COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 008324-96**

Barbara Callender Hansel Employee
City of Boston School Department Employer
City of Boston Self-Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine, and Wilson)

APPEARANCES
Nancy Hall, Esq., for the employee
Danna Crowley, Esq., for the self-insurer

CARROLL, J. The self-insurer appeals an award of ongoing § 34 benefits, claiming that the employee failed to submit medical evidence supporting her claim for temporary total incapacity benefits or causally relating her ongoing incapacity to her industrial injury. Alternatively, the self-insurer contends that the judge's findings on incapacity and causal relationship are not adequately supported by his subsidiary findings. We do not agree that the medical evidence was inadequate to support a finding of causal relationship or that the judge's findings are, as a matter of law, inadequate to support a causal relationship finding. However, we agree that the judge did not adequately support his finding of total incapacity beginning on September 9, 1999, the date of the employee's failed attempt to return to work. We therefore affirm in part and reverse in part, recommitting this case for further findings on extent of incapacity.

Barbara Callender Hansel, age fifty-nine at the time of the hearing, holds a bachelor's degree in education, as well as a Master of Fine Arts degree. She became a teacher in 1962, and began teaching art and visual studies at Boston Latin School in 1983. On January 2, 1996, she suffered an industrial injury after entering the school building, when she slipped on a wet spot on the floor, hitting her head on the wall and floor and losing consciousness. She was taken to Beth Israel Hospital, (Dec. 4), and ultimately came under the care of a variety of physicians and other specialists, including a

neurologist, a vision specialist, a speech-language pathologist, and a neuropsychologist. (Dec. 5.) Ms. Callender Hansel attempted to return to her regular work in June 1999, and again in September 1999, but was unable to continue due to difficulty remembering student names, processing information, understanding new grading procedures, and focusing her attention following lectures. (Dec. 8-9.) She also became easily fatigued and distracted when interruptions occurred. (Dec. 8.) After trying to return to work in June 1999, her treating neurologist, Dr. Cowell, recommended accommodations including no more than four hours per day of teaching, with rest breaks between classes. (Dec. 7, Ex. 9.) The school was unable to make these accommodations, and, following her second attempt to return to work, Dr. Cowell recommended that she retire from her teaching position. (Dec. 7-9.) She stopped working altogether on September 9, 1999. (Dec. 9.)

The self-insurer paid § 35 partial incapacity benefits from the date of injury at the rate of $432.40, based upon the employee's average weekly wage of $1,020.67, and an earning capacity of $300.00.[1] (Dec. 2 n. 1.) Eventually, the self-insurer filed a complaint to modify compensation, which was denied at conference. The employee's claim for § 34 benefits was joined at a de novo hearing on November 22, 1999. (Dec. 2 n. 2.)

Prior to the hearing, on December 7, 1998, Dr. Amin Sabra examined the employee pursuant to § 11A. He opined that the employee had sustained a post-concussion syndrome causally related to her fall at work, but felt that she "'will be able to resume her regular job as an art teacher.'" (Dec. 8, quoting Ex. 2.) However, he could not say "'beyond a reasonable doubt'" that her current symptoms were related to her injury at work. Id. The judge allowed the parties to submit additional medical evidence due to the complexity of the medical issues and the length of time (approximately eleven months) between the impartial examination and the commencement of the hearing. (Dec. 3.) The employee submitted reports from her treating neurologist, a neuropsychologist, a speech-language pathologist, and a vision specialist. (Dec. 5-8.) The self-insurer submitted a report from a neurologist. (Dec. 7; Ex. 10.)

