

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

Injury No.: 03-026643

Employee: Susan Van Winkle
Employer: Lewellens Professional Cleaning, Inc.
Insurer: Missouri Employers Mutual Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: April 4, 2003
Place and County of Accident: Adair 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 August 31, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Robert J. Dierkes, issued August 31, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2nd day of May 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers'

Compensation Law, I believe the decision of the administrative law judge should be reversed.

The administrative law judge makes several findings of fact which are not supported by the evidence.

- *"I find that the physical movement Claimant associated with the 'pop' was benign."*

Dr. Levy believes the twisting motion was traumatic, meaning it was an event that was out of the ordinary and caused a problem. Far from believing the twisting movement was benign, Dr. Levy believes that the motion was the prevailing factor resulting in employee's pain and subsequent medical condition.

Dr. Oh stated, "I have no reason to doubt that she turned and heard something pop and that caused her pain." When asked if the employee's twisting caused her pain, Dr. Oh responded, "If that's what she says, I don't dispute what she says."

- *"I find that Claimant's symptoms are coming from the Tarlov cysts, and not from an injury to a disc, vertebra, muscle, or tendon."*

Although Dr. Levy believes a change in pathology of the cysts contributed to employee's initial symptoms because the cysts were impinging on a nerve root, Dr. Levy does not believe the cysts are causing employee's ongoing symptoms. Dr. Levy believes that employee suffers from a chronic lumbrosacral strain.

Dr. Oh stated that if the cysts were the cause of the pain, he would see mass effect on the myelogram. "I have no reason to doubt that she turned and heard something pop and that caused her pain....I don't think it caused the cyst." "[T]he structural lesions that were identified were addressed and they did not make a difference after surgery". "I did not think the perineural cysts were related to her pain." "I would characterize a symptomatic perineural cyst as rare". "I'm not denying her pain or suffering. I'm just saying that I don't think the cyst had anything to do with it."

Both medical experts conclude that the pain employee is currently experiencing is not the result of the cysts. The administrative law judge concludes otherwise. In the face of uncontradicted expert testimony, I believe the administrative law judge erred in concluding employee's symptoms are coming from the Tarlov cysts.

The Commission may not arbitrarily disregard and ignore competent, substantial and undisputed evidence of witnesses who are not shown by the record to have been impeached, and the Commission may not base their finding upon conjecture or their own mere personal opinion unsupported by sufficient competent evidence. *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 179 (Mo. App. 2004). "Causation is established by medical testimony. The commission cannot find there is no causation if the uncontroverted medical evidence is otherwise." *Hayes v. Compton Ridge Campground, Inc.*, 135 S.W.3d 465, 470 (Mo. App. 2004), *citing Elliott v. Kansas City, Mo., School Dist.*, 71 S.W.3d 652, 657-58 (Mo. App. 2002). Nor should the Commission find there *is* causation from a particular source – here the cysts -- if the uncontroverted medical evidence is otherwise.

- *"It is clear that it was only a matter of time, and a very short time at that, before the Tarlov cysts would become symptomatic."*

This conclusion is contrary to all of the expert testimony. Drs. Levy and Oh both testified that it is uncommon for Tarlov cysts to become symptomatic.

Dr. Levy said, "many people have these all their life and don't have any symptoms."

Dr. Oh testified that he, "discussed with [employee] that these arachnoid cysts or perineural cysts are congenital findings usually and are most often asymptomatic" "There are a lot of people that walk around with perineural / arachnoid cysts, and most of these are asymptomatic."

The administrative law judge award reveals several misstatements of law.

- *“The requirement that the event happen ‘violently’ suggests that some significant force be applied to the body for an ‘accident’ to occur. There is no proof whatsoever that any significant force was applied to Claimant’s body in the ‘event,’ and, in fact, the evidence proves that there was minimal, if any, force applied to Claimant’s body.”*

The administrative law judge ignores over 70 years of case law when he suggests that some significant force must be applied to the body for an “accident” as defined in §287.020 RSMo to occur. The Missouri Supreme Court considered and rejected the administrative law judge’s analysis of the “suddenly and violently” requirement in 1932 and the analysis has been repeatedly rejected ever since:

What the statute means is that something must happen which, at the time, is sufficiently violent to produce an effect that can be noticed or observed by human senses. The objective symptoms of an injury, as that term is understood, were also present in this case. The employee became so ill that it was necessary to take him home.

Objective symptoms of an injury have been held to include:

“... weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute.”

Schulz v. Great Atlantic & Pacific Tea Co., 331 Mo. 616, 623 (Mo. 1932).

