MIHALAKOS, J., dissenting in part. Although I agree with the majority's analysis and conclusions in parts I A and II, I respectfully dissent from the majority's conclusion in part II B that the plaintiff, Susan Marandino, failed to prove causation. My disagreement with the majority is twofold. First, I believe that the report by Vincent Santoro, the plaintiff's orthopedic surgeon, is competent evidence on which the workers' compensation commissioner (commissioner) could rely. Second, I believe that the record reveals a sufficient factual basis for Santoro's conclusion.

I

It is well settled that the injured employee bears the burden of proof on causation, which must be met through competent evidence. See, e.g., *Keenan* v. *Union Camp Corp.*, 49 Conn. App. 280, 282, 714 A.2d 60 (1998). In this case, expert medical evidence on causation was necessary because the cause and effect relationship of the work-related arm injury and the subsequent knee injury was not a matter within the common knowledge of the fact finder. The plaintiff, therefore, was required to produce expert evidence establishing causation.

The plaintiff attempted to meet her burden by introducing Santoro's report. The defendants, Prometheus Pharmacy and CNA Risk Services, Inc., do not dispute that Santoro was an expert qualified to provide expert medical evidence establishing causation. The majority contends, citing *DiNuzzo* v. *Dan Perkins Chevrolet Geo, Inc.*, 99 Conn. App. 336, 913 A.2d 483, cert. granted, 281 Conn. 929, 918 A.2d 277 (2007), that Santoro's opinion failed to establish causation because it provided only an ultimate conclusion on that issue without also providing the supporting medical facts from which the conclusion was drawn.[1] I disagree with the majority's belief that the report was required to include the supporting medical facts.

In workers' compensation cases, "the opinions of experts [are] to be received and considered as in other cases generally . . . ." (Internal quotation marks omitted.) *Keenan* v. *Union Camp Corp.*, supra, 49 Conn. App. 284. While I am mindful of the fact that the commissioner is not bound by ordinary common-law or statutory rules of evidence or procedure; see General Statutes § 31-298; a general review of the law concerning the admissibility of expert testimony nevertheless is warranted.

"The trial court has wide discretion in ruling on the admissibility of expert testimony and, unless that discretion has been abused or the error is clear and involves a misconception of the law, its ruling will not be disturbed. . . . In order to render an expert opinion

the witness must be qualified to do so and there must be a factual basis for the opinion. . . . Some facts must be shown as the foundation for an expert's opinion, but there is no rule of law declaring the precise facts which must be proved before such an opinion may be received in evidence. . . . It is rare for this court to find that a trial court has erred in a ruling permitting expert testimony." (Citations omitted; internal quotation marks omitted.) *Madison Hills Ltd. Partnership II* v. *Madison Hills, Inc.*, 35 Conn. App. 81, 93, 644 A.2d 363, cert. denied, 231 Conn. 913, 648 A.2d 153 (1994); see also *Dixon* v. *United Illuminating Co.*, No. 03543 CRB-04-97-03 (April 9, 1998) ("[an] expert must demonstrate a special skill or knowledge, beyond the ken of the average juror, that, as properly applied, would be helpful to the determination of an ultimate issue" [internal quotation marks omitted]).

"The essential facts on which an expert opinion is based are an important consideration in determining the *admissibility* of the expert's opinion. . . . Where the factual basis of an opinion is challenged the question before the court is whether the uncertainties in the essential facts on which the opinion is predicated are such as to make an opinion based on them without substantial value." (Citation omitted; emphasis added; internal quotation marks omitted.) *Glaser* v. *Pullman & Comley, LLC*, 88 Conn. App. 615, 624, 871 A.2d 392 (2005). "Whether sufficient facts are shown as the foundation for the expert's opinion is a preliminary question to be decided by the trial court." Conn. Code Evid. § 7-4 (a), commentary, citing *Liskiewicz* v. *LeBlanc*, 5 Conn. App. 136, 141, 497 A.2d 86 (1985).

In the present case, Santoro's report was received by the commissioner without any challenge by the defendants as to the factual basis on which the report rested. If the defendants wanted to challenge the foundation for Santoro's opinion, they were required to object to the report's introduction. The majority's assertion that Santoro's report was not competent evidence because "testimony of even the most persuasive expert witness cannot be credited if it is not based on facts" relieves the defendants of their burden of objecting to the foundation of Santoro's opinion. Whether Santoro's opinion was based on facts is a preliminary question of admissibility. Once Santoro's report was properly received, the commissioner was entitled to rely on the conclusions set forth in the report if he found it credible. See *Chesler* v. *Derby*, 96 Conn. App. 207, 218, 899 A.2d 624 ("It is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony. . . . The trier may accept or reject, in whole or in part, the testimony of an expert." [Internal quotation marks omitted.]), cert. denied, 280 Conn. 909, 907 A.2d 88 (2006). Deeming the report not competent because it fails to include the supporting medical facts relieves the defendants of their burden

to object to the foundation for the introduction of the report.

Furthermore, I disagree with the majority's conclusion that Santoro's report was based on speculation and conjecture because it did not include any supporting medical facts. I believe that characterization misconstrues our law. Our precedent holds that "[e]xpert opinions must be based on reasonable probabilities rather than mere speculation or conjecture if they are to be admissible . . . . To be reasonably probable, a conclusion must be more likely than not." (Internal quotation marks omitted.) *Card* v. *State*, 57 Conn. App. 134, 138–39, 747 A.2d 32 (2000). Our case law concerning expert testimony grounded in speculation and conjecture concerns situations where an expert was unable to offer a firm conclusion and simply stated something to the effect that there was a fifty-fifty chance or causation was possible. See *Aspiazu* v. *Orgera*, 205 Conn. 623, 632, 535 A.2d 338 (1987) ("[a]ny expert opinion that describes a 'condition' as possible or merely fifty-fifty is based on pure speculation").

