

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

Injury No.: 07-129202

Employee: Nora J. Wigger  
Employer: Southeast Missouri Dermatology  
Insurer: State Farm Fire & Casualty Co.

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 4, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Gary L. Robbins, issued May 4, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 3<sup>rd</sup> day of September 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Nora J. Wigger

Injury No. 07-129202

Dependents: N/A

Employer: Southeast Missouri Dermatology

Additional Party: N/A

Insurer: State Farm Fire & Casualty Co.

Hearing Date: February 17, 2010

Checked by: GLR/rf

**SUMMARY OF FINDINGS**

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 June 19, 2007.
5. State location where accident occurred or occupational disease contracted: Alleged St. Francois 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? Not determined.
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 happened or occupational disease contracted: The employee claimed she injured her right shoulder when she fell while picking weeds.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Alleged right shoulder.
14. Nature and extent of any permanent disability: None.
15. Compensation paid to date for temporary total disability: \$0.
16. Value necessary medical aid paid to date by employer-insurer: \$0.
17. Value necessary medical aid not furnished by employer-insurer: Alleged \$49,902.28
18. Employee's average weekly wage: \$447.69.
19. Weekly compensation rate: \$298.46 per week for all purposes.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award. None.
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: N/A.

No attorney fees are awarded in this case.

## **FINDINGS OF FACT AND RULINGS OF LAW**

On, February 17, 2010, Nora J. Wigger, the employee, appeared in person and by her attorney, Gary G. Matheny, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Amy L. Young. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS**

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by State Farm Fire & Casualty Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Southeast Missouri Dermatology and was working under the Workers' Compensation Act.
3. The employee's claim was filed within the time allowed by law.
4. The employee's rate for temporary total disability, permanent total disability and permanent partial disability was stipulated to by the parties as \$298.46 per week.
5. The employer-insurer paid \$0 in medical aid.
6. The employer-insurer paid \$0 in temporary disability benefits.
7. The employee has no claim for mileage or other medical expenses under Section 287.140 RSMo.
8. The employee has no claim for temporary disability benefits.
9. The employee has no claim for permanent total disability benefits.

### **ISSUES**

1. Accident.
2. Notice.
3. Medical Causation.
4. Previously Incurred Medical Bills.
5. Temporary Total Disability
6. Permanent Partial Disability.

### **EXHIBITS**

The following exhibits were offered and admitted into evidence. The Court overruled all of the employer-insurer's objections.

#### Employee's Exhibits

- A. Performance Evaluation.
- B. Photographs (7 taken in 2009).

- C. Dave Kinney Benefit Flyer.
- D. Medical Records of David Mullen, D.O.
- E. Medical Records from Parkland Health Center.
- F. Medical Records of Daniel L. Kitchens, M.D.
- G. Medical Records of Donald R. Bassman, M.D.
- H. Medical Records from Advanced Ambulatory Surgical Care.
- I. Medical Records from Farmington Hand and Physical Therapy.
- J. Medical Records of Stephen M. Benz, M.D.
- K. Medical Report of Shawn L. Berkin, D.O.
- L. Supplemental Medical Bill List.
- M. Medical Bills.

Employer-Insurer's Exhibits

- 1. Deposition of Michael P. Nogalski, M.D.

**STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:**

**STATEMENT OF THE FINDINGS OF FACT-**

Nora J. Wigger, the employee testified personally at trial. AnnMarie Sutherland and Tiffany Bailey also personally testified on behalf of the employee. The employer-insurer called Denise E. Luetkemeyer to testify at trial. All other evidence was presented in the form of various medical records, written records or deposition testimony.

**Testimony of Nora J. Wigger**

Ms. Wigger was born on March 26, 1946 and is 63 years old. She is currently employed at Southeast Missouri Dermatology. She works four days per week from 7 a.m. to 5 p.m. The other employees work 5 days a week from 8 a.m. to 5 p.m. The employee arrives at work an hour earlier than her co-workers.

Ms. Wigger's job title is Insurance Manager and Collection Specialist. She has been employed on a full-time basis with her employer since 2005. As Insurance Manager and Collection Specialist she handles accounts receivable, collections, filing, taking phone calls, talking to insurance companies, solving insurance problems and moving files. She also testified that she cleaned around the office, pulled weeds, emptied the trash, broke down boxes, and did "anything and everything to make the office look professional inside and outside."

