

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 98-077476

Employee: Penny Austin
Employer: Air Products & Chemicals, Inc.
d/b/a PG Walker
Insurer: National Union Fire Insurance Company
Date of Accident: June 18, 1998
Place and County of Accident: Greene County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 6, 2005. The award and decision of Associate Administrative Law Judge L. Timothy Wilson, issued May 6, 2005, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 29th day of November 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Penny Austin

Injury No. 98-077476

Dependents: N/A
Employer: Air Products & Chemicals, Inc., d/b/a PG Walker
Additional Party: N/A
Insurer: National Union Fire Insurance Co.
Hearing Date: August 18, 2003

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: LTW/mp

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? yes
2. Was the injury or occupational disease compensable under Chapter 287? yes
3. Was there an accident or incident of occupational disease under the Law? yes
4. Date of accident or onset of occupational disease: June 18, 1998
5. State location where accident occurred or occupational disease was contracted: Greene County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
yes
7. Did employer receive proper notice? yes
8. Did accident or occupational disease arise out of and in the course of the employment? yes
9. Was claim for compensation filed within time required by Law? yes
10. Was employer insured by above insurer? yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
While performing repetitive work duties, Claimant sustained injury to her hands, arms, shoulders, arms, and neck.
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: hands, arms, shoulders, and neck
14. Nature and extent of any permanent disability: 25% permanent partial disability body as a whole
15. Compensation paid to-date for temporary disability:
16. Value necessary medical aid paid to date by employer/insurer?
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages:
19. Weekly compensation rate: \$257.78
20. Method wages computation: stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

An award for future medical care is denied

An award for additional temporary total disability compensation is denied.

100 weeks of permanent partial disability from Employer

\$25,333.00

22. Second Injury Fund liability: No

TOTAL:

\$25,333.00

23. Future requirements awarded: none

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Alexander W. Staab

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Penny Austin

Injury No: 98-077476

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Air Products & Chemicals, Inc., d/b/a PG Walker

Additional Party N/A

Insurer: National Union Fire Insurance Co.

Checked by: LTW/mp

The above-referenced workers' compensation claim was heard before the undersigned Associate Administrative Law Judge on August 18, 2003. The record was left open for the submission of additional evidence and/or briefs, resulting in the

record being completed and submitted to the undersigned on or about April 18, 2005.^[1]

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about June 18, 1998, Air Products & Chemicals Inc., d/b/a PG Walker, was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by National Union Fire Insurance Co.
- (2) On the alleged injury date of June 18, 1998, Penny Austin was an employee of the employer and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about June 18, 1998, the employee sustained an incident of occupational disease which arose out of and in the course and scope of her employment with Air Products & Chemicals Inc., d/b/a PG Walker.
- (4) The above-referenced employment and incident of occupational disease occurred in Greene County, Missouri. The parties agree to venue lying in Springfield, Missouri. Venue is proper.
- (5) The employee notified the employer of her injury as required by Section, 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) At the time of the alleged accident, and at all times relevant to this case, for purposes of this hearing, the employee's average weekly wage was sufficient to allow a compensation rate of \$253.33 for temporary total disability compensation and permanent disability compensation.
- (8) Temporary disability benefits have been provided to the employee in the amount of \$2,135.91, representing 8 2/7 weeks in disability benefits, payable at the compensation rate of \$253.33.
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$12,472.63 in medical expenses.

The sole issues to be resolved by hearing include:

- (1) Whether the occupational incident of June 18, 1998, caused the injuries and disabilities for which the employee is now claiming benefits? (The employer and insurer stipulate to the June 18, 1998, incident as being the cause of the employee suffering a ganglion cyst bilaterally to her wrists and bilateral carpal tunnel syndrome; but they dispute that this incident caused her to suffer fibromyalgia or such pain syndrome.)
- (2) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve her of the effects of the injuries?
- (3) Whether the employee is entitled to temporary total disability benefits, insofar as the employee is claiming permanent total disability?
- (4) Whether the employee sustained any permanent disability as a consequence of the alleged incident; and, if so, the nature and extent of the disability?

EVIDENCE PRESENTED

The employee, Penny Austin, testified at the hearing in support of her claim. Also, the claimant offered for admission the following exhibits:

- Exhibit A Complete Medical Report of Andrew I. Myers, M.D. (with attached Medical Records)
- Exhibit B Deposition of Michael Dreiling

Exhibit C Medical Record / Surgeon's Report of Ronald Weller, D.O. & Dr. Gil's Immediate Care & Occupational Health Center (2 pages)
Exhibit D Deposition of Neil Nathan, M.D.

Exhibits A, B, and C were received and admitted into evidence at the hearing. Exhibit D was received and admitted into evidence subsequent to the hearing by agreement of the parties.