The present case is not such a case. The conclusion reached by Santoro was unequivocal: "[The knee injury] is a direct result of her previous work-related trauma and as such is a continuation of her ongoing problems." Santoro's opinion was clear and conclusive. There simply is no indication that his opinion was based on speculation or conjecture, rather than on a reasonable probability. Whether he had a factual basis for making his conclusion is a different inquiry that is properly viewed as a preliminary question of admissibility. The defendants, however, did not question the factual basis for Santoro's conclusion. Once Santoro's report was admitted, the commissioner was entitled to give the report whatever weight he believed was appropriate in light of the report's unknown foundation. See *Chesler* v. *Derby*, supra, 96 Conn. App. 218. I would find that Santoro's clear and unequivocal conclusion was competent evidence on which the commissioner could rely.

II

My second disagreement is with the majority's contention that there are insufficient facts in the record from which causation could be inferred. My review of the record does not support the majority's belief that "[t]here is nothing in Santoro's reports, or in the record, to suggest that the arm injury, rather than some other source, was a substantial factor in bringing about the knee injury."

To prove causation in the present case, the plaintiff bore the burden of providing the commissioner with two distinct pieces of evidence. First, the plaintiff needed to provide the commissioner with competent evidence regarding causation. Second, because the causation at issue in this case is not a matter within the

common knowledge or experience of the average person, she was required to provide expert testimony interpreting the evidence. *Dengler* v. *Special Attention Health Services, Inc.*, 62 Conn. App. 440, 449, 774 A.2d 992 (2001). I believe that the plaintiff met her burden because evidence in the record satisfies the former and Santoro's report satisfies the latter.

Competent evidence means "evidence on which the trier properly can rely and from which it may draw reasonable inferences." Id., 451. My review of the record reveals at least two pieces of competent evidence that could establish causation. First, there are medical reports showing that the plaintiff has a limited range of motion in her right elbow and that she has "chronic limitation and pain in the right forearm." These reports also state that "with any volitional movement, there is shakiness of the right hand and forearm." Second, the plaintiff testified about the manner in which her knee injury occurred, namely, she was hurriedly running up a set of stairs and, because of fear of additional injury to her already injured right elbow, she reached across her body with her left arm to grab a railing located on her right side. Due to the cause and effect relationship of the injuries at issue, a medical expert was needed to draw the necessary inference regarding causation on the basis of the facts in the record. See id., 440.

Santoro certainly could conclude that a preexisting elbow injury that limited the plaintiff's range of motion in her right arm, combined with the manner in which the knee injury occurred, established, to a reasonable degree of medical certainty, that the plaintiff's knee injury was casually related to her preexisting elbow injury. The purpose of expert testimony is to draw inferences from the facts which the fact finder could not draw at all or as reliably. Although it is not entirely clear which facts Santoro relied on in making his conclusion, any attack of the factual basis for Santoro's conclusion, as discussed in part I, is properly done as a preliminary matter challenging the opinion's admissibility. That was not done. The evidence in the record establishes the extent of the preexisting elbow injury and manner in which the knee injury occurred and, consequently, provided the commissioner with sufficient facts from which causation could be inferred. Santoro's report was an expert opinion making the necessary inference. It is outside this court's competency to say that there are not sufficient facts in the record from which an expert could infer causation. Whether the plaintiff's knee injury was casually related to her preexisting elbow injury is a matter for an expert to decide. On the basis of the facts in the record as a whole, Santoro could make that conclusion.

Furthermore, while Santoro's opinion was not a model of clarity because it provided only an ultimate conclusion without also providing supporting facts, the

defendants were entitled to present their own evidence on causation. They could have deposed Santoro or produced their own expert rebutting Santoro's conclusion. They also could have challenged the report's admissibility in light of its omission of foundational facts. They did none of these. In light of the facts in the record and the remedial purpose of the workers' compensation statutory scheme, I believe that the workers' compensation review board properly upheld the factual determinations of the commissioner.

For the reasons given, I respectfully dissent.

[1] I believe that *DiNuzzo* is easily distinguishable from the present case on the basis of the facts of each case. In *DiNuzzo*, the court found that there was no factual basis in the record for the expert's opinion. *DiNuzzo* v. *Dan Perkins Chevrolet Geo, Inc.*, supra, 99 Conn. App. 346. The plaintiff's expert testified that the decedent died of a heart attack caused by atherosclerotic disease, although he never ordered tests to determine whether the decedent, in fact, had atherosclerotic heart disease. Id., 344. The court noted that a thorough review of the record disclosed no evidence, other than the expert's opinion testimony, that the decedent had atherosclerotic heart disease. Id. The expert also testified that he did not examine the decedent's body, that no autopsy had been performed, and that he did not know whether the decedent had a congenital heart defect that could have caused a heart attack. Id. Finally, he concluded that without an autopsy, there was no way to know the exact cause of the decedent's death. Id., 345. On this basis, the court concluded that there was no factual basis to infer causation. Id., 346.

In the present case, and as discussed more fully in part II of my dissent, there was a factual basis from which an expert could infer causation because the record included evidence regarding the plaintiff's preexisting elbow injury and the limitations it bestowed on her range of motion and the facts and circumstances in which her knee injury occurred. From this evidence, an expert was entitled to provide an opinion that the injuries were casually related.