COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 032479-00**

James Pratt	Employee
Transcend Carriers	Employer
Connecticut Indemnity Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, McCarthy and Costigan)

APPEARANCES
William N. Batty, Jr., Esq., for the employee
Gerard J. Powers, Esq., for the insurer

LEVINE, J. The employee appeals from a decision terminating his workers' compensation benefits, because the administrative judge concluded that the employee's industrial injury was no longer a major cause of his neck impairment, within the meaning of G. L. c. 152, § 1(7A).[1] We conclude that the opinion of the § 11A physician satisfied the applicable causation standard under § 1(7A) as a matter of law. We therefore reverse the decision as to causal relationship, and order that the insurer pay § 35 benefits in accordance with the judge's findings on the extent of the employee's incapacity. (Dec. 5.)

On August 8, 2000, while working as a truck driver, the employee injured his neck when a box fell on his head. The employee has not worked since then. (Dec. 3.) The insurer accepted liability and paid § 34 temporary total incapacity benefits. Thereafter, the insurer filed a complaint for modification, which the judge denied at the § 10A conference. The insurer appealed to a full evidentiary hearing. (Dec. 2.)

[1] General Laws c. 152, § 1(7A), provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

At hearing, the employee claimed ongoing § 34 benefits, and the insurer raised the issues of disability and extent of incapacity and § 1(7A) causal relationship. (Dec. 2.) On April 16, 2002, Dr. Anthony Caprio performed a § 11A impartial medical examination. Dr. Caprio expressed his opinion that the employee had a resolved cervical spine strain and resolved questionable post-concussive headaches, as well as chronic neck pain of unknown etiology, but which was secondary to the neck strain aggravating a preexisting asymptomatic degenerative process. (Dec. 4; Statutory Ex. #1.) In his report, Dr. Caprio stated that it is his "conjecture that the previous heretofore degenerative process, which was somewhat quiescent has been aggravated, causing him to have this pain and restricted motion. Therefore, the work related injury was the major, but not necessarily the predominant cause of his ongoing disability." (Statutory Ex. #1.) At his deposition, Dr. Caprio was asked what he meant by his use of the term "conjecture" in his report. Dr. Caprio answered: "It's a guestimation; it's an educated guess; it's a hunch; it's a visceral feeling, a gut feeling." (Dep. 10.) There was then this colloquy between the insurer's counsel and Dr. Caprio:

> Q: Okay. Is it fair to say that that means that it's not based on a reasonable degree of medical certainty?
>
> A: Well, I think the degree of medical certainty takes in all those -- takes in all your experiences including -- and that gives your -- it's the past history of 35 years of practice that gives a physician, an attorney, any professional that gut feeling, This is the way we should go, okay? If you want to call it sound logic, it probably isn't. But in our professions you do certain things that -- you've been there, done that and you think this is -- the visceral feeling, the way to go. I don't know how to say it any clearer than that. And you know that in your practices being professionals. It's not like -- making a house, saying, Okay, you need a 2 by 4 that -- we can't -- we got to put in a 2 by 4.

(Dep. 10-11.) Later in his deposition, Dr. Caprio testified that his opinions were based on a reasonable degree of medical certainty. (Dep. 20.)

The judge concluded that the employee's neck impairment was no longer causally related to his industrial injury, within the applicable standard of causation under § 1(7A).

The judge reasoned that Dr. Caprio's opinion that the industrial injury continued to be "a major cause" of the employee's disability was not based on a reasonable degree of medical certainty:

> Dr. Caprio has indicated that based upon "conjecture" the Employee's previous asymptomatic degenerative process was aggravated causing the employee to have pain and restricted motions. Consequently, based upon this "conjecture" he opines that a major cause of the Employee's disability is his work related injury. The necessary standard, however, is an opinion based upon a reasonable degree of medical certainty. I find that the opinion offered by Dr. Caprio as to the aggravation of the previously asym[p]tomatic degenerative condition does not meet the necessary standard. Consequently, in the absence of a motion to admit additional medical evidence, I find that the Employee has failed to meet his burden of proof under Section 1(7A).

(Dec. 5.) The judge therefore discontinued the employee's weekly benefits as of April 16, 2002, the date of the impartial medical examination, as the employee had not met his burden of proving that his work injury remained a major cause of his medical disability and resulting incapacity. (Dec. 6.)