She testified that no one has ever objected to her assuming these additional duties inside and outside of the office and that specifically no one ever objected to her pulling weeds. She admitted that no one has ever asked her to pull weeds outside the office or perform any other yard maintenance. She testified that she has been asked to clean dishes by Dr. Griffin's wife, who is also employed at the office. She did not testify whether or not she made her employer aware that she was pulling weeds outside the office or that her employer ever acknowledged she was pulling

weeds outside the office. She admitted that her employer employs a lawn service to mow the lawn, but she testified she was not satisfied that they took care of the weeds and she did not like the way it looked. She admitted that she was not compensated extra for pulling weeds and she was not hired to pull weeds.

The employee testified that on or about June 19, 2007 she arrived at work at 7 am. She clocked in and started the computers. She testified that it was a beautiful day and she went outside to pick up trash and pull weeds at approximately five to ten minutes after 7 a.m. She testified that she pulled weeds in the front and back of the office. She testified there was a weed by the back door that was like a celery stalk. Ms. Wigger admitted that this door was not the main entrance to the building, but indicated that on occasion patients parked in the back of the building and used the back door. She admitted that employees use the back entrance to enter the building, and there is a parking lot for patients in the front of the building with a separate front entrance.

Ms. Wigger testified she tried to cut the weed with scissors and then tried to saw it with a knife. She testified that she then tried to pull the weed with all her might and in doing so fell over backwards on her behind. She testified that she felt a hot burning pain in her right shoulder when she pulled the weed. She testified the pain was so bad she “saw stars.” She testified that this occurred about 7:30 am, and afterwards she went inside to sit down, catch her breath and hold her arm. She testified that shortly after she went inside her co-workers, AnnMarie Sutherland and Angelique Lappe arrived and she told them what happened. She testified that she continued to work that day. She admitted that she did not immediately report the injury to any management personnel that day including Dr. Griffin. She testified that the office manager, Denise Luetkemeyer, only works on Wednesdays and that is the reason why she did not report it to her immediately. She testified that she did not report the injury to Dr. Griffin, her employer, because she is “not allowed” and “forbidden” to speak to him. She did not immediately seek treatment for her shoulder.

Ms. Wigger testified that she went on vacation the week of July 4<sup>th</sup> to visit her son. She denied having any additional injuries to her right shoulder while on vacation. She testified that when she returned from vacation, she told Ms. Luetkemeyer that she hurt her right shoulder pulling weeds in the parking lot. Ms. Wigger testified that Denise is the office manager and that she is the person employees would report work injuries to. Ms. Wigger claimed that Ms. Luetkemeyer ignored her. Ms. Wigger also testified that she told Dr. Griffin her shoulder was hurting after she returned from vacation, but she admits that she did not tell him that she hurt it at work. She testified that she was afraid to tell him because she was afraid she would be fired. Ms. Wigger then testified that she spoke to Denise about it “every Wednesday morning of the world”.

While on direct exam, Ms Wigger testified she reported the accident to Ms. Luetkemeyer after she returned from vacation. However, on cross-examination, she claimed that she reported the accident the first Wednesday after the accident. The parties stipulated that June 19, 2007 was a Tuesday; therefore, if the accident happened that day, her testimony on cross-examination would suggest she reported it the next day as Ms. Luetkemeyer was only present at the office on Wednesdays.

Ms. Wigger testified that she spoke to Ms. Luetkemeyer about her work injury and need for medical care “every Wednesday of the world”. She also testified that she never initially asked Ms. Luetkemeyer for medical treatment and instead she just hoped that it would go away. She testified that she never asked Ms. Luetkemeyer to send her to a doctor and that she for some reason thought she had 6 months to ask for medical treatment.

Ms. Wigger testified that she did ask for medical treatment in November of 2007. She testified that she asked for medical care in November of 2007 because she was in so much pain she couldn't deal with it any longer. She claims she asked for care approximately 2 weeks before her first shoulder surgery. She testified that when she finally asked for treatment Ms. Luetkemeyer told her she would notify the insurance company. Ms. Wigger testified that she was contacted by the insurance company and they took her statement over the phone. Thereafter, she was informed that her claim had been denied.

Ms. Wigger testified that she already had a scheduled appointment with her primary care physician, Dr. Mullen in July, 2007 for a regular checkup. She testified that she told the doctor she had intense pain and he gave her a cortisone shot. Dr. Mullen sent her for an MRI, and then referred her to Dr. Kitchens. Dr. Kitchens reportedly evaluated her neck and shoulder. In October of 2007 she testified she went to the emergency room because she was in so much pain she was screaming. She later saw Dr. Bassman. Ms. Wigger has had three surgical procedures to her right shoulder.