The employer and insurer did not present any witnesses at the hearing of this case. The employer and insurer, however, offered for admission the following exhibits:

Exhibit 1 Deposition of David G. Paff, M.D.
Exhibit 2 Deposition of Ted Lennard, M.D.
Exhibit 3 Deposition of Andrew I. Myers, M.D.
Exhibit 4 Deposition of P. Brent Koprivica, M.D.

Exhibits 1, 2, and 3 were received and admitted into evidence at the hearing. Exhibit 4 was received and admitted into evidence subsequent to the hearing by agreement of the parties.

In addition, the parties identified several documents filed with the Division of Workers' Compensation which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File which include: Notice of Hearing; Letter Dated August 13, 2003; Entry of Appearance by Alexander Staab, Esq.; Request for Leave of Court to Withdraw as Employee's Counsel; Answer of Employer & Insurer to Claim for Compensation; Claim for Compensation; and Report of Injury.

DISCUSSION

The employee, Penny Austin, is 46 years of age, having been born on December 4, 1958. She resides in the metropolitan area of Springfield, Missouri.

Ms. Austin is a high-school graduate. However, with the exception of three months of vocational training in accounting and three months of excel training, she enjoys limited additional education or vocational training. Also, Ms. Austin's work history is varied, involving a combination of administrative or clerical employment and physical labor oriented work. This employment includes working as a clerk for AAA Auto Club and Hartford Insurance, and cleaning houses as a domestic aid. Additionally, this employment required Ms. Austin to engage in typing, perform paper work tasks, and to perform the tasks of a receptionist.

In or around 1991, Ms. Austin secured employment with P.G. Walker, working as a data entry operator. In this employment Ms. Austin engaged primarily in data entry and ten-key typing, together with telephone work. According to Ms. Austin, this work required her to use intensively her upper extremities. Notably, she used both hands to type; and she used her right hand to operate the adding machine. Additionally, according to Ms. Austin, she would type tickets and sales requests into P.G. Walker's computer data system; and she would use the telephone to perform customer service responsibilities.

Eventually, in or around June 1996, Ms. Austin received a promotion to the position of sales assistant, which had the effect of tripling her workload. Although she continued to perform the same type of duties, the promotion required her to use the telephone, perform data entry and ten-key operation a lot more, with 80 percent of her time being devoted to data entry or ten-key typing. Also, Ms. Austin states, in using the telephone, she did not have the benefit of a hand-free telephone and had to rest the telephone on her shoulder while she worked with her hands doing data entry and ten-key operation. Further, Ms. Austin notes she worked 4 to 5 hours straight without stopping for a rest or getting up from her desk.

In June 1998 Ms. Austin began to experience pain in her arms and noticed lumps and a cyst on her right hand / wrist. In light of these concerns, she notified the human resource officer with P.G. Walker of her concerns, and subsequently received a referral to Dr. Gil's for an evaluation. Following this evaluation and a tentative diagnosis of carpal tunnel syndrome, Dr. Gil fitted Ms. Austin for a right wrist splint and referred her to Scott Swango, M.D., who is an orthopedic surgeon, for a surgical consultation.

On July 9, 1998, Ms. Austin presented to Dr. Swango with complaints of "throbbing type pain with numbness." Additionally, Ms. Austin noted that the pain and numbness radiated from the hands into the shoulders, with her right hand being more symptomatic than the left hand. In light of his examination and findings of Ms. Austin, Dr. Swango diagnosed Ms. Austin with "probable bilateral carpal tunnel syndrome, early, occupationally acquired." Additionally, Dr. Swango diagnosed Ms. Austin with a mass, "dorsum of the left wrist and volar radial right wrist, probable ganglion cysts." Further, taking into consideration his examination and findings, Dr. Swango recommended that she pursue a course of conservative care with modified work duty.

The conservative care initially provided by Dr. Swango included splinting of the left wrist, prescription medication

for pain and swelling, and a diagnostic study in the nature of bilateral NCV, performed by Jeffrey Woodward, M.D. This diagnostic study proved to be negative. And in August 1998 Dr. Swango recommended that Ms. Austin be referred to one of the physicians with Springfield Physical Medicine and Rehabilitation for a second opinion, which resulted in a referral to Ted A. Lennard, M.D.

Also, in or around October 1998, Ms. Austin began treating on her own with Neil Nathan, M.D., whom is a physician practicing in the area of pain management. The treatment provided by Dr. Nathan included osteopathic manipulative therapy, which were helpful but provided only temporary relief. Additionally, Dr. Nathan treated Ms. Austin for other conditions, including episodic flair-ups of chronic low back pain, migraine headaches, and depression. (Ms. Austin continues to treat with Dr. Nathan.)