The judge did not adopt the opinion of the impartial physician because he evaluated causal relationship under an inappropriate standard, i.e., whether "beyond a reasonable doubt" the employee's current symptoms were related to her injury. (Dec. 8.) In addition, the judge found that the impartial doctor's opinion that she "will be able to resume her regular job as an art teacher" did not establish the extent of her incapacity at the time of the examination. Id. The judge likewise rejected the opinion of the self-insurer's neurologist, Dr. Tandon, that the employee's present symptoms were due more to stress and depression than to the post-concussive syndrome. (Dec. 7.) Instead, he found persuasive and adopted the opinions of the employee's four experts, without specifically discussing their opinions as to causal relationship except in the case of Dr. Bruno-Golden. (Dec. 5-8.) Regarding the employee's attempts to return to teaching in June and September 1999, the judge found that, "Insofar as Dr. Cowell had not recommended that the employee retire following the June 1999, attempt to return to work, . . . this recommendation [that she retire] in September constitutes a worsening of her condition." (Dec. 9.) The judge concluded that Ms. Callender Hansel "was not able to perform her job duties because of the effects of her industrial injury." (Dec. 10-11.) He then awarded her ongoing § 34 temporary total incapacity benefits beginning September 9, 1999, the date her second failed attempt to return to work ended. (Dec. 12.)

We consider the self-insurer's arguments regarding causal relationship and extent of incapacity separately. On causal relationship, the self-insurer argues both that the medical evidence was insufficient to support a finding of present causal relationship, and that the judge failed to support his general finding of causal relationship with subsidiary findings.[2] Though the judge's findings on causal relationship must largely be inferred from the award of § 34 benefits, we do not find that the decision must be reversed as a matter of law because the only rational inference that can be drawn from the medical

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[1] The judge states that § 35 benefits were paid by agreement, but the record reveals that they were initially paid by conference order, which was appealed, and then voluntarily adjusted prior to hearing. The agreement did not modify the conference order.

[2] We emphasize that the self-insurer accepts that the judge did make a causal relationship finding. (Self-insurer brief, 1.)

evidence adopted by the judge is that the employee's incapacity is causally related to her industrial injury.

It is the duty of the hearing judge to make such specific and definite findings based upon the evidence as will enable the reviewing board to determine with reasonable certainty whether correct rules of law have been applied. Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993), citing Zucchi's Case, 310 Mass. 130, 133 (1941). General conclusions unaccompanied by findings of fact as a basis to support them do not satisfy the requirement to make findings of fact, *unless the evidence is of such a character that no reasonable inference to the contrary could be drawn*. Judkins' Case, 315 Mass. 226, 227 (1943); Vouniseas's Case, 3 Mass. App. Ct. 133, 140 (1975). (Emphasis added.) Compare Craddock's Case, 310 Mass. 116, 125 (1941) (where reasonable inference contrary to the finding of the board would be warranted, if not required as a matter of law, and, from the two general conclusions made by the board, the court cannot determine with reasonable certainty whether correct rules of law have been applied to facts which could properly be found, the case was remanded for further proceedings); Demetrius' Case, 304 Mass. 285, 287-288 (1939) (case reversed and remanded where broad general findings of the board did not disclose the view that it took of the facts, which were susceptible of contrary finding).

Here, we conclude that the judge applied correct rules of law to facts that could be found because the evidence credited by the judge is such that the only reasonable inference that could be drawn from it is that the employee's present disability is causally related to her industrial accident. The judge specifically rejected the opinions of both the impartial examiner, who had evaluated causal relationship under an incorrect standard, (Dec. 8), and of the self-insurer's neurologist, who had opined that the employee's "present difficulties are due more to stress and depression than the post-concussive syndrome." (Dec. 7.) The judge went on to adopt the opinions of the employee's four experts, apparently in full. (Dec. 5-8.) While the self-insurer is correct that the judge did not make specific subsidiary findings regarding the causal relationship opinions of the

experts he adopted, except in the case of Dr. Bruno-Golden, the credited medical evidence, including all rational inferences of which it is susceptible, supports the judge's ultimate conclusion that the employee's current incapacity is causally related to her work injury. In Josi's Case, 324 Mass. 415, 418-419 (1949), the court reviewed the medical and lay evidence and held that the Board *impliedly* adopted a view of the evidence which supported a finding of causal relationship. Here, we infer from the judge's conclusion his view of the medical evidence, which is the only reasonable view of it. See id. at 416 (the issue is not what conclusion we would reach, but whether there is any evidence, including all rational inferences of which the evidence is susceptible, upon which the judge's finding could have been made).