Ms. Wigger followed up with Dr. Bassman. He performed her first shoulder surgery on November 30, 2007. Afterward, she had physical therapy which she testified did not help. Dr. Bassman then performed a closed manipulation for a frozen shoulder. After the second procedure, she decided to switch to Dr. Benz who also performed surgery. She testified that she missed a total of three weeks from work throughout the course of her treatment.

After she completed treatment, she was evaluated by Dr. Berkin at the request of her attorney. She testified that the medical bills, marked as Exhibits L and M represented treatment related to the right shoulder. However, upon cross-examination she admitted that the charges contained in Dr. Mullen's records for dates of service 3/12/08, 11/12/07, 11/9/07, and 4/8/08 totaling \$235.00 were not related to the right shoulder. She denied having any problems with her right shoulder before June 19, 2007. Ms. Wigger did acknowledge that she was diagnosed with fibromyalgia about 17 years ago. She admitted that she sometimes experiences soreness in her arms because of the fibromyalgia and takes Effexor to control her symptoms.

Ms. Wigger testified that her medical bills were submitted to her group health insurance carrier, Blue Cross/ Blue Shield and that her medical bills have been paid. She admitted that she had to fill out a form from Blue Cross Blue Shield and that she marked on the form that her right shoulder injury was not work-related. She testified that she knew if she said the accident was work related she would not get any care. She testified that she marked the accident as not being work-related as she felt she needed care and surgery. She further testified that she did not think this was an out and out lie and justified her actions by indicating that she knew that the group health carrier would subrogate and get their money back.

Ms. Wigger testified that she now has intense pain in her right shoulder and it's "virtually useless." She states she cannot lift; she has no strength, and can hardly dress herself. She testified that she cannot hold her one year old twin granddaughters. She testified that she can no longer decorate homes, hang pictures or ride a motorcycle. She also testified that she has limited range of motion and has difficulty putting makeup on her face. She stated that she uses her left hand for everything, but writing. She testified she has no strength in it whatsoever. Ms. Wigger testified that following her treatment she did return to her regular job duties. She no longer moves heavy items at work or pulls weeds. She admitted she is able to perform all the essential duties of her job.

At the conclusion of the trial, the Court observed the employee use her right arm to help her move her chair under the table.

### **Testimony of AnnMarie Sutherland**

Ms. Sutherland testified that she presently works for TrimFoot, Co. LLC. Before that, she worked for Southeast Missouri Dermatology as a receptionist and doctor's assistant. She testified that she was not a supervisor. She testified that she observed other employees performing activities such as cleaning and changing light bulbs. She also testified that she was aware that Ms. Wigger pulled weeds outside the building and picked up trash. She further testified that she occasionally helped her pick up trash. On direct examination she testified that she occasionally helped Ms. Wigger pull weeds, however on cross-examination, she testified that she did not pull weeds herself.

Ms. Sutherland testified that she was aware of a weed outside the back door. She claims to remember that it was 3-4 feet tall. One day she noticed that the weed was missing and when she came inside the office she asked Ms. Wigger about it. She testified that Ms. Wigger told her that she hurt her neck and shoulder from pulling the weed that she referred to as a beanstalk.

Ms. Sutherland also claims that she was present when Ms. Wigger reported the accident to Ms. Luetkemeyer. She testified that she could not recall whether or not it was the same day, but that the conversation must have happened on a Wednesday, because that was the only day Ms. Luetkemeyer was in the office. She testified that she could not recall the date of the conversation. She believed it was sometime in the summer.

On cross-examination, Ms. Sutherland testified that she could not remember the exact date when the incident happened or when the conversation that she overheard took place. She testified that she heard Ms. Wigger in Ms. Luetkemeyer's office say, "Yes, I did tell you" and Ms. Luetkemeyer's said, "You cannot claim workers compensation--this was not part of your job description." Ms. Sutherland admits that she was not in the same room, but was standing approximately 10-15 feet outside the door. She also claims that upon overhearing this conversation that she "chimed in" and said "neither is changing light bulbs."

### **Testimony of Tiffany Bailey**

Ms. Bailey testified that she is a medical assistant for Southeast Missouri Dermatology and has worked there since February 2007. She testified that she and Ms. Wigger are friends and have lunch together on a regular basis. She testified that she works upstairs in the office, and Ms. Wigger works downstairs.

