise out of employment *and* occur in the course of employment.<sup>139</sup> “An injury ‘arises out of’ employment if a causal connection exists between the employment and the injury.”<sup>140</sup> Further, an “injury arises in the course of employment when the injury and the employment coincide as to time, place, and circumstances.”<sup>141</sup>

#### IV. PROBLEMS FOR FIBROMYALGIA PATIENTS ATTEMPTING TO RECOVER WORKERS’ COMPENSATION

The recovery requirements of workers’ compensation laws and the problems inherent in fibromyalgia itself combine to present a huge array of problems for fibromyalgia patients attempting to recover benefits. The

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131. See N.Y. STATE WORKERS’ COMP. BD., EMPLOYERS’ HANDBOOK: A GUIDE TO THE WORKERS’ COMPENSATION AND THE DISABILITY BENEFITS SYSTEMS FOR THE NEW YORK STATE BUSINESS OWNER 8 (2008).

132. See, e.g., *Walston v. Burlington Indus.*, 285 S.E.2d 822, 828 (N.C. 1982).

133. *Lannom v. Kosco*, 634 N.E.2d 1097, 1100 (Ill. 1994) (emphasis omitted).

134. *L.B. Priester & Son v. McGee*, 106 So. 2d 394, 397 (Miss. 1958) (emphasis added) (quoting *Hardin’s Bakeries, Inc. v. Ranager*, 64 So. 2d 705, 706 (Miss. 1953)).

135. See, e.g., *Geist v. Martin Decker Corp.*, 313 So. 2d 1, 3 (La. Ct. App. 1975).

136. E.g., *Buffington v. Potlatch Corp.*, 875 P.2d 934, 936 (Idaho 1994).

137. N.C. GEN. STAT. § 97-53(13) (2007).

138. E.g., *Amoco Foam Products Co. v. Johnson*, 510 S.E.2d 443, 444 (Va. 1999).

139. E.g., *Meade v. Ries*, 642 N.W.2d 237, 243 (Iowa 2002).

140. *Id.* (citing *Bailey v. Batchelder*, 576 N.W.2d 334, 338 (Iowa 1998)).

141. *Id.* at 243–44.

first of these problems occurs because fibromyalgia is difficult to classify as either an injury by accident or an occupational disease.

*A. Fibromyalgia as an Injury by Accident—Problems with Causation*

Often, fibromyalgia patients attempt to recover workers' compensation by claiming that their fibromyalgia resulted from an accidental injury sustained at work. The accidental injuries that workers claim resulted in fibromyalgia range from falls<sup>142</sup> and physical attacks,<sup>143</sup> to dog bites<sup>144</sup> and small cuts.<sup>145</sup> Despite the counterintuitive nature of the causal link between injuries such as a dog bite or small cut to fibromyalgia, claimants almost always offer scientific evidence and expert testimony to show causation. However, workers still have a difficult time proving that the fibromyalgia "arose from" the employment because its causes are not known.<sup>146</sup>

Many studies have shown that fibromyalgia can be caused by physical trauma—even minute physical trauma like a cut or dog bite.<sup>147</sup> However, as with most areas of fibromyalgia, the relationship between physical trauma and fibromyalgia is disputed.<sup>148</sup> Thus, courts are often presented with conflicting evidence as to whether a physical trauma may cause fibromyalgia.<sup>149</sup> In a great majority of these cases, the court will settle the conflicting evidence in favor of the employer.<sup>150</sup> After the worker appeals, the appellate court may hold nothing but, "[d]espite the presence of contrary medical proof, it was within [the court's] province to resolve the conflicting evidence in favor of the employer."<sup>151</sup> While deferring to the findings of the lower court if reasonable is the duty of the appellate court in this situation, some courts appear less willing to defer when the lower court has allowed recovery for fibromyalgia.<sup>152</sup> Some courts have even gone as far as to reject expert testimony that fibromyalgia was caused by

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142. See, e.g., *Brown v. Patriot Maint., Inc.*, 99 P.3d 544, 545 (Alaska 2004).