On or about November 17, 1998, Ms. Austin presented to Ted A. Lennard, M.D., for an evaluation. In light of his examination and evaluation of Ms. Austin, which included a positive Phalen's bilaterally, Dr. Lennard diagnosed Ms. Austin with possible bilateral carpal tunnel syndrome despite negative nerve conduction studies. Yet, because of the negative nerve conduction studies, Dr. Lennard recommended that Ms. Austin be provided an MRI scan of the cervical spine in order to rule out any underlying cervical disc abnormality. This study subsequently occurred and proved to be negative, resulting in Dr. Lennard continuing to treat Ms. Austin under the secondary diagnosis of bilateral carpal tunnel syndrome, and a recommendation that she continue to be provided conservative treatment. Additionally, Dr. Lennard recommended that Ms. Austin be allowed to attempt her work in the ergonomically modified work environment for three to four weeks.

Following the November 1998 examination, Dr. Lennard continued to provide follow-up treatment, which included injections into the ulnar bursa of both the right and left wrists, done separately. These injections provided Ms. Austin with some relief; but she continued to experience pain intermittently in the hands, with associated swelling, worse on the right. In light of continuing symptomology, on March 19, 1999, Dr. Lennard recommended that Ms. Austin's work activities be further modified and limited to repetitive handwork to no more than two hours per day, divided in one-hour increments. Eventually, in light of continuing pain without complete resolution of symptomology, Ms. Austin returned to Dr. Swango for additional evaluation and treatment.

In July 1999 Dr. Swango performed surgery on Ms. Austin, which involved excision of the volar radial ganglion cyst and a carpal tunnel release of the right wrist. Following a period of being off work, Ms. Austin returned to work in mid-August 1999, and began to develop pain in her left hand, neck and shoulder, with continuing pain and weakness in her right hand. Upon returning to work, Ms. Austin changed her job and no longer did data entry or 10-key, but continued to work on reports and to engage in problem solving. In light of the continuing symptomology associated with the right hand, following the surgery, Dr. Swango declined to pursue surgery on the left hand. Additionally, on August 23, 1999, Dr. Swango released Ms. Austin to return to work full duty, but with the understanding that he would be getting a work site evaluation for her.

Subsequently, on or about August 31, 1999, Ms. Austin sought and obtained medical treatment on her own from Michael Grillot, M.D., who is an orthopedic surgeon. At the time of this examination, Dr. Grillot noted Ms. Austin appeared to present with a resolution of the carpal tunnel release on the right, with no sign of a ganglion being present. However, according to Dr. Grillot, Ms. Austin presented with symptoms suggestive of cubital tunnel syndrome bilaterally, and left carpal tunnel syndrome and dorsal ganglion. And, in light of his examination and findings, Dr. Grillot recommended that Ms. Austin pad the elbows during the day and wrap them with a towel at night to prevent hyperflexion, and to return in one month for a follow-up evaluation with consideration of surgery (carpal tunnel release and dorsal ganglion excision of the left wrist and ulnar nerve transposition) if she continued to present with persistent symptoms.

Also, in or around November / December 1999, Ms. Austin became separated from her employment with PG Walker. Ms. Austin indicated at the hearing that PG Walker terminated her, and informed her that the reason for the termination was her abandonment of the job. At the hearing Ms. Austin indicated that she has not worked since August 1999, although she has looked for work since being terminated by PG Walker. However, according to Ms. Austin, no employer has been willing to hire her.

In light of the continuing symptomology, in December 1999 Dr. Grillot performed a carpal tunnel release and an excision of the dorsal ganglion of Ms. Austin's left wrist. Dr. Grillot provided follow-up care. And, in light of continuing symptomology associated with the cubital tunnel, in January 2000, Dr. Grillot recommended that Ms. Austin proceed with an ulnar nerve transposition. Ms. Austin, however, elected not to proceed with such additional surgery. According to Ms. Austin, the carpal tunnel release provided her with some relief for approximately six months, as she no longer experienced the numbness and tingling. Yet, she was never pain free. And, after approximately six months the numbness and tingling returned. Additionally, Ms. Austin states, the pain progressed from her wrists to her arms, shoulders, neck, legs, and low back.

Also, according to Ms. Austin, in or around this time Dr. Nathan, from whom she continued to receive treatment, diagnosed her with fibromyalgia. Additionally, in light of this diagnosis, Ms. Austin states, Dr. Nathan recommended that

she not undergo the surgery recommended by Dr. Grillot for the cubital tunnel syndrome.

