

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 27

WCC No. 2009-2335

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LANA MULLANEY

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Petitioner filed an occupational disease claim for injuries to her neck, shoulders, and low back which she alleges were caused by poor ergonomic conditions in her workspace. Respondent denied Petitioner's claim, alleging that her complaints are not causally related to her employment. Petitioner then filed this claim for workers' compensation benefits.

**Held:** Petitioner's treating physician opined that her conditions were caused by her exposure to a non-ergonomic workspace while she was employed at Respondent's insured. Since the opinion of the treating physician is entitled to greater weight, the Court concludes that Respondent is liable for Petitioner's occupational disease claim.

**Topics:**

**Physicians: Treating Physician: Weight of Opinions.** The Court rejected the insurer's argument that the treating physician's opinion should be given less weight because the treating physician's medical records and opinion letter did not specifically mention his review of the claimant's older medical records and because the treating physician did not specifically state whether the claimant suffered a temporary or permanent aggravation of an underlying condition.

**Injury and Accident: Aggravation: Occupational Disease.** The claimant's treating physician opined that she was experiencing pain from a non-ergonomic workstation and that she suffered "injuries . . . as a result

of employment.” The insurer erred in disregarding this opinion based on its assumptions regarding the adequacy of the treating physician’s review of medical records and his failure to specifically state whether the aggravation was temporary or permanent.

¶ 1 The trial in this matter was held on February 10, 2010, at the Workers’ Compensation Court in Helena, Montana. Petitioner Lana Mullaney (Mullaney) was present and represented herself. Daniel B. McGregor represented Respondent Montana State Fund (State Fund).

¶ 2 Exhibits: Exhibits 1 through 33 were admitted without objection. Respondent withdrew Exhibit 34. The Court excluded Exhibits 35 and 36.

¶ 3 Witnesses and Depositions: The Court admitted Mullaney’s deposition. Mullaney, Rick Edwards (Edwards), and Amy Kirscher (Kirscher) were sworn and testified at trial.

¶ 4 Issue Presented: After considering the evidence at trial, I restate the dispositive issue to be determined as follows:

¶ 4a Whether Montana State Fund is liable for an occupational disease arising out of or contracted within the course and scope of Lana Mullaney’s employment with Headwaters Resource, Conservation, and Development, Inc.

### FINDINGS OF FACT

¶ 5 Mullaney testified at trial. Although I found that Mullaney was unclear with her medical providers and the claims adjuster regarding her insurance coverage status and her exercise regimen, I found her testimony at trial to be credible.

¶ 6 Headwaters Resource, Conservation, and Development, Inc. (Headwaters) hired Mullaney as a fiscal officer. She began working there on September 9, 2008. Jim Davison (Davison) was the chairman of Headwaters’ board of directors and Edwards was vice-chair.<sup>1</sup> Mullaney’s job duties were to oversee and perform Headwaters’ accounting and financial duties.<sup>2</sup> Mullaney was unsure who her direct supervisor was because she was given conflicting information. Edwards informed her that the board of directors was her direct supervisor, but he also stated that the federal coordinator, if

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<sup>1</sup> Trial Test.

<sup>2</sup> Trial Test. (Edwards)

present, was her direct supervisor. Lisa Wheeler (Wheeler), Headwaters' office manager, also handled some personnel matters.<sup>3</sup>

¶ 7 Mullaney testified that she began to suffer low-back, neck, and shoulder pain approximately two weeks after she began to work at Headwaters.<sup>4</sup> Mullaney did not immediately file a first report of injury because she did not want her injury to interfere with her employment.<sup>5</sup> Mullaney attributed her pain to her workstation, which consisted of two tables pulled together. A shelf which held oversized binders was installed underneath the tables. The binders prevented Mullaney from pulling her chair in closely enough to the tables to allow her to use the computer's mouse and keyboard without stretching her arms. Because she could not pull the chair in close to the table, she also had to reach forward and lean over to use the surface of the table.<sup>6</sup>