She has observed Ms. Wigger in the office performing her job duties, but has never seen her outside pulling weeds. She is aware that Ms. Wigger used to pull weeds, but only because Ms. Wigger told her so. She recalled that Ms. Wigger told her she hurt her right shoulder pulling weeds and had to go to the doctor. On cross-examination she indicated that her knowledge is from what Ms. Wigger told her. She did not overhear any conversations between Ms. Wigger and Ms. Luetkemeyer regarding the alleged accident. It is Ms. Bailey's recollection that on the date of the alleged accident, she helped Ms. Wigger to her car.

### **Testimony of Denise Luetkemeyer**

Ms. Luetkemeyer testified that she is the Office Manager for Southeast Missouri Dermatology and has been the office manager since September of 1999. She is also the office manager for several other offices in the area. She has 28 years of administrative experience and experience dealing with workers' compensation claims.

As office manager, she testified that it is her responsibility to handle all reports of work-related injuries. She testified that at the time Ms. Wigger claims she injured her shoulder at work she was working at Southeast Dermatology on Wednesdays from 7 a.m. to 6 p.m. While she was only in the office one day per week, she testified that she was always available to her staff 24 hours per day, seven days per week by cell phone. Ms. Luetkemeyer denied that Ms. Wigger is "forbidden" to speak to Dr. Griffin. She explained that Dr. Griffin has requested that Ms. Wigger speak to Ms. Luetkemeyer about any billing issues so that Ms. Luetkemeyer can explain it to Dr. Griffin in a manner that he understands. However, Ms. Wigger is allowed to speak to Dr. Griffin and frequently does so.

Ms. Luetkemeyer testified that she has known Ms. Wigger for approximately ten years, and knew her before she came to work for Southeast Missouri Dermatology. She testified that they are friends outside of work and went on vacation together in August of 2008.

Ms. Luetkemeyer testified that Ms. Wigger did not report injuring her right shoulder at work due to pulling weeds until November 26, 2007. On that date, she testified that Ms. Wigger came to her and said that she regretted marking on her group insurance form that her shoulder injury was not from a work accident and that she didn't report it earlier because she thought she would be fired. Ms. Luetkemeyer testified that this was the first time she was made aware of the alleged work/weed incident. She testified that on that occasion Ms. Wigger told her she had been pulling weeds outside and hurt her shoulder. Ms. Luetkemeyer testified that she was aware that the employee was having problems with her right shoulder prior to that date and had been seeing a doctor, but that she was not aware that Ms. Wigger claimed she hurt it at work. She testified that

when she previously asked Ms. Wigger how she hurt her shoulder, Ms. Wigger responded that she did not know. Ms. Luetkemeyer testified that if Ms. Wigger had reported the injury prior to November 26, 2007 she would have immediately reported it to their insurance carrier. She testified that when she was made aware of the “weed incident”, she did immediately report it to their insurance carrier. Ms. Luetkemeyer testified that Ms. Wigger never requested medical treatment from June 19, 2007 to November 26, 2007.

Ms. Luetkemeyer further testified that pulling weeds is not part of Ms. Wigger’s job description and it was not part of her job responsibilities at Southeast Missouri Dermatology. She testified that she was not aware that Ms. Wigger was pulling weeds at work and never saw her pulling weeds at work. She testified that if she had seen her pull weeds at work, she would have instructed her not to do so. She testified that Southeast Missouri Dermatology pays a lawn service to mow the lawn and spray for weeds and do not want their employees to spend company time on those tasks. She testified that she did not consider pulling weeds to be a productive use of Ms. Wigger’s time and did not consider it a benefit since she is paid to handle insurance, not to perform yard maintenance. Ms. Luetkemeyer testified that pulling weeds took Ms. Wigger away from the activities that they actually pay her to perform and that this was not acceptable. She testified that on the day Ms. Wigger reported to her that she hurt her shoulder pulling weeds, she was instructed that she is not to do that.

Since Ms. Wigger has completed her medical treatment, Ms. Luetkemeyer testified that she is performing her regular job activities and she has not observed her activities restricted in any way. However, she also indicated that the employee did favor her right arm. Ms. Luetkemeyer testified that Ms. Wigger came to her approximately three weeks prior to trial and asked her why she could not just say that she reported the injury so that she could receive her benefits. At this point, the Court directly asked the witness whether the employee asked her to lie. She responded stating that the employee asked her to lie about reporting the incident and asked her to go back and change the paperwork.