Dr. Cowell, the employee's treating neurologist, offered the only medical opinion during or after the employee's attempts to return to work in 1999. That opinion consisted of two reports, dated July 29, 1999, and September 9, 1999, (Tr. 62), though the judge discussed only the September report in his decision. (Dec. 7-8.) The September report listed the symptoms the employee was having—fatigue, ankle edema, exacerbation of facial dermatitis and cognitive overload[3]—and stated that, due to the employer's inability to accommodate the employee with fewer hours of teaching and rest breaks, she should retire from her teaching position. Id. In the July report, however, Dr. Cowell reported that the employee was seen "to follow-up on her rehabilitation needs *as the result of* her blunt head injury," (Ex. 9, July 29, 1999 report at 1), and that the employee's chief complaint is "residual cognitive and behavioral disruption *as the result of* a mild traumatic brain injury which occurred on 01/02/96." Id. (Emphasis added.) Dr. Cowell noted that, "A letter of support and a letter defining her *special needs regarding her traumatic brain injury* were forwarded to the school prior to this job trial." Id. (Emphasis added.) Dr. Cowell concluded that: "The patient is a 59-year-old woman who is now three and a half years *status post a traumatic brain injury secondary to a fall who has ongoing issues* related to cognition, behavior, chronic pain, fatigue and visual

[3] The judge noted that the employee did not claim that the edema or the facial dermatitis was related to her work injury.

disruption." Id. The only rational inference of which this testimony is susceptible is that the current symptoms described by the doctor are the result of the employee's fall in January 1996.

The testimony of Dr. Bruno-Golden, a neuropsychologist, Dr. Stern, an optometrist, and Ms. Kamath, a speech-language pathologist, was that the employee's symptoms and evaluations are "consistent with" post concussion syndrome associated with hypertension and possible vascular disturbances, (Ex. 7 at 10), post trauma vision syndrome, (Ex. 7 at 10; Ex. 8 at 3), and a mild traumatic brain injury. (Ex. 6 at 2), respectively. It has long been established that where causal relationship is a matter beyond the common knowledge and experience of a layman, its proof must rest upon expert medical testimony that indicates more than a possible causal relationship between the accident and the disability. Josi's Case, 324 Mass. 415, 417-418 (1949); Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801, 802 (1995). Though use of the words "consistent with" may not always imply that level of certainty necessary to sustain a finding of causal relationship, it can under certain circumstances. See Josi's Case, supra at 418-419 (expert's testimony that it was possible to trace the employee's arthritic condition to his industrial accident, combined with testimony that it was not unusual for arthritis to follow a trauma and the fact that there was nothing in the evidence to indicate that the employee ever complained of any trouble in his hip prior to the accident were sufficient to support a finding of causal connection between the work injury and the employee's incapacity). See also L. Locke, Workmen's Compensation § 522 (2d. ed. 1981), and cases cited. Here, there is nothing in the credited evidence to indicate that, prior to the industrial accident, the employee had had symptoms such as those described by the doctors. Moreover, the four experts whose opinions the judge adopted hypothesize as to no other cause of the employee's problems, but rather appear to assume as obvious that the employee's current symptoms are causally related to her fall at work.

Dr. Bruno-Golden, a neuropsychologist, recited the claimant's history of her fall at work on the first page of her report, and again referred to her "head injury" in her summary and recommendations before stating that "her neuropsychological evaluation is consistent with Post Concussion Syndrome associated with hypertension and possible vascular disturbances. Furthermore, her neuropsychological evaluation is also consistent with a Post-Traumatic Visual Syndrome . . . ." (Ex. 7 at 10.) There was no mention of any other contributing causes to the employee's problems.[4]

Dr. Stern, a behavioral optometrist, described the employee's "symptoms and visual skill level [as] consistent with what is being termed post trauma vision syndrome. This syndrome includes symptoms of poor concentration and attention, possible double vision, movement of objects or words on a page, and general eye discomfort." (Ex. 8.) The self-insurer argues that Dr. Stern neither indicated what trauma the employee suffered nor stated how that trauma had caused her symptoms. However, in the first paragraph of her report, Dr. Stern stated that she was evaluating the employee "regarding treatment for her post trauma vision syndrome. In January, 1996, Ms. Callender fell on her way into work and sustained two blows to her head with loss of consciousness for several minutes." Id. Clearly, Dr. Stern is referring to the only trauma the employee has suffered—the blow to her head when she fell at work.