¶ 8 Mullaney, who is left-handed, stated that her workstation was set up for a right-handed person and it was not possible to reconfigure it for a left-handed person.<sup>7</sup> Mullaney's chair sat on a mat which did not properly fit her workstation, and her chair got caught on the mat's edges. Mullaney added that her chair did not have proper lumbar support. Mullaney attempted to alleviate the ergonomic problems by removing the mat from underneath her chair and by moving the binders from the shelf under the desk. However, the extra space still did not provide adequate legroom. Mullaney tried other chairs but did not find a more suitable one. Mullaney testified that she repeatedly told a supervisor that her workstation needed to be corrected. Mullaney requested a different workstation, but her employer denied her request.<sup>8</sup>

¶ 9 Mullaney asked Davison to allow her to purchase a new chair.<sup>9</sup> Davison authorized her to purchase a new chair in mid-October 2008, but told her she could not spend more than \$100 on it. Mullaney did not find a suitable chair for that price. Mullaney stated that her workload prevented her from spending a substantial amount of time shopping for a new chair or rearranging her workspace.<sup>10</sup>

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<sup>3</sup> Mullaney Dep. 23:9 – 24:5.

<sup>4</sup> Mullaney Dep. 52:10 – 24.

<sup>5</sup> Trial Test.

<sup>6</sup> Trial Test.

<sup>7</sup> Mullaney Dep. 26:19 – 27:23.

<sup>8</sup> Trial Test.

<sup>9</sup> Mullaney Dep. 38:10 – 39:3.

<sup>10</sup> Trial Test.

¶ 10 Prior to working at Headwaters, Mullaney had treated with Warren Smith, DC, for preexisting back and neck pain.<sup>11</sup> She had last treated with Dr. Smith on February 4, 2008.<sup>12</sup> On October 7, 2008, Mullaney returned to see Dr. Smith, who noted:

On today's visit, Mrs. Mullaney reported that she is feeling pain in the left and right cervical region. She notes that she has significant headaches daily, felt at the base of the skull bilaterally. She has been at a new job, and her work station is poorly set up. . . . Her chair is not very supporting and has little adjustability. She has noted worst pain in the evenings after work. Her previous place of employment had a good work station, and she did not have any trouble with her back or neck while working there. Current symptoms are interfering with her ability to work, and making her usual exercise at the gym difficult due to pain. She exercises 5 times per week, doing indoor cardio exercise and light weight lifting on exercise machines. She reports that her weight lifting is not to exhaustion, but rather directed to balancing muscle group use for tone and general health.

Dr. Smith assessed Mullaney as having "moderate repetitive postural strain/sprain related to poor work station ergonomics."<sup>13</sup>

¶ 11 Edwards testified at trial. I found Edwards to be a credible witness. In October and November of 2008, Edwards was vice-chair of the Headwaters board of directors. He has been on the board of directors since approximately 2002. At the time of trial, he had been the chairman of the board of directors for approximately one month.<sup>14</sup>

¶ 12 Edwards testified that at the time Mullaney was hired, the Headwaters office environment was tense. The staff had a volatile relationship with the federal coordinator who consulted with Headwaters. Edwards testified that interoffice relationships continued to deteriorate after Mullaney was hired, and she and another employee were perceived by the rest of the office staff as being aligned with the federal coordinator against them. In an attempt to alleviate the polarized office environment, Edwards held a staff meeting on October 29, 2008. During the meeting, Edwards expressed his displeasure with Mullaney's decision to write a letter in favor of the federal coordinator.<sup>15</sup>

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<sup>11</sup> Ex. 14 at 1-2.

<sup>12</sup> Ex. 14 at 3-5.

<sup>13</sup> Ex. 14 at 6.

<sup>14</sup> Trial Test.

<sup>15</sup> Trial Test.