## **Medical Treatment Records**

### **Medical Records of Dr. Mullen**

According to the records, Ms. Wigger called Dr. Mullen’s office on July 13, 2007 complaining of pain in her right arm with sharp stabbing at times. **There is no mention of pulling weeds or a work accident in any of Dr. Mullen’s records.** There is a note indicating it was thought the symptoms might be coming from her neck. Ms. Wigger did not see Dr. Mullens until August 10, 2007. At that time, she complained of upper arm pain. It was noted that “Last week woke up with severe pain in arm-worse with lifting and raising arm”. **Again, there is no mention of pulling weeds or a work accident.** Dr. Mullen’s assessment was fibromyalgia, hyperthyroidism, cervical neuritis and spinal stenosis. She was apparently sent for an MRI of the neck. An MRI report dated September 14, 2007 showed a small disc herniation to the left at C4-5 and spinal stenosis changes at C3-4 and C4-5. She was referred to Dr. Kitchens for evaluation.

### **Medical Records of Dr. Kitchens**

Ms. Wigger was evaluated by Dr. Kitchens on October 2, 2007. She was evaluated for neck pain and pain into her shoulder blade, particularly to the right side with pain into her right shoulder and arm in her biceps region. **According to Dr. Kitchens, Ms. Wigger reported the pain started on about July 4, 2007. There is no mention of pulling weeds or a work accident.** Dr. Kitchens' assessment was neck and right shoulder pain. He recommended that she see an orthopaedic surgeon for evaluation of her right shoulder pathology.

An April 16, 2008 Record of Patient visit notes that the insurance plan was Blue Cross Blue Shield. All of the billing was to Blue Cross Blue Shield.

### **Medical Records from Parkland Health Center**

Ms. Wigger was seen in the emergency room at Parkland Health Center on October 11, 2007 with complaints of right shoulder pain. Under mechanism of injury, it is noted that she fell several months ago. Onset of pain is listed as three months. **There is no mention of injuring her shoulder by pulling weeds at work.**

### **Medical Records of Dr. Bassman**

Ms. Wigger initially saw Dr. Bassman on October 19, 2009. **According to Dr. Bassman's notes, "She does not remember any injury. The pain came on while she was sleeping and she woke up with horrible pain and grabbed her arm"**. Dr. Bassman diagnosed rotator cuff syndrome and recommended an MRI of the shoulder. An MRI report dated October 23, 2007 shows a full thickness anterior supraspinatus insertional tear measuring 1 cm with surrounding tendinopathy in both the supraspinatus and subscapularis tendons and AC joint arthropathy with undersurface spurring and proliferative change. The MRI also showed glenohumeral arthritis.

Dr. Bassman saw Ms. Wigger again on October 24, 2007. **He noted that, "She does not remember hurting it. Most painful thing she has had"**. He diagnosed her with a strain/tear of the rotator cuff and administered an injection. On November 30, 2007 Dr. Bassman performed an arthroscopy of the right shoulder with debridement of labral tear, a subacromial decompression, and an arthroscopic rotator cuff repair. Post operatively, he recommended physical therapy, which was performed at Farmington Hand and Physical Therapy. On January 25, 2008, Dr. Bassman noted that the employee appeared to be getting a frozen shoulder and he recommended a manipulation under anesthesia. This procedure was performed on February 1, 2008. The post operative diagnosis was adhesive capsulitis. Again, Ms. Wigger underwent a course of physical therapy. On April 4, 2008, Dr. Bassman recommended another MRI. The MRI report dated April 11, 2008 showed a full thickness tear, retraction and atrophy of the supraspinatus muscle with full thickness tear of the rotator cuff; joint effusion, and mild tenosynovitis of the biceps tendon.

Dr. Bassman treated the employee from October 19, 2007 at least through May 23, 2008. Nowhere is a work injury involving weeds mentioned. A May 23, 2008 entry does note that “Her insurances are a problem for her”.

### **Medical Records of Dr. Benz**

Ms. Wigger saw Dr. Benz on June 16, 2008. He noted that in 2007 the patient started having pain and discomfort to the right shoulder. **There is no mention of injuring her shoulder pulling weeds and no mention of a work accident.** Dr. Benz noted that the x-rays showed significant decompression of the subacromial space and it appeared as though the suture anchors were not in the humeral head at all and appeared to be just in the joint. He recommended a rotator cuff repair. Dr. Benz performed surgery on July 11, 2008 involving removal of one anchor and a rotator cuff repair. When he saw her on July 18, 2008 he noted no pain or discomfort out of the ordinary. On August 15, 2008 he noted that she seemed comfortable when sitting, but that she reported an incredible amount of pain. He indicated he would set up a trial of PT, but there is no indication this was done.