143. See, e.g., *Bachman Co. v. Workmen's Comp. Appeal Bd.*, 683 A.2d 1305, 1307 (Pa. Commw. Ct. 1996).

144. See, e.g., *Va. Elec. & Power Co. v. Brice*, No. 2654-95-2, 1996 WL 205841, at \*1 (Va. Ct. App. Apr. 30, 1996).

145. See, e.g., *Carter v. Williamson Eye Ctr.*, 906 So. 2d 503, 505 (La. Ct. App. 2005).

146. See Q&A about Fibromyalgia, *supra* note 4, at 3.

147. See *supra* note 107.

148. See discussion *supra* Part II.C.

149. See, e.g., *Epp v. Lauby*, 715 N.W.2d 501 (Neb. 2006).

150. See discussion *infra* Part IV.D.

151. *Gaylord v. Ichabod Crane Cent. Sch. Dist.*, 670 N.Y.S.2d 262, 263 (N.Y. App. Div. 1998) (noting that employer presented substantial evidence to support Board's conclusion that fibromyalgia was not causally related to employment).

152. See, e.g., *Safeway, Inc. v. Mackey*, 965 P.2d 22, 29–30 (Alaska 1998) (overruling grant of benefits for fibromyalgia); *Payne v. Sequatchie Valley Coal Corp.*, No. 01501-9610-CH-00214, 1997 WL 739526, at \*3 (Tenn. Dec. 2, 1997) (same); *Liberty Corr. Inst. v. Yon*, 671 So. 2d 194, 197 (Fla. Dist. Ct. App. 1996) (same).

an accidental injury at work even when the employer offers no contradictory expert testimony.<sup>153</sup>

This same scenario of courts weighing conflicting testimony in favor of the employer also plays out when employers offer evidence that fibromyalgia does not exist at all or is a purely psychological illness for which workers may not be compensated. Because it does not exist, or is purely psychological, employers argue that the fibromyalgia did not “arise from” the employment. These causation issues present huge problems for workers because a “[c]laimant’s subjective belief that her pain syndromes . . . must have originated in her work is entitled to little weight.”<sup>154</sup> Thus, courts often find any offer of proof as to causation “too speculative” to warrant recovery.<sup>155</sup>

Some courts also require objective evidence of fibromyalgia, which is of course a subjective condition that is not susceptible to objective evidence.<sup>156</sup> When no objective evidence is presented, workers are denied benefits.<sup>157</sup> Claimants attempting to offer what objective evidence is available of fibromyalgia, such as the tender points test, have also been denied recovery because this evidence is “transitory” and not truly objective.<sup>158</sup>

### *B. Fibromyalgia as an “Occupational Disease”*

It is perhaps even more difficult to classify fibromyalgia as an occupational disease. An occupational disease, as stated above, is “[a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.”<sup>159</sup> When workers cannot point to a specific accidental injury that led to fibromyalgia, they often attempt to classify it as an occupational disease.<sup>160</sup> However, courts have been reluctant to accept this theory of recovery, often holding that the

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153. See, e.g., *Rawls v. Coleman-Frizzell, Inc.* 653 N.W.2d 247, 254 (S.D. 2002).

154. *Woods v. Des Moines Pub. Sch. Dist.*, No. 06-1008, 2007 WL 1486107, at \*2 (Iowa Ct. App. May 23, 2007) (second alteration in original) (quoting decision of the Iowa Workers’ Compensation Commissioner).

155. See, e.g., *Edwards v. Blue Mountain Indus.*, 627 So. 2d 450, 451-52 (Ala. Civ. App. 1993).

156. See, e.g., *Norris v. Electrolux Home Prods., Inc.*, No. 5:06-CV-23, 2007 WL 1041153, at \*6 (W.D. Mich. Apr. 5, 2007) (holding that Board did not err in denying worker benefits when no objective basis was proven as to show disablement by fibromyalgia).