[4] In reference to Dr. Bruno-Golden's causation opinion, the judge misquoted her report to the extent that he left out the words "associated with hypertension and possible vascular disturbances." We do not find this discrepancy to be significant. Earlier in her report, Dr. Bruno-Golden had stated that the medical records of the employee's general physician, Dr. Alice Adams, indicated that the employee "had sustained hypertension due to the trauma of the surrounding events of her fall." (Ex. 7 at 1.) Thus, the evidence contained in this report is that hypertension was brought on by the employee's industrial injury. There is no other mention in the report of "possible vascular disturbances." However, in evaluating the employee's condition before her industrial injury, Dr. Bruno-Golden wrote: "Premorbidly the patient was generally very healthy and active. She has never had any previous head injuries or episodes of loss of consciousness. She has no history of seizures or central nervous system infections. She has no known history of cardiological problems, although she has some recall of a benign heart murmur. She has no known history of pulmonary problems." Id. at 3. Since Dr. Bruno-Golden did not list any contributing, non-work causes of the employee's disability in this section or elsewhere in the report, it was not unreasonable for the judge to omit mention of the hypertension and possible vascular disturbances from his discussion of Dr. Bruno-Golden's opinion.

Finally, Ms. Sucheta Kamath, a speech-language pathologist stated in her "impressions" that "Ms. Callender presents with symptoms consistent with a mild traumatic brain injury as evidenced by the presence of persistent cognitive, behavioral and emotional symptoms status post fall in January of 1996." (Ex. 6 at 2.) She notes that Ms. Callender had symptoms of "severe headaches, frequent loss of balance, vision problems, weight gain and problem[s] in 'thinking clearly'"[ ] which began immediately after the accident. Id. at 1. Ms. Kamath continued: "Ms. Callender's physical symptoms of brain injury, *that cannot be accounted for by peripheral injury or other causes from past medical history and medications* are characterized by frequent vision problems including blurred vision and feeling tired." Id. at 2. (Emphasis added.) The self-insurer's argument that the judge "failed to explain how the general observations were related to the slip and fall of January 2, 1996," (Self-insurer's brief 4), is unfounded.

In all four reports—Dr. Cowell's, Dr. Bruno-Golden's, Dr. Stern's, and Ms. Kamath's—it is clear, or can reasonably be inferred, that the symptoms the experts are describing result from her industrial injury. See Buck's Case, 342 Mass. 766, 769-770 (1961) (the question is "whether there is any evidence, including all rational inferences of which the evidence is susceptible, upon which the findings of the board [here, judge] could have been made, and if there is such evidence, we do not disturb the findings unless they are vitiated by some error of law"). This is not a case where the credited medical evidence suggests that there was more than one cause of the employee's ongoing symptoms.[5]

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[5] Compare Fitzgibbon's Case, 374 Mass. 633, 636 (1978) (Testimony that "the employee's history and background were more consistent with a diagnosis of psychotic depressive reactions resulting from the [industrial injury] than with a diagnosis of involutional melancholia" expresses more than a possibility or chance of causal connection). (Emphasis added.) Ex parte Diversey Corp., 742 So. 2d. 1250 (Ala. 1999), cited by the dissent, supports rather than contradicts our position that the words "consistent with" are a sufficiently definite statement of causal relationship in the circumstances of this case. There, the court wrote:

> As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any one theory

We note that the insurer did not raise § 1(7A) as an issue either at hearing or on appeal and therefore we need not address it.[6] See 452 Code Mass. Regs. § 1.15(4)(a) 3 ("The Reviewing Board need not decide questions or issues not argued in the brief"); see also, Capitol Bank v. Richman 19 Mass. App. Ct. 515 (1985) (court rejected appellant's argument for an enhanced standard of proof raised by a party for the first time on appeal). Accordingly, we affirm the judge's ultimate conclusion on causal relationship.