¶ 13 On October 30, 2008, Mullaney resigned her position at Headwaters. She tendered a letter of resignation which said:

Due to the severe personnel issues that have not been resolved at Headwaters, the lack of training that I received to effectively do my job and the retaliation that I have been subjected to because of a statement that I wrote in support of the Federal Coordinator, I am resigning my position at Headwaters RC&D, effective immediately.<sup>16</sup>

¶ 14 Mullaney testified that she only spent an hour in the office on the day she resigned and she did not list every reason for her resignation in her letter.<sup>17</sup> Mullaney stated that she did not mention her occupational disease because she was in a hurry.<sup>18</sup>

¶ 15 Dr. Smith saw Mullaney again on November 3, 2008, when she reported continuing pain in her neck and additional stiffness with dull pain in her posterior right cervical area, posterior left cervical area, posterior right and left upper shoulders, and right and left medial upper thoracic regions. Dr. Smith noted, “She notes that she recently left her employment due to the poor work set up that caused her symptoms.” Dr. Smith assessed Mullaney as having a moderate recurrence/continuance of postural strain related to work ergonomics and instructed her to call for follow-up as needed.<sup>19</sup>

¶ 16 Mullaney testified that she was not covered by Headwaters’ health insurance when she went to see Dr. Smith, but she had an existing health insurance policy which covered her until Headwaters’ health insurance became available. Mullaney testified that she asked Dr. Smith to file the claim with her health insurance, although she also told him it was work-related. When Dr. Smith explained that her insurer would likely reject the claim if she said it was work-related, Mullaney decided to file a workers’ compensation claim.<sup>20</sup>

¶ 17 On November 3, 2008, Mullaney filed a first report of injury with State Fund.<sup>21</sup> She listed her back as the part of body injured and explained:

The workstation that I was assigned to work at was not ergonomically correct. The chairs that were provided did not provide lumbar support and

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<sup>16</sup> Ex. 30 at 2.

<sup>17</sup> Trial Test.

<sup>18</sup> Mullaney Dep. 37:25 – 38:3.

<sup>19</sup> Ex. 14 at 6-7.

<sup>20</sup> Trial Test.

<sup>21</sup> Trial Test.; Ex. 2 at 2.

I could not move the chair forward so that I could sit with my knees at a 90 degree angle in front of the computer. There was a shelf that was attached to the underside of the desk that prevented me from moving my chair in. The keyboard and the mouse were located on top of the desk so my arms were elevated while I used these devices. [sic] Additionally, the workstation was set up for a right handed person and I am left handed.<sup>22</sup>

¶ 18 Mullaney sought follow-up care with Dr. Smith on November 6, 10, 13, 17, 18, and 24, and December 1, 2008, during which time she steadily improved.<sup>23</sup>

¶ 19 On November 10, 2008, Edwards wrote a letter “To Whom It May Concern” in which he stated that Mullaney’s claim was “a total surprise,” and stated that Mullaney had had regular chiropractic appointments while she worked at Headwaters due to preexisting back problems. Edwards further alleged that Mullaney had “express[ed] her disappointment that she would have to pay for her visits until her new insurance took effect.” Edwards further stated that the claim was “a bit suspicious” and that Mullaney “walked out of work without any notice on October 30<sup>th</sup> and filed the . . . claim the following Monday.”<sup>24</sup> At trial, Edwards testified that he had no firsthand knowledge about any of the allegations he made in his letter: Davison informed him that Mullaney was unhappy with her office chair and that he had authorized her to purchase a new chair. According to Edwards, after Mullaney resigned, Wheeler told Edwards that Mullaney did not have health insurance and that she had been treating with a chiropractor for a preexisting back condition. Edwards further testified that Mullaney never complained about her workspace to him and that the first time he learned she was dissatisfied with her workstation was when he received her post-resignation workers’ compensation claim.<sup>25</sup>

¶ 20 On November 15, 2008, Kirscher, the claims examiner assigned to Mullaney’s claim, requested that Mullaney provide additional information on her medical history and sign a medical release.<sup>26</sup> Kirscher testified at trial. I found Kirscher to be a credible witness.<sup>27</sup> When Kirscher first received Mullaney’s claim, she began her investigation by contacting Edwards and questioning Mullaney. On December 1, 2008, Kirscher took a recorded statement of Mullaney regarding her occupational disease claim. Among

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<sup>22</sup> Ex. 2.