157. See, e.g., *id.*

158. See, e.g., *Sloan v. Campbell Soup Co.*, No. CA96-963, 1997 WL 240996, at \*1 (Ark. Ct. App. May 7, 1997).

159. E.g., N.C. GEN. STAT. § 97-53(13) (2007).

160. See, e.g., *Nolan v. Univ. of Akron*, No. 16584, 1994 WL 432253, at \*1 (Ohio Ct. App. Aug. 10, 1994).

risks that led to the fibromyalgia were not characteristic of and peculiar to the particular occupation.<sup>161</sup>

Workers bring fibromyalgia claims under the theory of an occupational disease in all sorts of circumstances. Many claim fibromyalgia as the result of repetitive motions at work.<sup>162</sup> Some have claimed poorly ventilated fumes led to fibromyalgia.<sup>163</sup> Despite medical evidence showing causation in these cases, courts have been extremely hesitant to classify fibromyalgia as an occupational disease.<sup>164</sup>

### *C. The Effects of Malingering on Recovery*

Another problem that occurs when workers attempt to recover workers' compensation benefits for fibromyalgia deals with the high number of malingerers. Because there is no objective diagnosis, the problem of malingering is enhanced in fibromyalgia cases. The Diagnostic and Statistical Manual of Mental Disorders describes malingering as "the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs."<sup>165</sup> Malingerers not only take advantage of the system in a financial sense but also cast a shadow of doubt over those truly suffering. Those actually malingering<sup>166</sup> lead courts to doubt the sincerity of fibromyalgia patients in cases even when no evidence is shown to suggest the claimant is faking.<sup>167</sup>

### *D. Effect of These Problems on the Ability of Fibromyalgia Patients to Recover Workers' Compensation Benefits*

Since 2003, workers' compensation claims in which a worker sought to recover benefits for fibromyalgia have been denied in a significant majority of reported and unreported cases.<sup>168</sup> This is in stark contrast to the

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161. See, e.g., *id.*

162. See, e.g., *James v. Perdue Farms, Inc.*, 586 S.E.2d 557, 560-61 (N.C. Ct. App. 2003); *Nolan*, 1994 WL 432253, at \*1; *Thetford v. Am. Mfrs. Mut. Ins. Co.*, No. W2003-01904-SC-WCMCV, 2005 WL 1026577, at \*2 (Tenn. Workers Comp. Panel May 3, 2005).

163. See, e.g., *Rakowski v. State Ins. Fund*, 782 N.Y.S.2d 167, 168 (N.Y. App. Div. 2004).

164. See *id.*

165. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 739 (4th ed. 1994).

166. See, e.g., *Sjostrand v. N.D. Workers Comp. Bureau*, 649 N.W.2d 537 (N.D. 2002) (alleged fibromyalgia sufferer caught on videotape doing various strenuous activities).

167. See, e.g., *Napier v. Consol of Ky., Inc.*, No. 2003-SC-0853-WC, 2004 WL 2364865, at \*2 (Ky. Oct. 21, 2004) (doctor "could not rule out" motive for secondary gain as cause of fibromyalgia claim); *Herres v. Se. Neb. Dev.*, No. A-04-995, 2005 WL 1022055, at \*3 (Neb. Ct. App. Apr. 26, 2005) ("[A fibromyalgia diagnosis] is also consistent with . . . secondary gain.").

168. This figure is based on an examination of all the cases since 2003 resulting from a Westlaw search in the "allcases" database for "'workers' compensation' & 'fibromyalgia.'"



purpose of workers' compensation statutes: to provide speedy, no-fault recovery to injured workers.<sup>169</sup> It is also shocking considering that most courts start with the presumption that recovery should be allowed. To put this rejection rate into perspective, North Carolina statistics show that in the 1999–2000 fiscal year only 132 workers' compensation claims out of a total of 8,087 were denied in the state.<sup>170</sup> This equals a 98.3% approval rate and a mere 1.7% denial rate. Similarly in Wyoming, studies show that for the fiscal years 2000 and 2001, approximately 89% of the reported injuries were compensable.<sup>171</sup> In British Columbia, Canada, workers are calling for change to their system of workers' compensation because denial rates reached a ten-year high in 2006 of 8.2%.<sup>172</sup> A majority denial rate for fibromyalgia patients is far greater than expected and shows that current treatment of fibromyalgia by the courts is an injustice that must be remedied.