At the time of the hearing, Ms. Austin continued to be under active treatment with Dr. Nathan. Approximately once a month Dr. Nathan provides treatment for Ms. Austin, which includes osteopathic manipulative therapy. This therapy provides temporarily relief from the pain associated with Ms. Austin's headaches and neck. She is worse since leaving employment in November 1999. The pain is worse in her back, legs, hips, knees, feet, hands, elbows, neck and shoulders. She said the pain never goes away. She said activities such as driving, lifting a gallon of milk, washing and styling her hair, and doing laundry makes things worse. She has trouble with dropping things, and experiences difficulty opening lids because of a loss of strength. She also testified to problems sleeping. She attributed her difficulty in thinking and forgetting what she was saying in the middle of a sentence to "fibromyalgia fog."

She drives twice a week. She can do laundry, but can only do three loads a day. She can fold clothes for 15 minutes before taking an hour break. She doesn't cook as much and doesn't do any grocery shopping. She uses a computer at home for email and to research fibromyalgia. She uses the computer about 30 minutes at a time.

She testified that, before the injury she experienced migraine headaches. However, she began to experience more migraine headaches; and the headaches became more severe until she began using Topomax, a prescription medication prescribed by Dr. Nathan. Apparently, this medication has returned to the pre-injury level of approximately one migraine headache per month.

Andrew I. Myers, M.D., who is a physician practicing in the specialty of occupational and industrial medicine, testified in behalf of Ms. Austin through the submission of a complete medical report. Dr. Myers performed an independent medical examination of Ms. Austin on July 18, 2002. At the time of this examination, Dr. Myers took a history from Ms. Austin, reviewed various medical records, and performed a physical examination of her. In light of his examination and evaluation of Ms. Austin, Dr. Myers opined that, as a consequence of the cumulative and repetitive trauma associated with her employment with PG Walker, Ms. Austin sustained an injury in the nature of bilateral carpal tunnel syndrome, bilateral ganglion cysts, and severe fibromyalgia pain syndrome. (Dr. Myers did not find evidence of bilateral cubital tunnel syndrome, but noted that Ms. Austin had been removed from the cumulative and repetitive trauma for nearly three years.) Dr. Myers further opined that, as a consequence of this occupational injury, Ms. Austin sustained a permanent partial disability of 80 percent to the body as a whole.

In addition, Dr. Myers opined that, in light of this injury, Ms. Austin is governed by several restrictions and limitations. In the context of this issue Dr. Myers propounded the following comments:

With regard to restrictions, any repetitive and/or strenuous motions of any of the involved areas, particularly the upper extremities, elbows, wrists, fingers, neck, low back and knees is highly discouraged. However, as indicated above, ongoing stretching and strengthening exercises are highly encouraged. However, the patient is cautioned to strictly avoid strenuous exercise.

With regard to her upper extremities, Mrs. Austin should avoid any strenuous and/or repetitive lifting. She should avoid the use of any high impact tools such as a hammer. She should avoid any strenuous and/or repetitive use of her upper extremities such as she would experience utilizing a 10-key or computer or a grocery store scanner. She should avoid any strenuous and/or repetitive torquing motions with her bilateral upper extremities.

With regard to her neck, shoulders, mid and lower back, Mrs. Austin should also avoid any strenuous and/or repetitive lifting. She should avoid any lifting, particularly from ground level. Any lifting which she does perform which is not in a strenuous or repetitive nature should be performed from a height of at least three and one-half to four feet. She should avoid any strenuous and/or repetitive high/far reaching.

Mrs. Austin should certainly avoid any motions which require simultaneous flexion and torsion about the low back. She should avoid any prolonged posturing of the low back. She should be allowed in any job which it may be possible for her to undertake to have approximately a 20 minute sit/stand cycle in order to avoid the unnecessary stiffness and exacerbation of back pain. Of course, she needs to utilize an ergonomically designed work station. This ergonomically designed work station should give her forearms adequate support and take any unnecessary pressure off of her elbows and back.

Finally, fibromyalgia patients require frequent adjustments of their medications until they are at optimal doses of the most effective medications for them. Also, it should be noted that often once that goal has been achieved, from time to time, medication adjustments are still required.

Notably, in light of these restrictions, Dr. Myers is of the opinion that Ms. Austin is likely permanently and totally disabled, but believed it appropriate to defer such opinion to a vocational expert.

On cross-examination Dr. Myers acknowledged that the restrictions he prescribed for Ms. Austin, relative to the upper extremities, were for both the carpal tunnel syndrome problems and fibromyalgia. And, according to Dr. Myers, the other limitations and restrictions pertain to the fibromyalgia. Additionally, Dr. Myers noted that part of his experience with and understanding of fibromyalgia relates to a personal situation involving his wife, who suffers from this condition as a congenital disease process.