<sup>23</sup> Ex. 14 at 7-13.

<sup>24</sup> Ex. 6 at 3.

<sup>25</sup> Trial Test.

<sup>26</sup> Ex. 3 at 7.

<sup>27</sup> Trial Test.

other things, they discussed Mullaney's treatments with Dr. Smith which began in October 2008:

Q When you went in to Dr. Smith did he give you an idea of what he thought was going on?

A Um, oh I just . . . explained it to him that my, um, work station wasn't ergonomically correct . . . and then he just provided treatments. When I first went I – I put it on my health insurance, um, or not actually my health insurance, um, I didn't have insurance because I needed to wait, like 60 days or something like that and, um, then the next time I went I'm like, um, well I don't have health insurance, and it is related to work, and so, um, I'm just going to turn in a claim for it and that's when I filed the WC claim. Because I was willing to pay for it myself because I just started that job and I didn't want to file a WC claim.

Q So you had a 60 day waiting period for your other insurance to kick in.

A And I don't have insurance. So, since it was work-related I thought it was kind of crazy for me to be paying for it when, you know, I let them know it in the first two or three weeks they weren't concerned about it because they were more concerned about the budget than they were about providing me with a new chair.<sup>28</sup>

¶ 21 Although Mullaney informed Kirscher that she was uninsured, Mullaney presented evidence to the Court which demonstrated that she had health insurance coverage during the time she worked at Headwaters.<sup>29</sup>

¶ 22 Kirscher knows of three workers' compensation claims Mullaney has filed. Mullaney's current claim is for an occupational disease of the neck, shoulders, and low back. In 1999, Mullaney filed a claim for an occupational disease of her neck and shoulders. Mullaney filed a second claim for an occupational disease of her neck and shoulders in 2000 against the Montana Department of Military Affairs. State Fund is also the insurer for the 2000 claim.<sup>30</sup>

¶ 23 On December 9, 2008, Kirscher informed Mullaney that State Fund was denying her current claim because it had not received the medical records it had requested to

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<sup>28</sup> Ex. 23 at 4.

<sup>29</sup> See Ex. 28.

<sup>30</sup> Trial Test.

help make a determination of liability.<sup>31</sup> Kirscher testified that she intended to continue her investigation although she had denied the claim, and she encouraged Mullaney to attempt to obtain the medical information Kirscher needed.<sup>32</sup>

¶ 24 On January 6, 2009, Mullaney sought treatment with Dr. Smith and reported an acute aggravation of mild to moderate frequent left and right cervical pain with throbbing and dull pain in the posterior right and left cervical areas, posterior right upper shoulder, and right and left medial upper thoracic regions. Dr. Smith noted that Mullaney “has been trying to self manage with exercise and stretching, but has not felt any improvement.” He noted that Mullaney exercised daily, usually with stretching, weight machines, and “some cardio.” Dr. Smith assessed Mullaney with an acute exacerbation of her previous symptoms. He further instructed Mullaney in specific lifting techniques for her daily exercise routine.<sup>33</sup>

¶ 25 On February 6, 2009, Dr. Smith reported that Mullaney’s bilateral pain in her lower thoracic and lumbar region and her pain and discomfort in her neck were unchanged. Dr. Smith assessed her as having an acute exacerbation of previous symptoms, with slow but consistent improvement.<sup>34</sup> On February 12, 2009, Dr. Smith noted that Mullaney was suffering from frequent aggravation of her low-back and neck pain. Dr. Smith stated, “She has been trying to exercise to strengthen her back and neck, as she has been experiencing trouble with W/C and does not want to build a bill that is not covered.”<sup>35</sup>