Although the judge discontinued the employee's benefits, she did make findings on his incapacity. Dr. Caprio restricted the employee from returning to his truck driving, given that he could not turn his head or move his neck. (Dec. 4; Dep. 13.) The judge partially discounted the employee's testimony as to his degree of pain and limitations therefrom. (Dec. 4.) Then, after considering the employee's vocational profile and inability to turn his head, the judge found the employee to be partially incapacitated and assigned a weekly earning capacity of $400.00 (Dec. 4-5.)

We agree with the employee that, on the issue of causation, the judge erroneously failed to accept the overall import of Dr. Caprio's opinion. Dr. Caprio did state in his report that it was his "conjecture" that the degenerative process has been aggravated. However, an expert's opinion must be "considered as a whole to determine whether he is expressing his professional opinion or conclusion that it is more likely than not that there is a causal relationship between the employment and the injury, disability . . . . Use by the doctor of the words 'possible,' 'conceivable,' or 'reasonable' do not fatally flaw his

opinion." L. Locke, Workmen's Compensation 522 (2d. ed. 1981). See also Coughlin v. Bixon, 23 Mass. App. Ct. 639, 645 (1987)(experts' statements reviewed in their entirety).

As recounted above at p. 2, the doctor did not accept the suggestion of insurer's counsel that the doctor's use of the word "conjecture" meant his opinion of causal relationship was not based on a reasonable degree of medical certainty. (Dep. 10.) Instead, Dr. Caprio referred to his 35 years of practice to explain how he reached that opinion. Cf. Hicks v. Boston Medical Ctr., 15 Mass. Workers' Comp. Rep. 1, 8 (2001), aff'd, Single Justice of the Appeals Court (September 26, 2003)(doctor's considerable experience relevant to the admissibility of his opinion). And Dr. Caprio's further response was a statement of the obvious - - that medicine is an imperfect science. Moreover, when he was later asked whether his opinion was based on a reasonable degree of medical certainty, Dr. Caprio answered, without equivocation, "yes." (Dep. 20.)[2] Thus, Dr. Caprio's opinion was not speculative but "the cautious declaration of an opinion which is based upon disputed and disputable facts and conclusions of fact." Walker's Case, 243 Mass. 224, 225 (1922).

The doctor's opinion need not be to a certainty. The standard - - to a reasonable degree of medical certainty - - does not mean that all possibilities, other than the industrial injury, are eliminated. The standard means that the industrial injury was more likely a major cause of the employee's condition than some other cause. See Coughlin, supra (medical malpractice). Locke, supra.[3] See also Riccio, "Does use of the phrase 'to

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[2] Q: And, Doctor, you talked about your experience over the years. Is it fair to say that this report and your opinion including your assessment at the end of the report [, which includes causal relationship,] is based on a reasonable degree of medical certainty?

A: Yes, it is.

(Dep. 20.)

[3] That is why the doctor's testimony - - that he could not "say for certainty" that the employee's present condition was the result of the industrial injury or his pre-existing condition, (Dep. 12-13) - - is of no consequence.

a reasonable degree of medical certainty' create a higher burden of proof in civil cases?" in 6 Mass. Bar Ass'n Section Review, p. 9 (2003). Dr. Caprio's opinion that the work injury was "the major cause" of the ongoing disability, (Statutory Ex. #1), satisfied the employee's burden of proof under § 1(7A).[4] Since Dr. Caprio's opinion was the exclusive prima facie medical testimony on causation, there is no reason to recommit the case for further findings on § 1(7A). Reynolds v. The Rhim Cos., 18 Mass. Workers' Comp. Rep. ___, ___ (July 6, 2004).

Accordingly, we reverse the judge's discontinuance of weekly benefits based on her causal relationship findings. We order that the insurer pay the employee § 35 partial incapacity benefits based on the $400.00 weekly earning capacity found by the judge, said benefits beginning on April 16, 2002 and continuing. (Dec. 5-6.) Pursuant to § 13A(5), the insurer is ordered to pay the employee's counsel a hearing fee in the amount of $4,457.40. See Conroy's Case, 61 Mass. App. Ct. 268, 275-277 (2004); Connolly's Case, 41 Mass. App. Ct. 25, 38 (1996); Mikel v. M.B.T.A., 14 Mass. Workers' Comp. Rep. 84, 92-93 (2000).

So ordered.

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Frederick E. Levine
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Filed: **August 27, 2004**

[4] In fact, the doctor's testimony went beyond what was necessary, as the §1(7A) standard is "a major cause," not "the major cause," as used by the doctor.