#### V. SOLUTIONS FOR COURTS TO ALLOW FIBROMYALGIC WORKERS A FAIR CHANCE AT COMPENSATION

Adding to the array of severe problems that fibromyalgia patients must deal with as a direct result of the illness are the problems in our current system of workers' compensation that make it extremely difficult for them to recover. In order to best deal with these problems, several steps must be taken. First, courts must acknowledge the existence of fibromyalgia as a real illness.

People are suffering from fibromyalgia. Despite the contentions of those who claim that it does not exist or is purely a psychological illness, too much evidence now exists that this is in fact a real illness with real consequences. Although there is no objective diagnosis for fibromyalgia, there are many commonalities among patients that are objective and all suggest its authenticity: consistent sleep patterns, gray matter loss in regions of the brain dealing with stress and pain processing, genetic correlations, abnormally high levels of Substance P, and decreased levels of serotonin, among others. Courts, even if not explicitly stating that their reason

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169. It should be noted that some courts are allowing recovery for fibromyalgia. A majority denial rate of course leaves a minority of claims allowed. *See, e.g.*, *V.I. Prewett & Son, Inc. v. Brown*, 896 So. 2d 564 (Ala. Civ. App. 2004); *Brinson v. Finlay Bros. Printing Co.*, 823 A.2d 1223 (Conn. App. Ct. 2003); *Watson v. Johnson Controls, Inc.*, 36 P.3d 323 (Kan. Ct. App. 2001); *Singleton v. N.C. Baptist Hosp.*, 619 S.E.2d 888 (N.C. Ct. App. 2005); *Judy v. Dept. of Labor & Indus.*, No. 23474-6-III, 2005 WL 3475804 (Wash. Ct. App. Dec. 20, 2005).

170. N.C. OFFICE OF STATE PERS., RISK CONTROL SERVS. DIV., *ILLNESS/INJURY AND WORKERS' COMPENSATION STATISTICAL ANALYSIS 1* (2001), available at <http://www.osp.state.nc.us/divinfo/frames/divisions/rcs/00fiscal/Statisti.pdf>.

171. WYO. LEGISLATIVE SERV. OFFICE, *WORKERS' COMPENSATION CLAIMS PROCESSING 5* (2003), available at <http://legisweb.state.wy.us/progeval/reports/2003/WorkersComp/chapter1.pdf>.

172. Travis Lupick, *WorkSafeBC Under Fire from MLA, Others* (Nov. 8, 2007), <http://www.straight.com/article-117444/worksafebc-under-fire-from-mla-others>.

for not allowing recovery is because they do not believe it exists, appear to have a negative perception of fibromyalgia that leads them to the conclusion that recovery should not be allowed. When weighing equal evidence on both sides, courts end up ruling against recovery in the majority of cases. Educating the courts about the latest advances in fibromyalgia studies will help to rid the courts of this negative perception and allow workers a fair chance at recovery. Weeding out malingerers will also help to change the negative perception associated with fibromyalgia.

Courts must find a better way to determine whether a particular plaintiff actually has fibromyalgia or is simply taking advantage of the system. The Seventh Eighth Circuits, in ERISA claims, have recently recognized the tender points test as constituting objective evidence of the presence of fibromyalgia.<sup>173</sup> However, this test is not without limitations of its own<sup>174</sup> and until a truly objective test is discovered, courts should consider accepting expert testimony from mental health professionals to help aid in determining whether a patient is actually suffering.

Parties to workers' compensation disputes are increasingly utilizing psychologists to evaluate the claims.<sup>175</sup> This is especially appropriate in the fibromyalgia context where medical doctors cannot objectively determine a true diagnosis. Mental health professionals may be able to do so. One of the most commonly used and most effective tests in detecting malingering is the Minnesota Multiphasic Personality Inventory (MMPI).<sup>176</sup> The MMPI-2 is the latest version of this test and includes the Fake Bad Scale (FBS), which is specifically designed to detect malingering in personal injury cases.<sup>177</sup> Studies have shown the FBS to correctly classify 96% of personal injury claimants diagnosed as malingerers.<sup>178</sup> These tests may go a long way in helping to eliminate those faking fibromyalgia and therefore lend more credibility to those actually suffering.