¶ 26 Although State Fund had denied Mullaney’s claim, on March 25, 2009, Kirscher told Mullaney that State Fund was pursuing an independent medical examination (IME).<sup>36</sup> On March 26, 2009, State Fund sent Mullaney’s medical records to Allen M. Weinert, M.D. for his review.<sup>37</sup> On March 31, 2009, Kirscher informed Mullaney that she was scheduled for an IME with Dr. Weinert.<sup>38</sup> Kirscher also wrote to Dr. Weinert on that date and asked him to answer several questions about Mullaney’s condition, including

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<sup>31</sup> Ex. 3 at 11.

<sup>32</sup> Trial Test.

<sup>33</sup> Ex. 14 at 14.

<sup>34</sup> Ex. 14 at 15.

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

<sup>36</sup> Ex. 3 at 25.

<sup>37</sup> Ex. 3 at 26.

<sup>38</sup> Ex. 3 at 27.

diagnoses, preexisting conditions, causation, work-relatedness, and treatment recommendations.<sup>39</sup>

¶ 27 On April 1, 2009, Mullaney wrote to Kirscher and requested that State Fund accept liability for her occupational disease claim and to pay certain medical benefits. Mullaney explained that she had provided State Fund with a medical release and a list of past medical providers and had made attempts to get those providers to send medical records to State Fund.<sup>40</sup>

¶ 28 On April 10, 2009, Kirscher wrote to Mullaney in response to Mullaney's April 1, 2009, letter. Kirscher explained that although Mullaney had provided a signed medical release, State Fund had been unable to obtain some of the medical information sought. Kirscher further explained that the medical records State Fund had received did not clearly address the cause of Mullaney's current condition and that the IME with Dr. Weinert would assist State Fund in determining causation.<sup>41</sup>

¶ 29 On April 21, 2009, Mullaney saw Dr. Weinert for an IME regarding the causality of her neck, upper back, and low-back pain. Dr. Weinert noted that Mullaney denied having a history of neck or low-back pain or injury; however, he summarized medical records from October 1999 and May 2000 which indicated that Mullaney had occupationally-related cervical symptoms. Dr. Weinert further noted that in 2001, an MRI revealed that Mullaney had a left-sided disk herniation with cord impingement at C5-6.<sup>42</sup>

¶ 30 Dr. Weinert noted that Mullaney alleged that she did not experience any increased pain in her neck or scapular regions from 2005 through 2008 while she worked for the Human Resources Council. However, Dr. Weinert noted that he personally saw Mullaney on February 22, 2005, for complaints of neck and scapular region pain, and she was diagnosed with chronic cervical and scapular region myofascial pain with central disk protrusions at C3-4 and C5-6. Dr. Weinert noted that he also saw Mullaney on October 9, 2007, for new complaints of low-back pain and that x-rays taken at that time showed degenerative changes at L2-3 and L3-4.<sup>43</sup>

¶ 31 Dr. Weinert reported that Mullaney was independent in activities of daily living, had fairly good sleep, and that she exercised six or seven days a week. After a physical

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<sup>39</sup> Ex. 3 at 30-31.

<sup>40</sup> Ex. 4 at 9-10.

<sup>41</sup> Ex. 3 at 28-29.

<sup>42</sup> Ex. 15 at 11.