An October 1, 2008 entry notes that the employee is paying for PT out of her pocket.

### **Independent Medical Evaluation of Dr. Berkin**

Ms. Wigger was evaluated by Dr. Berkin on September 3, 2008 at the request of her attorney. Dr. Berkin is an osteopathic family physician. Dr. Berkin reviewed medical records, took a history and conducted a physical examination. The employee told Dr. Berkin that she hurt her shoulder at work when she was pulling weeds on June 19, 2007. This is the first written record that mentions a work incident where the employee was injured pulling weeds.

Dr. Berkin concluded that Ms. Wigger injured her shoulder while pulling weeds at work in June of 2007. With regard to causation, he opined that the accident in June of 2007 was the direct and proximate cause of the employee’s disability. He rated a 45% permanent partial disability to the right shoulder. He also rated a 1988 left arm fracture at 15% permanent partial disability and a 1998 neck injury at 30% permanent partial disability to the body as whole.

### **Testimony of Dr. Nogalski**

Dr. Nogalski examined Ms. Wigger at the request of the employer/insurer on March 10, 2009. **Dr. Nogalski noted that Ms. Wigger “had some type of ill defined pain around that time of her claimed event, but this is not clearly documented in any specific medical records from a retrospective standpoint. It appears to be more strongly discussed and complained of as we get farther away from the event”. He noted that no specific event is described in any of the medical records.**

Dr. Nogalski concludes that “It is not clear that her rotator cuff condition which probably was a longstanding rotator cuff tendinopathy and generalized rotator cuff failure, was ‘caused’ by the event she describes nor does it appear to be clearly aggravated by this, especially with respect to

information as volunteered to her primary care physician initially in this matter.” He also concludes that the accident she described as occurring on June 19, 2007 is not the prevailing factor in causing her shoulder problems.

Dr. Nogalski testified by deposition on August 10, 2009. He testified that 40% of his practice is devoted to evaluating and treating shoulders. Dr. Nogalski testified that it is standard practice in his profession to take a history from a patient and ask them how they got hurt. He explained that it is important to distinguish between a traumatic or non-traumatic issue because it may lead one to choose a different treatment path or testing modality. **Dr. Nogalski testified that in his review of medical records, there was no mention of any work accident to any of the treating doctors. He testified that the first documentation of injuring her shoulder while pulling weeds at work was Dr. Berkin’s report.**

Dr. Nogalski testified that as part of his evaluation, he reviewed Ms. Wigger’s October 23, 2010 MRI report and that in his opinion the findings on the MRI report were degenerative. He also reviewed the operative report from November 30, 2007 and noted that the findings documented by Dr. Bassman appeared to be degenerative and that the report did not document any acute findings. Dr. Nogalski testified that the general nature of her findings suggested a longstanding rotator cuff tendon disease and degenerative labral tears. He also noted arthritic changes. Dr. Nogalski also reviewed the MRI report of April 11, 2008. Dr. Nogalski opined that following the first surgery the repaired tissue was poor and degenerative, therefore, the attempt to repair that tissue was not successful and the tissue failed and retracted, thus causing the need for the second surgery. On cross-examination, Dr. Nogalski explained that a labral or rotator cuff tear is “an incomplete attachment of the tissue or a frayed piece of tissue-not necessarily something that was actively injured. Because these commonly occur in patients with glenohumeral arthritis, labral tears are merely a victim in these settings of irregular joint surfaces of areas where the soft tissues are rubbed on by irregular joint surfaces so to speak . . . In this situation, it looks like the tear of the labrum was some frayed pieces of tissue around the socket”.

Dr. Nogalski also explained that “patients can indeed have a traumatic, severe onset of shoulder problems such as a process like adhesive capsulitis which can come along on its own . . . there’s many more plausible scenarios for someone to have an acute onset of shoulder pain in this setting with all the data provided than there are reasonable scenarios to reconcile a traumatic event in the context of the history she provided early on, as well as the context of the findings as outlined by Dr. Bassman, incidentally, not at all supported from a traumatic standpoint by Dr. Bassman”.

With regard to his causation opinion, Dr. Nogalski opined that the described work accident was not the prevailing factor in causing the employee’s right shoulder problems. He opined that irrespective of causation she probably sustained a 23% permanent partial disability to the right shoulder.

## **RULINGS OF LAW-**

### **Accident**

The employee claims that she had a work-related accident when she injured her right arm at work on or about June 19, 2007 when she was pulling a weed located on the outside of her employer's office. The employer-insurer denies accident and denies that the employee sustained an accident or occupational disease that arose out of and in the course of the employee's employment.