In discussing generally the medical condition of fibromyalgia, Dr. Myers acknowledged that people with fibromyalgia tend to talk about their symptoms more than people with other diseases, primarily in an effort to try to convince people their problems aren't in their head. Further, he acknowledged that all symptoms and findings associated with a diagnosis of fibromyalgia are subjective. And, in addressing the issue of fibromyalgia and its cause, he identifies four categories of cause for fibromyalgia: (1) childhood onset, (2) serious infection (3) surgical procedure and (4) trauma, both acute and cumulative. According to Dr. Myers, if someone doesn't fit into one of the four categories, the problem is a failure of the history to find it.

Neil Nathan, M.D., a treating physician of Ms. Austin since 1998, and selected by Ms. Austin at her own expense, testified by deposition on behalf of Ms. Austin. Dr. Nathan testified that, while initially his treatment of Ms. Austin began as a referral to provide osteopathic manipulative therapy to provide relief of her symptoms, the pain has progressed to the point that she is now symptomatic from "the top of her head to the tip of her toe." According to Dr. Nathan, Ms. Austin is in exquisite pain, and the treatment he provides her is merely able to provide episodic and symptomatic relief in the form of medication and manipulation to make her "barely functional." Notably, the treatment being provided to Ms. Austin by Dr. Nathan relates primarily to her fibromyalgia, which Dr. Nathan believes is causally related to her employment with PG Walker.

On cross-examination Dr. Nathan testified that "fibromyalgia can be caused by trauma, injury, infection, or it can be idiopathic." He did not know how such factors can cause fibromyalgia. Additionally, Dr. Nathan testified that, there was no difference in the clinical presentation of someone who had idiopathic fibromyalgia, trauma-induced fibromyalgia, or infection-induced fibromyalgia; and the differences in diagnosis of type of fibromyalgia is premised on the individual history of the patient. In the context of Ms. Austin, Dr. Nathan opines, by history Ms. Austin suffers from trauma-induced fibromyalgia. Further, in considering the nature and extent of Ms. Austin's restrictions and limitations, Dr. Nathan is of the opinion that all of her current complaints are attributed to fibromyalgia caused by her work.

Michael Dreiling, who is a vocational consultant, testified by deposition in behalf of Ms. Austin. Mr. Dreiling performed a vocational evaluation and examination of Ms. Austin on July 29, 2003. At the time of this evaluation, Mr. Dreiling took a social, educational, work, and medical history of Ms. Austin, reviewed various medical records, and performed certain vocational tests. In light of his examination and evaluation of Ms. Austin, and taking into consideration Ms. Austin's "significant pain issues," Mr. Dreiling opined that Ms. Austin was not a candidate for referral to the State Vocational Rehabilitation Program for any further academic or vocational training. Additionally, taking into consideration the restrictions and limitations imposed by Dr. Nathan or Dr. Myers, Mr. Dreiling is of the opinion that Ms. Austin is unemployable in the open and competitive labor market.

Notwithstanding, Mr. Dreiling concedes that, if Ms. Austin could perform full-duty clerical activities, she would be employable in the open and competitive labor market. Similarly, Mr. Dreiling concedes that, if he assumes the testimony and restrictions of Dr. Swango, without consideration of the restrictions and limitations imposed by Dr. Myers or Dr. Nathan, Ms. Austin is employable in the open and competitive labor market.

Ted Lennard, M.D., who is a treating physician practicing in the specialty of physical medicine, testified by deposition in behalf of the employer and insurer. Dr. Lennard provided limited conservative treatment for Ms. Austin in November 1998. Later, on or about July 28, 2003, Dr. Lennard performed a comprehensive examination and evaluation of Ms. Austin. Notably, according to Dr. Lennard, from the time he first saw Ms. Austin in 1998 to the time he examined her in July 2003, she had treated with multiple physicians and had experienced an

expansion of problems. In addressing this issue, Dr. Lennard notes:

When I saw her on 7/28/03 she basically hurt everywhere. I asked her the question is there anywhere on her body that didn't hurt, and the only thing she responded was maybe her jaw. She said that she's progressively worsened. Her problems extended into her legs, lower back, having headaches, and was currently under the treatment of Dr. Nathan.

Yet, at the time of this July 2003 examination, Ms. Austin indicated to Dr. Lennard that she could do most activities, but at a slower pace.

Also, according to Dr. Lennard, his neurological examination of Ms. Austin on July 28, 2003 was "essentially normal." Although, upon palpating her, Ms. Austin complained of pain about everywhere, Dr. Lennard notes that Ms. Austin did not exhibit "any specific focal bony tenderness but rather diffuse muscle tenderness." Other than the tenderness on palpation, Dr. Lennard did not observe or find any positive findings in his clinical examination of Ms. Austin.