Next, the self-insurer argues that the judge did not adequately support his finding that the employee's incapacity changed from partial to total on September 9, 1999. We

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> of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

Id. at 1254, citing Southern Ry. v. Dickson, 100 So. 665, 669 (Ala. 1924). In Diversey, the language used by the expert was that "it's more probable that these strong industrial-strength cleaning agents were the cause." Diversey, supra at 1253. However, since one of the cleaning agents was not manufactured by the defendant, the court found that the experts' theory of causation was "just as consistent with the theory that [the chemical not manufactured by the defendant] caused [the employee's] injuries as it is with the theory that one or more of Diversey's products caused her injuries." Id. at 1255. By contrast, in the instant case, the evidence points to "one theory of causation, indicating a logical sequence of cause and effect." Id. at 1254.

[6] However, we do not believe that, under the circumstances of this case, a § 1(7A) analysis would have been required, even if it had been raised. First, the judge clearly rejected Dr. Tandon's opinion that he could not relate "'the entire repertoire of the employee's symptoms'" to the January 2, 1996 work injury, (Dec. 7, quoting Ex. 10), and that "the post-concussive syndrome and the difficulty with her pursuing tasks at home and at school is due to more stress, depression, rather than post-concussive syndrome." (Ex. 10 at 6; see Dec. 7.) Thus, any analysis as to whether stress and depression were combining non-compensable pre-existing conditions is obviated. Moreover, neither Dr. Tandon, Dr. Cowell, nor Ms. Kamath suggests that any of the other conditions they listed combined with the employee's industrial injury to cause or prolong her disability or need for treatment. See Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 82 (2000) (the insurer "had the burden of producing evidence of the predicates to § 1(7A)'s application—the existence of a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, that combines with the compensable injury or disease that is the subject of the claim or complaint"). In Fairfield, supra, we held that the "a major" standard in § 1(7A) did not apply as a matter of law because there was no medical opinion of obesity as a combining noncompensable pre-existing disease. On the other hand, see Robles v. Riverside Mgmt., Inc., 10 Mass. Workers' Comp. Rep. 191 (1996) (application of § 1(7A) triggered where only medical evidence diagnosed employee with gangrene of the toe, cellulitis of the foot and peripheral vascular occlusive disease, *probably related to* atherosclerosis and diabetes mellitus).

agree. Although the judge found that the employee's condition had worsened, that finding was based not on an analysis of the state of the employee's physical condition while she was collecting partial incapacity benefits and a measurement of the deterioration from that point to the close of the evidence, but rather on the treating doctor's opinion that the employee could not physically do full-time, unaccommodated work for the employer. See Foley's Case, 358 Mass. 230, 232 (1970) (where employee had earlier been found to be partially incapacitated, the burden in later proceedings was upon him to prove total incapacity). The judge here found that the employer had been unable to accommodate the employee, as recommended by Dr. Cowell, by allowing her to teach no more than four hours per day, and take rest breaks between classes. (Dec. 7.) The judge concluded, "Insofar as Dr. Cowell had not recommended that the employee retire following the June 1999, attempt to return to work, . . . this recommendation [that she retire] in September constitutes a worsening of her condition." (Dec. 9.) However, a recommendation that the employee retire because the employer cannot accommodate her physician's recommendations for changes in her work does not demonstrate any change in the employee's incapacity for work. It merely shows that the employer could not accommodate her.

Moreover, the judge's findings on the vocational aspects of incapacity focus only on the employee's inability to perform her full-time teaching job with the employer or to be retrained, to the exclusion of any consideration of residual earning capacity in the same occupation with other employers and comparison of the present physical impairment with the medical condition during the duration of weekly payments for partial incapacity:

> Considering the employee's age of 59 years, as well as the fact that she has worked in a single profession for more than thirty years which she can no longer perform, based on medical opinion and her demonstrated inability to perform it; considering also that the employer is unable to provide an accommodation as recommended by Dr. Cowell; considering also that the employee's demonstrated difficulty with attention and concentration; her easy distractibility; her difficulty with multiple task activity, it would be difficult for her to be trained in any new occupation. The fact that the employee does have some ability to drive a motor vehicle and to function in certain situations independently does not transform itself into the ability to become employed in other than a trifling manner.