The burden of proof is on the employee to prove all material elements of his claim. See Marcus v. Steel Constructors, Inc., 434 S.W.2d 475 (Mo. 1968) and Walsh v. Treasurer of the State of Missouri, 953 S.W.2d 632,637 (Mo. App. 1997). The employee has the burden of proof that his injuries were the result of an accident that arose out of and in the course of employment. See Strate v. Al Baker's Restaurant, 864 S.W.2d 417, 419-420 (Mo. App. 1993) and Smith v. Donco Construction, 182 S.W.3d 693, 699 (Mo. App. 2006).

A claim for compensation may be decided solely upon a finding of lack of credibility of uncontradicted and unimpeached testimony. See Cox General Motors Corporation, 691 S.W.2d 294 (Mo. App. 1985), Beyer v. Howard Construction Company, 736 S.W.2d 78 (Mo. App. 1987), Smart v. Chrysler Motors Corp., 851 S.W.2d 62, 64 (Mo. App. 1993) and Alexander v. D.L. Sitton Motor Lines, 851 S.W.2d 525 (Mo. Banc. 1993).

There are a number of evidentiary problems that support a finding that the employee has failed to meet her burden of proof on the issues of accident and medical causation. These problems are addressed as follows:

### **Medical Records**

The employee claims she was injured on June 19, 2007. When you review all of the evidence and the employee's testimony, she claims that the accident caused so much pain that she saw stars. The employee provided this testimony at her trial. The first medical record of any kind addresses a phone call that the employee made to Dr. Mullen's office on July 13, 2007. The record indicated that the employee had sharp stabbing pain in her right arm. This is well after the July 4<sup>th</sup> vacation and almost a month after the "weed pulling". An August 10, 2007 record of Dr. Mullen reports that the employee woke up last week with severe pain. A record of Dr. Bassman dated October 24, 2007 indicated that the employee had the most pain she has ever had. If you accept the employee's statements, the injury that she says occurred from pulling weeds on June 19, 2007 was a significant event in the employee's life that has totally changed her life. Given all of the evidence in this case, the Court does not accept and totally rejects this position.

There are medical records beginning on July 13, 2007 proceeding through three surgical procedures, substantial conservative care and many visits for physical therapy. Not one record ever reports a work injury. Not one record indicated that the employee hurt her right arm when pulling weeds. Not one record mentions any event that happened on June 19, 2007. There is no mention of any traumatic event at all. Dr. Mullen is the employee's primary care doctor. His

records never mention a weed pulling incident. The same goes for Dr. Kitchens, Parkland Health Center, Dr. Bassman, Dr. Benz or Farmington Physical Therapy. The first mention of a weed pulling work related accident in any medical record or evaluation report occurs in the rating report of Dr. Berkin dated September 3, 2008. The Court is aware that the employee filed her claim alleging an injury while pulling weeds on February 4, 2008.

When you examine the medical records you find some interesting evidence. On October 2, 2007, Dr. Kitchens reported that the employee told him that her pain began on about July 4, 2007. On October 19, 2007 Dr. Bassman reported that the employee said "She does not remember any injury. The pain came on while she was sleeping and she woke up with horrible pain and grabbed her arm". On October 24, 2007, Dr. Bassman reported "She does not remember hurting it. Most painful thing she has had". In a record dated May 23, 2008, Dr. Bassman reported "Her insurances are a problem for her". A Farmington Hand and Physical Therapy record reports that the employee used all 20 visits allowed her by her insurance company and her plan is to pay on a "self pay" basis.

The Court cannot and does not accept that all of the medical providers and all of the medical records failed to document a work related injury as the employee claims she had. As Dr. Nogalski clearly pointed out, in a situation where there is a traumatic injury, it is very important that an accurate history is taken as it may determine the type of treatment that is provided. The Court cannot accept that if the employee had an event in her life as significant as she claims that the first time it would be recorded in the medical records is in an evaluation report by a physician that was hired by her attorney. These records alone show that the employee's testimony lack credibility, but there is more information to review.

### **False Information**

The employee admitted that she lied when she filled out her group health insurance papers. She works with insurance companies in medical billing and should have special knowledge in insurance company forms. She testified that she knew that her accident was a work-related event yet, she checked that it was not so she could get medical care. Any way you cut it, this is a lie-it is tantamount to fraud. She indicated that she knew if she checked that her accident was work related she would not get care. Group health paid for all of her medical bills totaling almost \$50,000.00. The employee testified that she marked "No" on the group health questionnaire after she was denied care through the workers' compensation carrier. She testified she knew if she marked "Yes" it would create a conflict. Her justification for "lying" was that she needed care and surgery. In addition, she rationalized her actions with the statement that she knew that the group health carrier could subrogate and get their money back.