Courts must also find an appropriate way to deal with classifying fibromyalgia as an injury by accident. Although many cases have cited to the fact that scientific studies are inconclusive as to whether a physical trauma may cause fibromyalgia, recent studies show that this relationship does in fact exist in some patients.<sup>179</sup> Thus, courts should not only allow workers to offer expert testimony that the physical trauma in question did

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173. *Chronister v. Baptist Health*, 442 F.3d 648, 656 (8th Cir. 2006); *Hawkins v. First Union Corp. Long-Term Disability Plan*, 326 F.3d 914, 919 (7th Cir. 2003).

174. See discussion *supra* Part II.A.

175. Myling Sumanti et al., *Noncredible Psychiatric and Cognitive Symptoms in a Workers' Compensation "Stress" Claim Sample*, 20 CLINICAL NEUROPSYCHOLOGIST 754, 754 (2006).

176. John E. Meyers et al., *A Validity Index for the MMPI-2*, 17 ARCHIVES CLINICAL NEUROPSYCHOLOGY 157, 157 (2002).

177. *Id.* at 158.

178. *Id.*

179. See *supra* note 107.

cause the fibromyalgia but should also not simply rule against the worker when the employer offers conflicting expert testimony.

In cases where fibromyalgia is the result of employment, but not an accidental injury, courts have limited options for recourse. However, legislatures can get involved to pass legislation recognizing fibromyalgia as an occupational disease. Many states have incorporated specific findings into their workers' compensation statutes to specifically allow certain conditions to be considered occupational diseases. For example, North Carolina has made statutory allowances for twenty-eight separate conditions.<sup>180</sup> Exceptions for specific conditions have even been made on the federal level. The Black Lung Benefits Act was first passed in 1969 and extended in 1972 to provide cash benefits for coal miners disabled by black lung disease.<sup>181</sup> While hesitant to disrupt state systems of workers' compensation by passing the Act into law, President Richard Nixon noted that he felt compelled to do so because "States have not yet improved their own-financed laws to meet the challenge posed by black lung—and there are too many victims of this dread disease [to] not to have acted."<sup>182</sup> Perhaps current legislatures will feel so compelled to do something about the growing number of fibromyalgia sufferers who are not able to fairly recover under the current system.

#### CONCLUSION

Almost every illness has been unknown at some point in time. Even current diseases as prevalent and universally accepted as Alzheimer's disease have eluded all attempts to find a cause, objective diagnosis, or cure. Lesser known diseases like relapsing-remitting multiple sclerosis can also provide a model by which fibromyalgia may be compared. Before the advent of MRI and other technologies, relapsing-remitting multiple sclerosis sufferers were "dismissed as being psychologically disturbed or malingerers, complaining of odd neurological symptoms like blindness and dizziness and drunken gait, yet appear[ing] virtually neurologically intact on examination."<sup>183</sup> When the proper technology came along, however, these patients were shown as true sufferers of a true illness.<sup>184</sup> In the fibromyalgia context, just as it did with this form of multiple sclerosis, "[t]echnology ultimately will catch up with reality and will prove [fibro-

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180. See N.C. GEN. STAT. § 97-53 (2007).

181. See Pub. L. No. 92-303, 86 Stat. 153 (1972) (codified as amended at 30 U.S.C. § 901 (2000)); Pub. L. No. 91-173, 83 Stat. 792 (1969).

182. Richard Nixon, Statement About Signing the Black Lung Benefits Act of 1972 (May 20, 1972).

183. White, *supra* note 114, at 638–39.

184. *Id.*

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myalgia] doubters wrong.”<sup>185</sup> Until that time, courts and legislatures must find a way to allow fibromyalgia sufferers a fair chance at recovery under workers’ compensation.

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185. *Id.* at 638.