(Dec. 10.) Findings are necessary both on whether there is deterioration of the employee's condition from the time she was partially incapacitated, see Foley's Case, supra, and on whether she "can perform other labor of a less remunerative kind" where she cannot continue her usual work. Scheffler's Case, 419 Mass. 251, 260 (1994).

This decision is reversed and recommitted for further findings on extent of incapacity. In view of the passage of time and in the interest of justice, the judge may take further evidence as he deems necessary.

So ordered.

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

WILSON J., (concurring in part and dissenting in part). I concur with my colleagues that the case should be recommitted for further findings on incapacity. I would, however, also recommit the case for the judge to make the findings on causal relationship that were entirely absent from the decision before us.

This is a case marred by the wholly inadequate causal relationship opinion of the impartial examiner as well as those submitted as additional evidence by both parties. The judge correctly rejected the flawed causal relationship opinions of both the impartial examiner and the self-insurer's expert. But he then inexplicably made no attempt to craft subsidiary findings or even a general finding on causal relationship based on the equally flawed medical evidence submitted by the employee. Any attempt to paper over these deficiencies in the employee's medical evidence and the judge's omission of findings by invoking Buck's Case, 342 Mass. 766 (1961), misses the point of that case. Buck's Case

allows affirmance of findings on causal relationship if there is any evidence, including rational inferences "upon which the findings of the [judge] could have been made." Id. at 769-770 (emphasis supplied). Hence, it is one thing to affirm an administrative judge's causal relationship finding that has scant support in the subsidiary findings, but a basis in the record. Id. It is quite another to ignore the structural deficiencies of the decision before us, which completely omits causal relationship findings on the employee's medical evidence, both subsidiary and general. This is especially so where there is contradictory medical evidence on the record or evidence that is susceptible to contrary findings, see Vouniseas's Case, 3 Mass. App. Ct. 133, 140 (1975), and the will-o'-the-wisp "medical evidence" that the majority relies upon in finding causal relationship ranges from nothing more than the employee's own self-serving statement, to a mere diagnosis, speculative opinions, and reports that do not address the lengthy gap period between the impartial examiner's report and the hearing, as found by the judge.[7]

The determination of causal relationship is a finding of fact. Zerofski's Case, 385 Mass. 590, 594 (1982). Since the 1991 amendments to the Workers' Compensation Act, the reviewing board no longer has the ability to make findings of fact. G.L. c. 152, § 11C. Because the administrative judge made no findings on continuing causal relationship, and because the employee's medical evidence is notably devoid of either specific continuing causal relationship opinions or anything else that on its face constitutes a causal relationship opinion to a sufficient degree of medical certainty, we should recommit the case on causal relationship, as well as extent of incapacity. We cannot attempt to step into the shoes of the administrative judge and make those missing findings of fact.

[7] Of the four medical exhibits submitted by the employee to address the gap period after the December 7, 1998 impartial physician's examination, three either predate the § 11A report, (Sucheta Kamath, M.A., CCC/SLP, 10/2/98; Barbara Bruno-Golden, Ed.D, 9/4/98 and 9/10/98), or are contemporaneous with it, (Cathy Stern, OD, FCOVD, 2/19/99). The two reports of Dr. Cowell, 7/29/99 and 9/9/99, that address the gap period are conspicuous for the absence of any causal relationship opinion linking the diagnosis and all the listed symptoms with the 1996 work injury.