In light of his examination and evaluation of Ms. Austin, together with his review of the medical records, Dr. Lennard diagnosed Ms. Austin with multiple medical concerns, including bilateral carpal tunnel syndrome and bilateral ganglion cysts that resulted in surgery to both the right and left wrists; widespread musculoskeletal pain, and depression. Also, in examining the cause of these multiple medical conditions, Dr. Lennard opined that, as a consequence of Ms. Austin's employment and work with PG Walker in June 1998, she sustained a soft tissue injury to her neck; she sustained carpal tunnel syndrome and ganglion cysts, bilaterally, which necessitated surgical intervention; and she sustained cubital tunnel syndrome, bilaterally. Dr. Lennard further opined, relative to this occupational injury, Ms. Austin sustained a permanent impairment of 20 percent referable to the right wrist; she sustained a permanent impairment of 15 percent referable to the left wrist; and she sustained a permanent impairment of 5 percent to the body as a whole referable to the neck. (The assessment of 5 percent to the body as a whole includes consideration of the bilateral cubital tunnel syndrome.) And, Dr. Lennard is of the opinion that Ms. Austin is not in need of additional medical treatment relative to her wrists and neck. Nor is Dr. Lennard of the opinion that Ms. Austin needs additional medical care for the cubital tunnel syndrome.

In addition, in considering the restrictions and limitations governing Ms. Austin relative to this occupational injury, Dr. Lennard propounds the following testimony:

- Q. Do you have an opinion as to restrictions that Ms. Austin would have on a job at this time from the injuries that are related to her work at P. G. Walker?
- A. She should avoid repetitious upper extremity activities in reaching out prolonged in front of her body and above her head.
- Q. When you are speaking about repetitious use of the hands, what are you contemplating that she should not be doing?
- A. Continuous wrist flexion-extension in the hand gripping and elbow flexion-extension activities on a continual basis.
- Q. If a job required her to do that on a less than continuous basis, then you think that would be acceptable for her?
- A. Well, maybe occasionally, which would be less than a third of the time, but not the continual repetitious activity.

Yet, Dr. Lennard is of the opinion that Ms. Austin's overall medical condition and limitations do not relate solely to her occupational injury. Rather, Dr. Lennard opines, Ms. Austin suffers additional medical concerns unrelated to her employment; and these conditions include general musculoskeletal pain and/or fibromyalgia, and depression. Further, according to Dr. Lennard, the fibromyalgia and depression is continuing to cause Ms. Austin problems, which present her with additional limitations and restrictions, and which continue to present a need for additional medical treatment. However, Dr. Lennard notes, this medical condition and need for treatment is not related to the occupational injury of June 1998.

David G. Paff, M.D., who is a physician practicing in the specialty of occupational medicine, testified by

deposition in behalf of the employer and insurer. Yet, at the request of Ms. Austin's attorney, Dr. Paff performed an independent medical examination of Ms. Austin on October 27, 2000. At the time of this examination, Dr. Paff took a history from Ms. Austin, reviewed various medical records, and performed a physical examination of her. In light of his examination and evaluation of Ms. Austin, Dr. Paff opined that, as a consequence of the occupational injury of June 1998, Ms. Austin sustained an injury in the nature of bilateral carpal tunnel syndrome, bilateral ganglion cysts, and bilateral cubital tunnel syndrome. Notably, relative to this injury, Dr. Paff opined that the surgeries for the bilateral carpal tunnel syndrome and ganglion cyst were appropriate, but she should not undergo any surgery for the cubital tunnel syndrome, and she was not in need of any additional medical care for this injury. Also, in the context of this occupational injury, Dr. Paff opined that Ms. Austin sustained a permanent partial disability of 20 percent, referable to each upper extremity at the 210-week level.

In addition, Dr. Paff opined that Ms. Austin suffers from fibrositis (Fibromyalgia)^[2]; and this condition is responsible for her continuing to suffer pain, and is the cause of "[m]uch of her inability to get well." Further, relative to the fibrositis, Dr. Paff opines that this medical condition is not related to the occupational injury of June 1998; and Ms. Austin does not need any additional medical treatment.

P. Brent Koprivica, M.D., M.P.H., testified by deposition in behalf of the employer and insurer. Yet, at the request of Ms. Austin's attorney, Dr. Koprivica performed an independent medical examination of Ms. Austin on December 7, 2001. At the time of this examination, Dr. Koprivica took a history from Ms. Austin, reviewed various medical records, and performed a physical examination of her. In light of his examination and evaluation of Ms. Austin, Dr. Koprivica opined that, as a consequence of the occupational injury of June 1998, Ms. Austin sustained an injury in the nature of bilateral carpal tunnel syndrome, bilateral ganglion cysts, and bilateral cubital tunnel syndrome. Further, Dr. Koprivica opined that the surgeries for the bilateral carpal tunnel syndrome and ganglion cysts were appropriate; and the decision not to pursue further surgical intervention for the cubital tunnel syndrome is appropriate.