“Violently” is a relative term having a connotation sufficiently broad to cover causes found in that vast area between the most minor compensable injury and accidental death, and is properly descriptive of any cause efficient in producing a harmful result.

Raef v. Stock-Hartis, Inc., 416 S.W.2d 201, 205 (Mo. App. 1967).

[A] strain is compensable even though the work being performed at the time of the injury was routine and the strain was not unusual or abnormal...Where the performance of the usual and customary duties of an employee leads to physical breakdown or a change in pathology, the injury is compensable.

Wolfgeher v. Wagner Cartage Service, Inc., 646 S.W.2d 781, 784 (Mo. 1983).

[T]he injury need not result from any unusual or abnormal event. Rather, it is sufficient to show only that the performance of usual and customary duties led to a breakdown or a change in pathology. The worsening of a preexisting condition is a ‘change in pathology.’

Bennett v. Columbia Health Care, 80 S.W.3d 524, 529 (Mo. App. 2002).

The administrative law judge erred in questioning the occurrence of an accident based upon a flawed understanding of the meaning of “violently.”

- *“Keeping the ‘violently’ requirement in mind, can it be seen that Claimant’s injury followed as a natural incident of her work? Claimant’s physical movement preceding the “pop” and subsequent pain was benign, and in no way violent. Is it ‘natural’ that such a benign movement would cause such a significant disability as Claimant now suffers? Logic and common sense certainly lead me to believe that it would be unnatural for such a benign physical movement to cause such a significant disability.”*

Both medical experts testified that employee’s twisting movement could cause employee’s lumbar pain. In fact, Dr. Levy believes the movement was the prevailing factor in causing employee’s low back condition. The unanimous opinion of the medical experts that the twisting movement could have caused employee’s low back condition makes clear that the administrative law judge reliance on “logic and common sense” to reach a contrary opinion was error. Medical causation of employee’s symptoms is not uncomplicated. The

commission may not substitute the administrative law judge's personal opinion on the question of medical causation of the symptoms for the uncontradicted testimony of a qualified medical expert. See *Wright v. Sports Associated*, 887 S.W.2d 596, 600 (Mo.banc 1994)

"It is clear that Claimant's injury did come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life (if, indeed, such a benign physical movement can be characterized as a 'hazard' or 'risk' at all). Any worker, outside of his or her employment life, would perform the same benign physical movement dozens of times each day – getting into and out of a vehicle, getting into and out of bed, getting into and out of the bathtub, getting into or out of a seated position, and many others."

Though the administrative law judge's observations may be true, they have little place in the analysis of this claim. Missouri case law is clear. To arise out of the employment, the injury must be incidental to and not independent of the employment relationship. *Drewes v. Trans World Airlines, Inc.*, 984 S.W.2d 512, 514 (Mo.banc 1999). There is no question that changing linens was not independent of employee's employment relationship with employer. It was one of employee's primary duties. Once again, "the injury need not result from any unusual or abnormal event. Rather, it is sufficient to show only that the performance of usual and customary duties led to a breakdown or a change in pathology." *Bennett*, 80 S.W.3d at 529.

- *"Dr. Jerome Levy, who testified on Claimant's behalf, agreed that Claimant's physical movement could have happened anywhere, at any time. He testified:*

Q. One question I was going to ask you is given your testimony that there was nothing unusual about this twisting on April 4, 2003, could this have happened to her anywhere at any time?

A. Sure. She could have twisted in the garden or something, but that's not the history. Had she twisted somewhere else or she was bathing or something, sure, that could have triggered the cyst, but it's not the history that she gave me.

Q. Well, but my question was it could have happened anywhere, any time, and your answer is yes?

A. Yes.

Q. Could have been in the bathtub at home, making a bed at home?

A. It could have been.

Q. Or grocery shopping?

A. Sure.

The quoted testimony of Dr. Levy also makes it clear that the benign physical movement which occurred at Claimant's workplace on April 4, 2003, was no more than a mere "triggering or precipitating factor" in causing her disability. It is clear that it was only a matter of time, and a very short time at that, before the Tarlov cysts would become symptomatic. While the benign physical movement was temporally followed by the onset of symptoms, it is difficult to find a cause-effect relationship between such a benign physical movement and the symptoms that ensued."

The above excerpt discloses that the administrative law judge places much emphasis on the fact that employee could have twisted like she did during the work incident outside of work. The administrative law judge's emphasis is misplaced. It bears repeating: "[T]he injury need not result from any unusual or abnormal event. Rather, it is sufficient to show only that the performance of usual and customary duties led to a breakdown or a change in pathology." *Bennett*, 80 S.W.3d at 529.