<sup>43</sup> *Id.*

examination, Dr. Weinert opined that Mullaney had preexisting conditions in her cervical spine unrelated to any specific occupational disease or work injury; a temporary aggravation of her cervical and scapular myofascial pain from her 1999 occupational disease; and lumbar degenerative arthritis at L2-3 and L3-4 which was aggravated by Mullaney's exercise program and not related to a work injury or occupational disease, although her low back may have been temporarily aggravated by her work conditions at Headwaters. Regarding Mullaney's cervical and scapular symptoms, Dr. Weinert opined that these symptoms were present to some degree since her 1999 occupational disease onset, and that the fact that these symptoms continued after she ended her employment at Headwaters indicates they date back to the 1999 injury. Regarding her low-back symptoms, Dr. Weinert opined that her work at Headwaters was at most a temporary aggravation of a preexisting condition and that she suffered no overall permanent impairment as a result of her work at Headwaters.<sup>44</sup>

¶ 32 After reviewing Dr. Weinert's IME report, Kirscher again denied Mullaney's claim. Kirscher testified that she based the denial largely upon Dr. Weinert's IME report.<sup>45</sup>

¶ 33 On June 11, 2009, Dr. Smith wrote a letter "To Whom It May Concern" in which he stated that he had been treating Mullaney for "injuries sustained as a result of employment." In that letter, Dr. Smith related Mullaney's description of her workstation in nearly identical fashion to the configuration which Mullaney described to this Court. He opined, "The injuring factor that led to her symptoms was repetitive micro-trauma as a result of a non ergonomic work station. . . ." Dr. Smith described her workstation at Headwaters and opined that Mullaney's injuries were "directly attributable to inadequate work station ergonomics." Dr. Smith noted that he is a trained work place injury prevention specialist with Future Industrial Technologies/Backsafe and has 12 years' experience in treating both traumatic and cumulative postural injuries. He opined that the conditions of Mullaney's workstation caused her to suffer cumulative trauma.<sup>46</sup>

¶ 34 Mullaney testified that she also pursued a second opinion with Anthony J. Russo, M.D. because she found Dr. Weinert's IME report to be full of inaccurate information.<sup>47</sup> On September 4, 2009, Dr. Russo examined Mullaney's low-back condition. He diagnosed her as having "[m]echanical low back pain associated with prolonged exposure to a non-ergonomic workplace." In his report, Dr. Russo noted that x-rays

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<sup>44</sup> Ex. 15 at 12-13.

<sup>45</sup> Trial Test.

<sup>46</sup> Ex. 14 at 18.

<sup>47</sup> Trial Test.

indicated Mullaney has mild degenerative disk disease at L2-3 and some facet arthrosis at L4-5 and L5-S1.<sup>48</sup>

¶ 35 Kirscher testified that although she considered the opinions of Drs. Smith and Russo, she denied Mullaney's claim largely on the basis of Dr. Weinert's IME report. Kirscher explained that she gave more weight to Dr. Weinert's causation opinion than to Dr. Smith's because it appeared that Dr. Weinert had a more complete set of medical records to review in making his determination. Kirscher testified that, since Dr. Smith's letter does not contain any mention of previous medical records, she concluded that he had not reviewed Mullaney's older medical records. Kirscher stated that she also gave more weight to Dr. Weinert's opinions than to Dr. Russo's because she did not know if Dr. Russo had been provided with a complete set of medical records to review prior to rendering his opinion.<sup>49</sup>

### CONCLUSIONS OF LAW

¶ 36 Mullaney's last day of work was October 30, 2008. The 2007 Workers' Compensation Act applies to her claim.<sup>50</sup>

¶ 37 Mullaney bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.<sup>51</sup> To prevail in an occupational disease claim, she must not only prove the existence of her conditions, but also must prove that they were caused by her employment.<sup>52</sup>

¶ 38 Under § 39-71-407(8)-(9), MCA, an employer is liable for an occupational disease if it arises out of or is contracted in the course and scope of employment. An occupational disease is considered to arise out of or be contracted in the course and scope of employment if the occupational disease is established by objective medical findings and events occurring on more than a single day or work shift are the major contributing cause of the occupational disease. For purposes of this statute, § 39-71-407(13), MCA, defines "major contributing cause" as a cause that is the leading cause contributing to the result when compared to all other contributing causes.