A closer look at the employee's evidence reveals that Dr. Cowell's reports of 7/29/99 and 9/9/99 include the employee's complaints, a history and a diagnosis, but no opinion that the multitude of current complaints and the diagnosis are causally related to the work injury.[8] (Exh. 9.) Sucheta Kamath, M.A., a speech and language pathologist, Barbara Bruno-Golden, Ed.D, a neuropsychologist, and Cathy Stern, OD, a behavioral optometrist, variously state only that the employee's symptoms and evaluations are "consistent with" a mild traumatic brain injury, (Exh. 6 at 2), post concussion syndrome associated with hypertension and possible vascular disturbances, (Exh. 7 at 10), and post trauma vision syndrome. (Exh. 7 at 10; Exh. 8 at 3.) These circular statements on their face do no more than assert that the employee's evaluations and symptoms are consistent with the diagnoses. These observations also fail to specifically causally relate the employee's extensive present symptoms and conditions to the employee's 1996 fall. Moreover, the words "consistent with" as used in the three reports are conjectural as, in my opinion, they fall short of the medical certainty necessary to show that it is more likely than not that there is a causal relationship with the work injury. Sevigny's Case, 337 Mass. 747, 750 (1958). See also, Sponatski's Case, 220 Mass. 526, 528 (1915). It is generally accepted that "[e]videntiary standards of reasonable certainty are satisfied if medical testimony is based upon opinion that is more likely than not." 32 C.J.S. Evidence § 648 at 552-553 (1996). Expert testimony that the relation of cause and effect is only "possible, conceivable or reasonable, without more, leaves the issue trembling in the balance." DeFilippo's Case, 284 Mass 531, 534-535 (1933). See Green's Case, 266 Mass 355, 357 (1929)(conjecture or surmise is not proof that a condition is causally related to an injury). It has been explained that "[a]s a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but is not deducible

[8] The nearest thing to a proper causal relationship opinion is set out in Dr. Cowell's first report. (Exh. 9.) But it is a non-starter, as it is not the opinion of the doctor but, rather, the self-serving "Chief Complaint" of this highly intelligent employee. She reported that she had "[r]esidual cognitive and behavioral disruption as the result of a mild traumatic brain injury which occurred on 1/02/96." Dr. Cowell's own statements that the employee has "rehabilitation needs" and special needs" as a result of a "mild traumatic brain injury" is hardly a statement that relates her present constellation of complaints and symptoms to the 1996 injury.

from them as a reasonable inference." Ex Parte Diversey Corp., 742 So. 2d 1250, 1254 (Ala.1999) (emphasis supplied). An employee "must go further than simply to show a state of facts which is as equally consistent with no right to compensation as it is with such right." Sponatski's Case, supra at 528. See Sevigny's Case, supra at 750. In rejecting an expert opinion that it was "conceivable" that a fall hastened a worker's cancer, the court in King's Case, 352 Mass. 488, 491-492 (1967), concluded that the opinion, "expressed no more than a mathematical likelihood that the employee's death was causally related to his accident. . . . That proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable . . . ." Id., citing Tartas's Case, 328 Mass. 585, 587 (1952). Hence, the court in Fitzgibbons's Case, 374 Mass. 633, 636 (1978), asserted that a medical opinion expressed more than a possibility or chance of causal connection when the expert testified that "the employee's medical history and background were more consistent with a diagnosis of psychotic depressive reactions resulting from the prison incident than with a diagnosis of involutional melancholia." Id., emphasis supplied. It is that element of the medical evidence being more consistent with causal relationship than not, or more likely than not, that is absent from the opinions of the employee's experts in the instant case. The words "consistent with" are merely the equivalent of conceivable or reasonable, as they may indicate only forty or fifty percent consistency and, thus, fail to convey that it is more likely or probable that the employee's present complaints and diagnosis are causally related to her 1996 fall. See Tartas's Case, 328 Mass. at 587 ("The claimants cannot prevail if the question is left to guess, surmise, conjecture or speculation, so that the facts established are equally consistent with no right to compensation and with such a right."). See also L. Locke, Workmen's Compensation § 502, at 599 (2d ed. 1981). This shortcoming is all the more troubling where, as here, there are expert opinions, including that of the § 11A examiner, that cast doubt on causal relationship, see Gorrell v. Town of West Boylston, 8 Mass. Worker's Comp. Rep. 78, 79-80 (1994). As the majority concedes, the employee's own experts, Dr. Cowell and Ms. Kamath, "listed" "other conditions." Dr. Cowell reported that her past medical history is "notable for" hypertension and thyroid disease, and Ms. Kamath found her