What the administrative law judge has concluded here is that, at most, the twisting movement in which employee engaged *triggered* the Tarlov cysts to change from asymptomatic to symptomatic. The administrative law judge's

conclusion is based upon the unsupported findings that the Tarlov cysts are causing the condition for which employee seeks compensation and that the Tarlov cysts were destined to become symptomatic. The medical expert testimony presented does not support either finding as set forth in detail above.

I accept the testimony of the experts that employee's current symptoms and pain are not caused by the Tarlov cysts. The testimony of Drs. Levy and Oh establishes that employee's ongoing lumbar pain symptoms are not caused by her Tarlov cysts but, rather by a chronic strain injury. The doctors know the cysts are not causing the current symptoms because employee underwent surgery to relieve any nerve impingement caused by the cysts yet the pain persisted. Both experts agree that the symptoms employee is experiencing could be caused by the twisting incident at work. Of course, Dr. Levy goes even farther, believing that the twisting incident is the prevailing factor in causing employee's current symptoms. Dr. Levy testified unequivocally that he does not believe the twisting event was a mere triggering event in making the Tarlov cysts symptomatic because Tarlov cysts rarely become symptomatic.

I note that even if employee's symptoms were being caused by the cysts, as the majority finds, I would still find this claim compensable. It has long been the rule in Missouri that an inherent weakness or bodily defect, such as degenerative spine disease, occurring in conjunction with an abnormal strain will support a claim for compensation. See *Johnson v. General Motors Assembly Division G.M.C.*, 605 S.W.2d 511, 513 (Mo. App. 1980). (citations omitted) (overturned on other grounds). To prove a compensable injury, employee must prove he experienced a change in pathology as a result of the work incident. "The worsening of a preexisting condition, i.e., an increase in the severity of the condition, or an intensification or aggravation thereof, is a 'change in pathology.'" *Winsor v. Lee Johnson Construction Co.*, 950 S.W.2d 504, 509 (Mo. App. 1997), citing *Rector v. City of Springfield*, 820 S.W.2d 639, 643 (Mo. App. 1991). "[D]isability sustained by the aggravation of a preexisting nondisabling condition or disease caused by a work-related accident is compensable even though the accident would not have produced the injury in a person not having the condition." *Kelley v. Banta & Stude Constr. Co.*, 1 S.W.3d 43, 48 (Mo. App. 1999). "[A]n injury is compensable when it is an unexpected result of the performance of the usual and customary duties of an employee which leads to physical breakdown or a change in pathology." *Wolfgeher*, 646 S.W.2d at 784; See also § 287.020.3." *Smith v. Climate Engineering*, 939 S.W.2d 429, 436 (Mo. App. 1996), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003) (citing *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 781 (Mo. banc 1983)).

Dr. Levy testifies unequivocally that the work incident was the prevailing factor in causing employee's resulting lumbar condition. Employee has established that her lumbar condition was caused by the work twisting incident.

Employee has established that she sustained a work-related accident and compensable injury. I would reverse the award of the administrative law judge. I would award compensation including past medical expenses, mileage, temporary total disability benefits, and permanent partial disability benefits. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee: Susan Van Winkle

Injury No. 03-026643

Dependents: N/A

Before the

**DIVISION OF WORKERS'
COMPENSATION**

Employer: Lewellens Professional Cleaning, Inc.

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri

Insurer: Missouri Employers Mutual Insurance Company

Jefferson City, Missouri

Hearing Date: July 25, 2006

Checked by: RJD/tmh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged as April 4, 2003.
5. State location where accident occurred or occupational disease was contracted: Alleged to be Adair 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? No.
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: N/A.
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: N/A.
14. Nature and extent of any permanent disability: N/A.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$187.07.
19. Weekly compensation rate: \$124.70.
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Second Injury Fund liability: None
23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Susan Van Winkle

Injury No: 03-026643

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: Lewellens Professional Cleaning, Inc.

Additional Party: Second Injury Fund

Insurer: Missouri Employers Mutual Insurance Company

Checked by: RJD/tmh

ISSUES DECIDED

An evidentiary hearing was held in this case in Kirksville on July 25, 2006, on Claimant's request for a final award. The parties requested leave to file post-hearing briefs, which leave was granted. The case was submitted on August 23, 2006. The evidentiary hearing was held to decide the following issues:

1. Whether Claimant Susan Van Winkle sustained an accident arising out of and in the course of her employment with Lewellens Professional Cleaning on April 4, 2003;
2. If Claimant sustained a work-related accident, whether that accident caused an injury to Claimant;
3. If Claimant sustained a work-related accident, whether that accident was the cause of any of the injuries or medical conditions alleged by Claimant;
4. Whether Employer-Insurer shall be ordered to pay temporary total disability ("TTD") benefits, and, if so, for what period(s) of time;
5. Whether Employer-Insurer shall be ordered to reimburse Claimant for medical bills she has incurred;
6. The nature and extent of Claimant's permanent partial disability, if any;
7. Whether Employer-Insurer shall be ordered to reimburse Claimant for her travel expenses for medical treatment; and
8. A determination of the rights, if any, of the Department of Social Services, Division of Medical Services, pursuant to §287.266, for Medicaid payments made on Claimant's behalf.