Also, Dr. Koprivica opined that, as a consequence of the occupational injury of June 1998, Ms. Austin is governed by several limitations and restrictions. In regard to this issue, Dr. Koprivica propounds the following comments:

Ms. Austin should avoid work activities, which require repetitive hand use including repetitive pinching and repetitive grasping. She should avoid repetitive wrist flexion / extension activities, repetitive ulnar deviation of the wrists and avoid repetitive elbow flexion / extension activities. Finally, she should avoid exposing her upper extremities to vibration.

And, in rendering an assessment of disability for this occupational injury, in the context of the aforementioned limitations and restrictions, Dr. Koprivica opined that Ms. Austin sustained a permanent partial disability of 40 percent to the body as a whole. (This assessment of permanent disability, which involves a body as a whole rating, takes into consideration the disability attributable to each upper extremity, together with the synergistic effect of the opposite extremities combining to create additional disability greater than the simple sum. Dr. Koprivica opined that the permanent disability attributable solely to the right upper extremity at the 210-week level is 35 percent, and the permanent disability attributable solely to the left upper extremity at the 210-week level is 30 percent.)

Further, Dr. Koprivica is of the opinion that, in addition to suffering from an occupational injury, Ms. Austin suffers from fibromyalgia – a medical condition that Dr. Koprivica does not believe to be related to work. According to Dr. Koprivica, the fibromyalgia is continuing to cause Ms. Austin to need additional medical care, including prescription medication, which presents her with a significant vocational impact and additional disability. Notably, Dr. Koprivica opines that, relative to the fibromyalgia, Ms. Austin is governed by additional limitations and restrictions. In rendering this opinion Dr. Koprivica states:

Ms. Austin's fibromyalgia, with the fatigue problems that are present, will make the ability to reliably predict her physical capabilities impossible. She will need postural allowances. The allowance of changing from captive sitting on an hourly basis would be recommended. Standing and walking should be restricted to 15 minutes or less with

the allowance of sitting on an as-needed basis.

I would generally recommend that Ms. Austin not do climbing activities.

The medications that she takes do effect concentration and memory. There will be negative vocational impact on any type of activity, which requires concentration in the performance of the job task.

In general, she should avoid repetitive bending at the waist, pushing, pulling, or twisting. She should avoid sustained or awkward postures of the lumbar spine.

Finally, I would generally recommend that she limit physical demand activities to sedentary physical demand in light of the loss of strength in her hands, in particular.

Additionally, Dr. Koprivica opined that, as a consequence of the fibromyalgia, Ms. Austin has sustained a permanent partial disability of 25 percent to the body as a whole; and the combination of the disability associated with the fibromyalgia and the occupational injury combine to create additional disability greater than the simple sum.

FINDINGS AND CONCLUSIONS

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo. App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo. Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo. App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo. App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Brufat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo. App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo. App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe, but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo. App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575, 577 (Mo. App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo. App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo. App. W.D. 1993).

I. Occupational Injury & Medical Causation

The parties stipulate that, on or about June 18, 1998, the employee, Penny Austin, sustained an incident of occupational disease, which arose out of and in the course of her employment with Air Products & Chemicals, Inc. d/b/a PG Walker. The parties further acknowledge that this occupational injury resulted in Ms. Austin suffering an injury in the nature of bilateral carpal tunnel syndrome and bilateral ganglions cysts, which necessitated surgery. The parties, however, dispute the severity and extent of her injuries.

Ms. Austin contends that, as a consequence of the occupational injury of June 18, 1998, and following the surgeries for the bilateral carpal tunnel syndrome and ganglion cysts, she developed fibromyalgia, which caused her to experience disabling pain and to render her unemployable in the open and competitive labor market. In support of her contentions, Ms. Austin relies upon the medical opinions of Dr. Neil Nathan and Dr. Andrew Myers, and the vocational opinion of Michael Dreiling. The employer and insurer, however, contend that the severity of Ms. Austin's injuries and primary basis of her disability relate to the fibromyalgia and depression; and these medical conditions are not causally related to the occupational

injury of June 18, 1998. The employer and insurer rely upon the medical opinions of Dr. Ted Lennard, Dr. David Paff, and Dr. P. Brent Koprivica.

After consideration and review of the evidence, I find and conclude that, as a consequence of the accident of June 18, 1998, the employee sustained an injury in the nature of bilateral carpal tunnel syndrome, bilateral ganglion cysts, bilateral cubital tunnel syndrome, and a mild neck strain. I do not find that the occupational injury of June 18, 1998, caused Ms. Austin to sustain or develop fibromyalgia. In rendering this decision, I resolve the conflict in medical testimony in favor of the opinions of Drs. Lennard, Paff, and Koprivica, who I find to be credible and persuasive. Notably, Dr. Lennard is a well-respected treating physician; and Drs. Paff and Koprivica were initially secured by the employee for the purpose of rendering an independent medical examination, but did not believe the medical evidence supported an opinion establishing a causal relationship between the occupational injury and the diagnosis of fibromyalgia. Further, as noted by Dr. Lennard, many of the symptoms associated with the diagnosis of fibromyalgia did not begin to manifest and become part of Ms. Austin's condition until many months after she ceased working and being employed by PG Walker.