history of those conditions is "significant". (Exh. 9, 6.) Most significantly, Barbara Bruno-Golden, the employee's neuropsychologist, stated in her September 1998 report that "her neuropsychological evaluation is consistent with Post Concussion Syndrome associated with hypertension and possible vascular disturbances." (Exh. 7 at 10, emphasis supplied.) The judge adopted her speculative "opinion." In his decision, however, the judge omitted the critical words "associated with hypertension and possible vascular disturbances." This part of the expert statement demonstrates her opinion that these other prior and present medical conditions, together with the post concussion syndrome are "consistent with" the evaluation results to some unstated degree. Nonetheless, this statement casts doubt on whether the work injury alone more likely than not is the cause of the present symptoms and condition, when the expert opinion is expressed merely in terms of an evaluation being "consistent with" a post concussion syndrome "associated with" other, ongoing medical problems.[9] In these circumstances, the use of "consistent with" is speculative. Moreover, since the judge's omission of this pivotal part of the

[9] It appears that the employee's experts were not apprised of her entire, extensive medical history of pre-injury treatment for several medical conditions, some of which mirror the complaints and conditions of which she complains presently, including headaches, stress, depression, high blood pressure and fatigue. (Exh. 6, 7.) The insurer's neurologist, Dr. Tandon, set out in great detail a history of treatment of headaches since 1990, long-standing high blood pressure, eating disorder, stress and depression at least three years prior to the injury, high cholesterol management, thyroid enlargement, and failure to take blood pressure and anti-depressant medications both prior to and after the 1996 work injury. (Exh. 10.) Yet the employee may have been less than forthcoming with her own experts, as Sucheta Kamath reported that, prior to the injury, she "was generally very healthy and active." (Exh. 6.) An expert opinion is entitled to no weight where the foundation is based on omissions of material fact, as the history relied upon is crucial to an opinion. Cook v. Stop and Shop Co., 15 Mass. Worker's Comp. Rep. 252, 259 (2001). The judge did not discredit Dr. Tandon's long recitation of this history of several overlapping conditions. It is noteworthy that the evidence of these preexisting conditions, together with Barbara Bruno-Golden's combining of the effects of the postconcussion syndrome and other preexisting, non-work-related medical conditions, as repeated by Dr. Tandon, (Exh. 10 at 5), might satisfy the insurer's burden of producing "the predicates" to the application of § 1(7A) and trigger the analysis of whether the compensable injury remains "a major cause" of the disability or need for treatment. Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 82 (2000); Cook v. Stop & Shop Co., supra at 257-258. But the parties, nearly ten years after the heightened causal relationship element was enacted, showed neither an awareness of the legal principles in effect nor the parameters of the medical dispute under § 11A in their defenses and presentation of medical evidence.

expert opinion is a material error, recommittal is required. Cook v. Stop & Shop Co., 15 Mass. Workers' Comp. Rep. 252, 260 (2001).

Of course, an administrative judge may exercise his discretion and bolster the three speculative opinions and thus "tip the scale" with other facts from the medical and lay record. DeFilippo's Case, supra at 535. See also Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801, 803-804 (1995). But in this case, the judge neither attempted to do so nor gave any indication in the decision that he considered the continuing causal relationship issue, other than to discard the insurer's and § 11A examiner's contradicting opinions. Certainly, it is beyond the statutory role of the reviewing board to attempt to do so.

In these circumstances, where contrary inferences can be drawn from the medical evidence and the required causal relationship findings are absent or deficient, recommittal is not only appropriate, but necessary. In Vouniseas's Case, 3 Mass. App. Ct. 133, 140 (1975), the Appeals Court directed that "[b]road general findings which do not disclose the view taken of the facts will be acceptable only where no contrary inference can be drawn from the evidence. The . . . single member must set out subsidiary findings in a form sufficiently explicit so that the correctness of the general findings may be reviewed." See also, Judkins's Case, 315 Mass. 226, 228 (1943). As we have stated many times, "we should be able to look at these subsidiary findings of fact and clearly understand the logic behind the judge's ultimate conclusion." Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). When the decision before us entirely omits both subsidiary findings and general findings on causal relationship, the decision lacks "reasoned decision making" and fails "to address the issues in a case in a manner enabling this board to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Scheffler's Case, 419 Mass. 251, 258 (1994); Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993).

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Sara Holmes Wilson
Administrative Law Judge

Filed: **October 25, 2001**
MC/jdm