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<sup>48</sup> Ex. 33.

<sup>49</sup> Trial Test.

<sup>50</sup> *Grenz v. Fire & Cas. of Conn.*, 278 Mont. 268, 271, 924 P.2d 264, 266 (1996).

<sup>51</sup> *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

<sup>52</sup> *Dewey v. Montana Contractor Compensation Fund*, 2009 MTWCC 17, ¶ 46.

¶ 39 In the present case, Mullaney alleges that her work at Headwaters either caused her to develop low-back, neck, and shoulder pain, or permanently aggravated her preexisting low-back, neck, and shoulder pain. In addition to her testimony, Mullaney points to the medical records and opinions from Drs. Smith and Russo, both of whom opined that her conditions were caused by exposure to a non-ergonomic workspace. Mullaney argues that this Court should assign greater weight to the opinions of Drs. Smith and Russo than to Dr. Weinert, who opined that Mullaney's cervical and scapular symptoms related back to her 1999 occupational disease and that her low-back symptoms were at most a temporary aggravation of a preexisting condition.

¶ 40 State Fund argues that this Court should assign greater weight to Dr. Weinert's opinion than to Dr. Russo's because it is unclear which medical records Dr. Russo reviewed prior to offering his causation opinions. State Fund further argues that while Dr. Smith opined that Mullaney's pain was caused by her work conditions, Dr. Smith did not state whether this was a temporary or permanent aggravation and therefore Mullaney cannot prove that State Fund is liable for an occupational disease arising out of her employment with Headwaters.

¶ 41 Dr. Smith is Mullaney's treating physician as defined in § 39-71-116(37)(b), MCA. As a general rule, the opinion of a treating physician is accorded greater weight than the opinions of other expert witnesses. However, a treating physician's opinion is not conclusive. To presume otherwise would quash the role of the fact finder in questions of an alleged injury. As the finder of fact, this Court remains in the best position to assess witnesses' credibility and testimony.<sup>53</sup>

¶ 42 In the present case, Dr. Smith opined in October 2008 that Mullaney was experiencing pain as a result of a non-ergonomic workstation. In June 2009, he again opined that Mullaney's condition was "directly attributable to inadequate work station ergonomics." He opined that Mullaney suffered "injuries sustained as a result of employment." Kirscher testified that she disregarded Dr. Smith's opinion because she concluded that he had not reviewed Mullaney's older medical records since he had not specifically mentioned those records in his opinion letter. According to State Fund, since Dr. Smith did not specifically state whether Mullaney suffered a permanent or temporary aggravation of an underlying condition, and since Kirscher could not ascertain from Dr. Smith's medical notes whether he had reviewed an adequate amount of Mullaney's medical records, his opinion should not be given greater weight than Dr. Weinert's even though Dr. Smith is Mullaney's treating physician.

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<sup>53</sup> *EBI/Orion Group v. Blythe*, 1998 MT 90, 288 Mont. 356, ¶¶ 12-13, 957 P.2d 1134 (1998).

¶ 43 Dr. Smith's June 11, 2009, opinion letter clearly states that he was treating Mullaney "for injuries sustained as a result of employment." Dr. Smith's letter in no way suggests that he believed Mullaney to be suffering from a temporary condition; rather, he indicates that "Mullaney's injuries . . . are directly attributable to inadequate work station ergonomics." Under the treating physician rule, I find that Dr. Smith's opinions are entitled to greater weight and therefore conclude that Mullaney suffered an occupational disease due to her exposure to a non-ergonomic workspace while she worked at Headwaters. State Fund is therefore liable for her occupational disease claim.

### JUDGMENT

¶ 44 Montana State Fund is liable for an occupational disease arising out of or contracted within the course and scope of Lana Mullaney's employment with Headwaters Resource, Conservation, and Development, Inc.

¶ 45 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 27th day of August, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Lana Mullaney  
Daniel B. McGregor  
Submitted: February 10, 2010