II. Future Medical Care

The employee is continuing to treat with Dr. Nathan, and it appears that Ms. Austin will continue to need a significant amount of treatment for the indefinite future. Yet, the treatment being provided by Dr. Nathan and Ms. Austin's need for continuing treatment pertains solely to her fibromyalgia, which appears to be a debilitating and progressive condition. Ms. Austin is not in need of treatment for her occupational injury of June 1998, and the conditions associated with bilateral carpal tunnel syndrome, bilateral ganglion cysts, bilateral cubital tunnel syndrome, or the mild neck strain. None of the physicians indicate that Ms. Austin is a surgical candidate and should be provided additional surgery for her bilateral carpal tunnel syndrome, bilateral ganglion cysts, bilateral cubital tunnel syndrome, or neck strain. And, while Dr. Lennard acknowledged that the medication Ms. Austin is receiving for her fibromyalgia and depression provide her with some relief of the injuries involving her upper extremities and neck (bilateral carpal tunnel syndrome, bilateral ganglion cysts, bilateral cubital tunnel syndrome, and neck strain), such treatment would not be necessary for the treatment of these medical conditions considered alone, without consideration and treatment of the fibromyalgia and depression.

Accordingly, for the foregoing reasons, the request for future medical care is denied.

III. Temporary Disability Compensation

The evidence is supportive of a finding that the employer and insurer provided the employee with all temporary disability compensation that is due, and the employee is not entitled to additional temporary total disability compensation. Accordingly, the employee's request for additional temporary total disability compensation is denied.

IV. Permanent Disability Compensation

The occupational injury of June 1998 causes Ms. Austin to be governed by certain restrictions and limitations; and there are several physicians offering different medical opinions of the nature and extent of the governing limitations and restrictions, applicable to the occupational injury. I resolve the conflict in medical opinions in favor of the medical opinion of Dr. Lennard, who I find to be credible and persuasive.

Thus, I find and conclude that, as a consequence of the occupational injury of June 1998, Ms. Austin is governed by the restrictions and limitations prescribed by Dr. Lennard – namely, Ms. Austin should not perform jobs that do not require her to lift over 10 pounds; she should avoid repetitious upper extremity activities in reaching out prolonged in front of her body and above her head; and she should not perform continuous wrist flexion-extension in the hand gripping and elbow flexion-extension activities on a continual basis. In describing the phrase, "continual basis" Dr. Lennard acknowledged that occasional to less than a third of the time would be acceptable. Also, while Ms. Austin is governed by other more restrictive restrictions and limitations, these additional restrictions pertain to the fibromyalgia and depression, and are not causally related to the occupational injury of June 1998. Notably, in this context, the vocational opinion of Mr. Dreiling is of limited value, as his opinion includes the limitations and restrictions associated with Ms. Austin's overall medical condition, including the fibromyalgia and depression.

Accordingly, after consideration and review of the evidence, I find and conclude that, as a consequence of the occupational injury of June 18, 1998, Ms. Austin sustained a permanent partial disability of 25 percent to the body as a whole, referable to the bilateral carpal tunnel syndrome, bilateral ganglion cysts, bilateral cubital tunnel syndrome, and the mild neck strain, including consideration of the combination of disabilities associated with each medical condition. The occupational injury of June 18, 1998, considered alone, does not render Ms. Austin permanently and totally disabled. Perhaps, Ms. Austin is permanently and totally disabled. However, if Ms. Austin is unemployable in the open and competitive labor market, it is the combination of all of her medical conditions, including subsequent developing medical conditions of fibromyalgia and depression, unrelated to the occupational injury of June 18, 1998, which rendered her permanently and totally disabled.

Therefore, for the foregoing reasons, the employer and insurer are ordered to pay to the employee the sum of \$25,333.00, which represents 100 weeks of permanent partial disability compensation, payable at the applicable rate of \$253.33 per week.

The award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Date: May 30, 2005

Made by: /s/ L. Timothy Wilson
L. Timothy Wilson
Associate Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia "Pat" Secrest
Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[\[1\]](#) The parties stipulated to the complexity of the issues and extenuating circumstances, which necessitate and justify the record being left open for submission of additional evidence in excess of 30 days, and issuance of the award in excess of the statutory / regulatory period.

[\[2\]](#) Dr. Paff testified that, in referencing fibrositis, he was referring to fibromyalgia, which he considered the two terms to be the same thing.