STIPULATIONS

The parties stipulated as follows:

1. The Division of Workers' Compensation has jurisdiction over this case;
2. Venue is proper in Adair County;
3. The claim is not barred by Section 287.430 or Section 287.420;
4. Both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. The rates of compensation are \$124.70/\$124.70, based on an average weekly wage of \$187.07;
6. Lewellens Professional Cleaning was fully insured by Missouri Employers Mutual Insurance Company for Missouri workers' compensation liability at all relevant times; and
7. Employer-Insurer has paid no benefits under Chapter 287, RSMo.

EVIDENCE

The evidence consisted of the testimony of Claimant, Susan Van Winkle; the deposition testimony and narrative report of Dr. Jerome Levy; the deposition testimony of Dr. Michael Oh; medical records; medical bills; wage statement; report of injury; and correspondence from the Missouri Department of Social Services, Division of Medical Services; official notice was also taken of the statutes of the State of Missouri and the Missouri Code of State Regulations.

FINDINGS OF FACT AND RULINGS OF LAW

I find that Claimant, Susan Van Winkle, was born on January 8, 1966, and has an 11th grade education and no other certification or training. Claimant began working for Employer on April 4, 2003. Employer's business is providing cleaning services at Northeast Missouri Regional Hospital in Kirksville.

Claimant testified that her main duties were to clean the emergency rooms and trauma rooms. This required her to clean up blood, strip and wash down the beds, dispose of the trash and laundry, and wash the walls and floors. However, on days when Employer was short-handed, Claimant would also be required to clean patient rooms.

On April 4, 2003, the date in question, Claimant had completed cleaning the emergency and trauma rooms. She then had to proceed to clean some patient rooms, because another employee did not come to work that day. Claimant testified that she cleaned two patient rooms without incident. Claimant testified that she was in the process of cleaning the third patient room when the alleged accident occurred.

Claimant testified that she always followed the same routine when cleaning patients' rooms. One of the duties was to strip the bed, wash it, and remake the bed with clean sheet. Claimant testified that prior to washing the bed, she had taken clean sheets from the cart in the hallway and set the clean sheets in a chair near the bed. This was also a part of the usual routine. When Claimant was ready for the clean sheets, she was standing up, facing the side of the bed. The chair, with the sheets, was to her left. Claimant turned to her left and slightly down to get the sheets. While reaching for the sheets, Claimant felt a pop in her hip and a burning sensation in her left leg. Within minutes, Claimant was experiencing significant pain.

Claimant testified that at the time she felt her hip "pop," she was not lifting or carrying anything; she testified that she had nothing at all in her hands or arms and that the "pop" occurred before she even reached the sheets. Claimant testified that, at the time her hip "popped," she was not bending or stooping excessively and that she made no unexpected movements. Claimant testified that her physical movement at the time her hip "popped," was similar to movements she had made many times previously, both at work and at home. Claimant was seen by several physicians; an early diagnosis of herniated disc proved incorrect. In fact, Claimant had cysts all up and

down her spine. These cysts are known as meningeal cysts or Tarlov cysts. They are also known as arachnoid cysts or perineurial cysts. Although Claimant testified that she understood these cysts “developed” after her alleged work-related accident, that is clearly not the case; both physicians who testified made it quite clear that these cysts pre-existed the alleged work-related injury. Dr. Jerome Levy, who testified on Claimant’s behalf, testified: “It’s a congenital and developmental condition where people develop these cysts. Undoubtedly she’s had these cysts for a long time ...”. Dr. Michael Oh, Claimant’s neurosurgeon, who testified on behalf of Employer-Insurer, testified: “This type of arachnoid or perineurial cyst is almost always a congenital finding.”

Dr. Oh eventually performed surgery on Claimant on October 10, 2003, and again on November 17, 2003, to remove portions of the cysts. Claimant testified extensively regarding her change in appetite, pain, inability to work and perform routine chores, problems dressing, bathing, sleeping, sitting, standing and walking since April 4, 2003.