In this same general area, when pressed by the Court, Ms. Luetkemeyer testified that the employee asked her to lie about reporting the incident and to go back and change paperwork. This information comes from a person who is the employee's supervisor, and more importantly the employee's friend.

In the Court's opinion, the willingness of the employee to take the actions that she did to get what she wants directly reflects on her credibility in a negative manner.

### **Request for Medical Care**

The employee's testimony was quite clear. She did not request medical care from Denise Luetkemeyer until shortly before her first surgery in November 2007. The evidence indicated that the date is November 26, 2007. If the employee's accident is a traumatic work accident as the employee claims, it is illogical to assume that she would not ask for medical care from her work supervisor until right before surgery and would instead process bills through group health. Temporally, the request for medical care seems to have occurred right after the workers' compensation carrier denied coverage.

### **Reporting the Workers' Compensation Accident**

There is disputed and contradictory evidence on this subject. Unfortunately, some of it comes from the testimony of the employee. On direct examination the employee testified that she told Ms. Luetkemeyer after she returned from vacation; this is the July 4<sup>th</sup> vacation when the employee was at her sons. However, during cross examination she testified that she reported her accident that first Wednesday after the accident. The parties stipulated that June 19<sup>th</sup> was a Tuesday, therefore, the first Wednesday would have been June 20<sup>th</sup> and the next Wednesday would have been June 27<sup>th</sup>. Ms. Luetkemeyer is quite clear, while she knew that the employee was having some problems with her shoulder, she never knew that it was claimed to be work related and never received a request for medical care until November 26, 2007.

### **General Credibility of Witnesses**

AnnaMarie Sutherland and Tiffany Bailey were called as witnesses to testify on behalf of the employee. Generally, both witnesses supported the employee's position in some way.

Ms. Sutherland testified that she was aware that the employee pulled weeds. She contradicted her testimony by indicating she helped Ms. Wigger pulling weeds and then testifying that she did not pull weeds herself. She gave specific information about the weed, when it was pulled, the employee telling her that she hurt herself when she pulled the weed, and the conversation she overheard about the incident between the employee and Ms. Luetkemeyer. However, when specifically questioned about her statements, she admitted that she did not remember the exact date that the incident took place or when the conversation she overheard took place.

Tiffany Bailey testified that she and the employee are friends. While she generally supported the employee's testimony, she admitted that her knowledge is from what the employee told her.

When you look at the testimony of the employee, the testimony of Ms. Sutherland, the testimony of Ms. Bailey and compare it to the testimony of Ms. Luetkemeyer, you find stark differences in factual information. There are two versions concerning the events of the weed pulling incident. Both sides cannot be correct. The Court has carefully compared the testimony of all of the

witnesses standing alone and then contrasted their testimony with each other and then compared the substance of their testimony with all of the other evidence in the case.

The Court finds that the testimony of Ms. Luetkemeyer is more credible than the testimony of the employee. The Court further finds that the testimony of Ms. Luetkemeyer is more credible than the testimony of the employee even with whatever support is provided by the testimony of Ms. Sutherland and Ms. Bailey.

Based on a thorough review of the evidence including the cumulative effect of the evidentiary problems discussed above, the Court finds that the employee failed to satisfy her burden of proof on the issue of accident. Given this finding on “accident”, the Court determined that it is not necessary to address concepts such as “course and scope” or “prevailing factor”. The Court specifically finds that the employee has not shown by reliable, consistent and credible evidence that she sustained a work-related accident on August 19, 2007 that arose out of and in the course of her employment.

**Notice, Medical Causation, Past Medical Bills, Temporary Total Disability and Permanent Partial Disability**

The Court has ruled that the employee failed to prove that she sustained an accident on or about June 19, 2007. Based on this ruling, all other issues in this case are moot and are not ruled on.

**ATTORNEY’S FEE**

No attorney fees are awarded in this case.

**INTEREST**

No interest will be paid in this case.

Made by:

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Gary L. Robbins  
*Administrative Law Judge*  
*Division of Workers' Compensation*

Date: \_\_\_\_\_

A true copy: Attest:

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Naomi Pearson  
*Division of Workers' Compensation*