Accident; injury; causation. I will discuss these three issues together. On April 4, 2003, Section 287.020, RSMo, subsections 2 and 3, read as follows:

2. The word “accident” as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

3. (1) In this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

(2) An injury shall be deemed to arise out of and in the course of employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and
- (b) It can be seen to have followed as a natural incident of the work; and
- (c) It can fairly be traced to the employment as a proximate cause; and
- (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

A reading of these statutory provisions shows that the issues of “accident,” “injury,” and “causation” are intertwined in many cases, and it is certainly true in this case. I find that, for many years prior to April 4, 2003, Claimant had Tarlov cysts on her spine, but they were asymptomatic. I find that, while working on April 4, 2003, Claimant felt a “pop” in her left hip and has experienced significant back pain and left lower extremity pain since that time. I find that the physical movement Claimant associated with the “pop” was benign. I find that Claimant’s symptoms are coming from the Tarlov cysts, and not from an injury to a disc, vertebra, muscle, or tendon.

In order for there to be an “accident,” there must be an “identifiable event”. Claimant has identified an “event” (a hip “pop” and pain associated with a benign physical movement), and the occurrence of that “event” is not disputed by Employer-Insurer. In order for there to be an “accident,” the event must be unexpected and unforeseen; Claimant certainly did not expect nor foresee that this benign movement would be followed by significant pain. In order for there to be an “accident”, the event must happen “suddenly” and “violently”; “suddenly” can mean “without warning” or “quickly” (or both). Certainly, this event happened “suddenly”. But, did it happen “violently”? This is the first key question.

In order for there to be an “accident”, there must also be an “injury”. Thus, while in common parlance, a motor vehicle collision might be called an “accident,” a work-related motor vehicle collision is not an “accident” under Chapter 287, RSMo, unless the employee sustained an injury as a result. The “injury” must be clearly work-related; work must be a substantial factor in the cause of the medical condition or disability. There is no “injury” if work was only a “triggering or precipitating factor”. Was Claimant’s work a mere “triggering or precipitating factor” in the causing her “disability”? This is the second key question.

Section 287.020.3(2) yields additional key questions: Can Claimant's injury be seen to have followed as a natural incident of her work? Did Claimant's injury come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life?

The requirement that the event happen "violently" suggests that some significant force be applied to the body for an "accident" to occur. There is no proof whatsoever that any significant force was applied to Claimant's body in the "event," and, in fact, the evidence proves that there was minimal, if any, force applied to Claimant's body. Keeping the "violently" requirement in mind, can it be seen that Claimant's injury followed as a natural incident of her work? Claimant's physical movement preceding the "pop" and subsequent pain was benign, and in no way violent. Is it "natural" that such a benign movement would cause such a significant disability as Claimant now suffers? Logic and common sense certainly lead me to believe that it would be unnatural for such a benign physical movement to cause such a significant disability.

It is clear that Claimant's injury did come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life (if, indeed, such a benign physical movement can be characterized as a "hazard" or "risk" at all). Any worker, outside of his or her employment life, would perform the same benign physical movement dozens of times each day – getting into and out of a vehicle, getting into and out of bed, getting into and out of the bathtub, getting into or out of a seated position, and many others. Dr. Jerome Levy, who testified on Claimant's behalf, agreed that Claimant's physical movement could have happened anywhere, at any time. He testified:

Q. One question I was going to ask you is given your testimony that there was nothing unusual about this twisting on April 4, 2003, could this have happened to her anywhere at any time?

A. Sure. She could have twisted in the garden or something, but that's not the history. Had she twisted somewhere else or she was bathing or something, sure, that could have triggered the cyst, but it's not the history that she gave me.

Q. Well, but my question was it could have happened anywhere, any time, and your answer is yes?

A. Yes.

Q. Could have been in the bathtub at home, making a bed at home?

A. It could have been.

Q. Or grocery shopping?

A. Sure.

The quoted testimony of Dr. Levy also makes it clear that the benign physical movement which occurred at Claimant's workplace on April 4, 2003, was no more than a mere "triggering or precipitating factor" in causing her disability. It is clear that it was only a matter of time, and a very short time at that, before the Tarlov cysts would become symptomatic. While the benign physical movement was temporally followed by the onset of symptoms, it is difficult to find a cause-effect relationship between such a benign physical movement and the symptoms that ensued.

Therefore, I find that the event of April 4, 2003, did not constitute a compensable accident under Chapter 287, RSMo. Claimant's claim for compensation is thus denied, and the claim against the Second Injury Fund is likewise denied. All other issues are moot.

Date: _____

Made by: _____

ROBERT J. DIERKES
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation