CLARENCE S. NASBY, Employee, v. FAIRWAY FOODS and NAT'L UNION/CRAWFORD & CO., Employer-Insurer, and FAIRWAY FOODS and HOME INS./RISK ENTER. MGMT., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 24, 2001

No. [REDACTED SSN]

HEADNOTES

SETTLEMENTS - INTERPRETATION. Where material terms of the stipulation at issue were ambiguous as to whether the first insurer was liable thereunder to reimburse the second insurer for neck-related medical expenses, and where evidence existed extrinsic to the stipulation to aid in resolving that ambiguity, it was not improper for the compensation judge to consider the extrinsic evidence in interpreting the stipulation, rather than simply construing the stipulation contrary to the drafting party without considering that evidence.

SETTLEMENTS - INTERPRETATION. Where the judge's interpretation of the stipulation at issue was supported by medical records, pleadings, and testimony extrinsic to the terms of the otherwise ambiguous stipulation, the compensation judge's construction of the stipulation for settlement was not clearly erroneous and unsupported by substantial evidence.

CONTRIBUTION & REIMBURSEMENT - SUBSTANTIAL EVIDENCE. Where it would not have been unreasonable for the judge to conclude from the evidence that the employee sustained some injury to his neck in his first as well as his second work-related injury, the compensation judge's award of contribution and reimbursement to the insurer on the employee's second work-related injury was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Wilson, J. and Wheeler, C. J.
Compensation Judge: Paul V. Rieke

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer Home Insurance Company appeal from the compensation judge's award of contribution/reimbursement to insurer National Union Fire Insurance Company. We affirm.

BACKGROUND

On May 16, 1977, Clarence Nasby sustained a personal injury in the course of his employment with Fairway Foods. Mr. Nasby [the employee] was forty-nine years old on that date,

and Fairway Foods [the employer] was insured against workers' compensation liability by Home Insurance Company/Risk Enterprise Management [Home]. On June 1, 1977, the employer and Home [jointly hereafter, Home] filed a report with the Department of Labor and Industry, describing the injury as one to his "[l]eft shoulder, thought to be a pulled muscle."[1] About eight years later, on August 15, 1985, the employee sustained another injury in the course of his employment with Fairway Foods. On that date the employer was insured against workers' compensation liability by National Union Fire Insurance Company/Crawford & Company [hereafter, jointly with the employer, National]. On September 9, 1985, the employee saw occupational medical specialist Dr. P. C. Hoversten, for a primarily low back injury identified as "[o]ngoing since 1975." Dr. Hoversten indicated that the employee had stated "that he developed left shoulder and neck pain" in 1977 and that "[h]e has had several exacerbations of similar pain and symptoms since that time." On October 30, 1985, the employee was examined also by low back specialist Dr. James Gmeiner, who noted that the employee presented "with the onset of low back, lower extremity, and cervical pain in 1975," which symptoms were exacerbated as a result of his work accident in May 1977.

On January 23, 1986, the employee was seen for complaints of "pain through the neck and lower back" by orthopedist Dr. William Ferraraccio. After taking a history from the employee, Dr. Ferraraccio noted that the "lower back difficulties seemed to begin first" and that "[o]ver the years the pain has been well localized to the axial skeleton, both cervical and lumbar." Dr. Ferraraccio diagnosed degenerative arthritis and degenerative disc disease of both the cervical and the lumbar spine. On May 12, 1986, after review of some additional evidence, including some 1974 x-rays of the employee's cervical spine, Dr. Ferraraccio concluded that the employee's cervical difficulties "seemed to begin in 1980 without any particular trauma associated with their onset." On June 18, 1986, the employee filed a Claim Petition, alleging against Home and National entitlement to permanent partial disability compensation, consequent to "injuries to back" on June 9, 1977,[2] and August 15, 1985.

On July 1, 1986, in a letter to National's claims adjuster, Dr. Ferraraccio expressed an opinion that, based on the history he had obtained from the employee, "it seems to me that his lower back difficulties began in 1977" but that "he did not have significant difficulties with the cervical spine" until at least 1980 and more clearly 1985. On October 2, 1986, the employee underwent an independent medical examination for Home by neurologic surgeon Dr. David R. Johnson. In his report dated October 7, 1986, Dr. Johnson indicated that the employee had given him a history of experiencing an "acute onset of low back pain and neck shoulder strap pain" as a consequence of his 1977 work injury. Dr. Johnson indicated that it was his opinion that the employee "had a musculoligamentous strain of his low back and his neck shoulder strap area, and I relate this directly to his accident of June 9, 1977, assuming that is correct." It was Dr. Johnson's opinion that the employee "does have some permanent partial disability," which Dr. Johnson believed to be "entirely due to the June 9, 1977, episode." Dr. Johnson indicated that he did "not feel that [the employee] has any so-called Gillette type of injury, and I do not feel that he has any

[1] We find no contemporaneous medical records are in evidence.

[2] The earlier of the two work injuries here at issue was several times identified as a June 9, 1977, injury rather than a May 16, 1977, injury before being finally fixed at the May 16 date.

permanent partial disability referable to anything that may have occurred some time in the spring or summer of 1985, when he said that his symptoms became more severe."

On October 6, 1986, a day prior to Dr. Johnson's report, the employee underwent an independent medical examination for National by orthopedic surgeon Dr. Michael Davis. In his history, Dr. Davis reported that the employee had "had discomfort in both his neck and low back" following a work injury in September 1975 and that he had "had increased soreness in his neck and low back" following his work injury on May 16, 1977. Dr. Davis indicated also that the employee "thinks he was off work about three and a half weeks" after that injury. He indicated that the employee reported "that slowly over the years his neck and low back became worse," until he finally sought treatment again in 1985. Dr. Davis rated the employee's whole-body permanent partial disability at 10.5% related to the low back and at 10.5% also related to the neck. He indicated that he would apportion liability for disability, as well as for any temporary total disability or required medical care, one-third to the employee's 1975 work injury, one-third to his 1977 work injury, and one-third to a 1985 Gillette-type injury. He indicated also that he believed that the employee had reached maximum medical improvement from the August 1985 injury and was able to return to work full time with restrictions.

Subsequently, by a Stipulation for Settlement filed January 28, 1987, the employee, Home, and National entered into an agreement intended to resolve all of the employee's claims for permanent partial disability benefits relative to both the lumbar and the cervical spine, to the extent of the parties' various positions at the time. On February 9, 1987, an Award on that stipulation was filed.

On August 12, 1987, the employee filed another Claim Petition, alleging entitlement to benefits for permanent total disability continuing from August 1, 1987, stemming from "injuries to his back" on both May 16, 1977, and August 15, 1985. Subsequently, on September 30, 1987, the employee testified by deposition as to his work injuries and his claim. In the course of that testimony, when asked if he had experienced any pain in his upper back or neck following his 1977 injury, the employee responded, "I don't recall at that time, no." The employee indicated that he was off work for about three weeks following that 1977 injury, and when asked if he recalled any neck or upper back symptoms following the injury the employee responded, "Not as far as I can remember, no."

On January 8, 1988, the parties filed a Stipulation for full, final, and complete settlement of all remaining claims with the exception of future medical expenses and permanent partial disability compensation. Paragraph III of that stipulation provided that, on or about May 16, 1977, the employee had sustained a work-related "injury to his back." Paragraph VII of the stipulation provided that, on or about August 15, 1985, the employee had sustained a work-related Gillette-type "injury to his neck and back." Paragraph XIII of the stipulation provided that "the Employer and its Insurers will continue to pay future medical expenses relating to the work-related back injuries of May 16, 1977 and August 15, 1985. Each Insurer agrees to pay one-half of these medical expenses." It is uncontested that the stipulation was drafted by attorneys for National. An Award on this stipulation was filed on February 3, 1988. There is evidence that eight months later, in October 1988, Home made payment of nearly $3,000.00 to National in

reimbursement of 50% of payments National had made for medical treatment to the employee's spine that included treatment to the employee's neck.

The employee eventually incurred certain medical expense for treatment to his low back and neck, and on July 1, 1994, he filed a Claim Petition seeking National's payment of those expenses based on the employee's August 1985 Gillette neck and back injury. That petition was subsequently struck from the calendar for the employee's failure to provide certain documentation requested at a settlement conference. On August 14, 1997, the employee filed an Amended Claim Petition, seeking medical benefits against both Home and National, based on a "back injury and Gillette neck" on May 16, 1997, and August 15, 1985. National answered alleging that the petition failed for lack of medical support, and Home answered denying any liability for any neck injury. On October 21, 1997, National petitioned for a Temporary Order, based in part on the Stipulation for Settlement filed January 1988, and the requested Temporary Order was issued and filed October 29, 1997. In January of 1998, pursuant to that Temporary Order, the parties entered into yet another full, final, and complete Stipulation for Settlement, closing out all claims by the employee except future medical claims, against the employer and "Home . . . arising out of the alleged injury of May 16, 1977 to the back" and against the employer and "National . . . arising out of the alleged injury of August 15, 1985 to the back." In that Stipulation, National reserved its right to obtain contribution and reimbursement from Home. An Award on this stipulation was filed February 20, 1998.

On January 20, 1999, National filed a Petition for Contribution and/or Reimbursement, seeking reimbursement of $6,169.74 on a total medical expense bill of $12, 339.49, based on its stipulations for settlement of record. In its Answer to the petition, filed February 1, 1999, Home declined to reimburse payment for any treatment to the employee's neck, which Home believed to constitute the majority of the treatment at issue. Home asserted that, while under the February 1987 Award on Stipulation the parties had separately stipulated to back injuries on both May 16, 1977, and August 15, 1985, under the Stipulation for Settlement approved on February 4, 1988, National had also stipulated to a neck injury on August 15, 1985. "It was agreed," Home asserted, "in paragraph XIII of that stipulation that the parties would apportion medical expenses related to the back," not to the neck. National subsequently withdrew its January 1999 petition in order to consolidate issues in the case.

On June 8, 1999, deposition testimony was take from Judge Timothy McManus, who had been an attorney for National at the time of the employee's 1988 Stipulation for Settlement and instrumental in the drafting of that stipulation. Judge McManus testified in part that "the law back then did not delineate between the neck and back in that the spinal cord was considered one unit," that "[b]ack then, back and neck were sometimes used, sometimes they weren't." He suggested that this was resulting in some confusion and that therefore, if the lower end of the spine were intended to be distinguished from the upper end, the normal language would have been "back only" or "neck only" (emphasis added).

On August 25, 1999, deposition testimony was taken from Craig Larsen, who had been an attorney for Home at the time of the employee's 1988 Stipulation for Settlement. Mr. Larsen testified in part that, while Home was prepared to split the expenses of treatment for the employee's low back, and while Home may even have been prepared to split expenses for

treatment to the employee's back and neck combined, Home was not agreeing to split the expenses of treatment to the employee's neck alone. He suggested also that, even if Home had split the costs of treatment to the employee's neck at or near the time of the 1988 settlement, it would not necessarily follow that they intended to reimburse future cervical spine medical expenses just because they initially did so.

On September 10, 1999, deposition testimony was taken from Julie Spurbeck, who had been a claims adjuster for Home at the time of the employee's 1988 Stipulation for Settlement. Ms. Spurbeck testified in part that in her experience the term "back" would not have included "neck" in stipulations in 1988. She testified that, contrary to what might be inferred from the testimony of Mr. Larsen, she would not have been inclined to reimburse half of any expense related to the neck, even in circumstances where the neck treatment was simultaneous with low back treatment. She suggested that the most efficient and fair reimbursement in those circumstances would be for Home to reimburse 25% of the total bill–excluding the half related to the neck and dividing the half related to the low back. She testified that, should the record disclose that she made any 50/50 reimbursements on treatment to the employee's neck,

> either one of two things may have happened . . . . Either I did not read the stipulation carefully enough to see that the neck and back was National Union Fire and not both. And, secondly, I may have been busy and overlooked the fact that treatment was for both and inadvertently paid half. It could have been either way.

At the suggestion of Home's attorney, Ms. Spurbeck agreed that another possibility might be that she didn't have the medical records underlying the bill.

On September 13, 1999, deposition testimony was taken also from Renate Richter, a former claims adjuster for National, who had been involved in the employee's 1988 Stipulation for Settlement. Ms. Richter testified in part that it was her understanding at the time of that settlement that the case was being settled on an fifty-fifty basis with regard to the whole back, including both low back and neck. She testified that, to that end, National had compromised its position that it was liable for only one-third of the employee's disability and consequent benefits, a position based on the October 1986 opinion of Dr. Davis. She testified that National would not have agreed to enter into a Stipulation for Settlement that did not address who would be paying for treatment to the employee's neck.

On January 24, 2000, National filed an Amended Petition for Contribution and/or Reimbursement. In that petition, National contended (1) that the employee's May 1977 work injury included a neck injury, (2) that the parties' prior stipulations for settlement, supported by the employee's medical records and reports, required Home to reimburse National for 50% of all medical care and treatment expenses after August 15, 1985, and (3) that, if the 1988 stipulation were to be found ambiguous as to obligation for payment of future cervical spine treatment, National is entitled to an apportionment of liability two-thirds against Home and one-third against National for all benefits paid by National after August 15, 1985, based on the October 6, 1986, IME report of Dr. Davis.

The matter eventually came on for hearing on November 7, 2000, on the sole issue of National's entitlement to contribution/reimbursement of 50% of all medical expenses outlined in paragraph XIV of National's January 24, 2000, Amended Petition. At hearing, attorneys for both National and Home contended that the terms of the 1988 Stipulation for Settlement regarding obligation for the employee's neck disability were unambiguous. National contended that Home was clearly obligated under the stipulation to pay for 50% of all medical expenses, including treatment for the employee's neck; Home contended that clearly it was obligated under the stipulation to pay 50% of only treatment costs related to the employee's "back," National being solely liable for the neck treatment. To simplify accounting, Home essentially agreed to pay 25% of all billings for treatment to both the low back and neck. No direct testimony was taken at hearing, but included in evidence presented at hearing were the depositions of the employee in September of 1987, of former National attorney Judge McManus in June of 1999, of the employee again in August of 1999, of former Home claims adjuster Spurbeck in September of 1999, and of former National claims adjuster Richter also in September of 1999.

By Findings and Order filed November 9, 2000, the compensation judge concluded in part in Finding 9 that, contrary to the positions of both insurers, "[w]hen a total and complete reading of the settlement agreement is made, it cannot be concluded that the agreement regarding payment of the medical expenses is unambiguous." In Finding 10, the judge went on to conclude that "the preponderance of the evidence of record proves that the intent of the insurers by entering into this agreement was to have each of the insurers pay 50% of all the medical expenses relating to the employee's back including those relating to the neck." On that conclusion the judge granted National's Petition for Contribution/Reimbursement and ordered Home to reimburse National for 50% of medical expenses related to the employee's back injuries, including medical expenses for treatment to the neck. Home appeals.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Id.

DECISION

On appeal, Home contends the following: (1) that the compensation judge erred as a matter of law in failing to construe the 1988 stipulation to unambiguously require 50% reimbursement only with regard to low back treatment; (2) that, in the alternative, to the extent that the stipulation may have been ambiguous, the judge erred as a matter of law in failing to construe the stipulation in favor of Home as the nondrafting party; (3) that the extrinsic facts on which the judge based his construction of the stipulation and his grant of National's contribution claim did not constitute substantial evidentiary support for those conclusions.

Ambiguity in the Stipulation

At Finding 9, the compensation judge concluded that "the provisions of the January 1988 Stipulation for Settlement regarding payment of medical expenses [are] ambiguous"–so ambiguous that, once "a total and complete reading of the settlement agreement is made, it cannot be concluded that the agreement regarding payment of the medical expenses is unambiguous" (emphasis added). Home contends that the stipulation at issue unambiguously requires reimbursement only for treatment of parts of the back exclusive of the neck. Home bases its position in large part on the fact that, whereas Paragraph III of the Stipulation establishes that "on or about May 16, 1977 the employee herein sustained an injury to his back" and Paragraph VII of the Stipulation establishes that "on or about August 15, 1985, the Employee herein sustained a Gillette injury to his neck *and* back, Paragraph XIII of the Stipulation provides that the insurers were ultimately agreeing to share liability only for "expenses relating to the work-related back injuries of May 16, 1977 and August 15, 1985" (emphases added). Home argues that the use of the language "neck and" in Paragraph VII while not in either Paragraph III or Paragraph XIII unambiguously demonstrates that "neck" is not to be presumed part of "back" for purposes of this stipulation. We are not persuaded.

It was in our view not unreasonable for the compensation judge to find the language at issue ambiguous as to the reimbursability of the employee's neck treatment. This is true particularly in light of the conflicting sworn testimonies of those several people involved in the settlement at issue--Judge McManus, Craig Larsen, Renate Richter, Julie Spurbeck–as to their understanding of the meaning of the term "back" in stipulations at the time. Therefore we affirm the judge's conclusion that the stipulation was materially ambiguous.

Construction Against the Drafter

In Finding 9, in immediate follow-up to his statement that "it cannot be concluded that the agreement regarding payment of the medical expenses is unambiguous," the compensation judge went on to explain,

> To accept Home's assertions would mean that the agreement nowhere provided for liability [for] the medical expenses relating to the "neck" and clearly uncertainties regarding these disputed terms arise when assuming that not only the parties meant such claim to

> be unattended but that a Compensation Judge would agree to approve such an agreement [sic].

The compensation judge then went on to state in Finding 10[3] that "the preponderance of the evidence of record proves that the intent of the insurers by entering into this agreement was to have each of the insurers pay 50% of all the medical expenses relating to the employee's back including those relating to the neck." Citing case law, Home contends that, once he had so unequivocally found the stipulation to be ambiguous in its material terms, the judge was legally bound to construe the stipulation in favor of the nondrafting party–which in this case was Home. We are not persuaded.

In support of its position that ambiguous workers' compensation stipulations are to be construed in favor of the nondrafting party, Home cites Peterson v. Honeywell, Inc., slip op. (W.C.C.A. June 26, 1996), and McLaughlin v. Crenlo, Inc., slip op. (W.C.C.A. Oct. 8, 1992). We find these cases distinguishable. In Peterson, the basis of the ambiguity in the stipulation lay in the fact that certain separate provisions of the stipulation were, by their own separately unambiguous language, apparently diametrically contradictory. The stipulation expressly provided for the close-out of chiropractic expenses while expressly providing that future chiropractic care was to be limited to twelve visits a year. Significantly, the court noted that "the employer offered absolutely no evidence, only argument, to support its interpretation of the stipulation." Absent any evidence extrinsic to the language of the stipulation itself, the court had no alternative but to construe the stipulation in the manner it did, "[b]ecause ambiguities in a contract are to be construed against the drafter of the contract, and because the only evidence bearing on the issue indicates that a representative of the employer drafted" (emphasis added) the stipulation at issue. This virtual contradiction between separate provisions in the stipulation in Peterson–a contradiction not resolvable by assessment of extrinsic evidence--is an entirely different sort of "ambiguity" from that which exists as to the understood meaning of the term "back" in the stipulation here at issue--a meaning that might be clarified by additional evidence.

McLaughlin is also distinguishable. The issue in that case had to do with whether language in the stipulation at issue closed out claims based on a previous work injury with the same employer. While agreeing with the compensation judge that any ambiguity in the stipulation at issue should be construed against the drafter, the court in McLaughlin appears to have based its decision primarily on supreme court case law precedent[4] discouraging stipulations that purport to close out benefits too broadly beyond those related to a specified injury. Clearly the courts in both Peterson and McLaughlin were willing to resolve the ambiguities there at issue by looking outside the language of the respective stipulations, if resolution could be accomplished by that means. In the present case, it was also appropriate and proper for the court to seek, as it did, resolution of the ambiguity at issue in evidence extrinsic to the mere language of the stipulation.

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[3] There are two Finding 10 in the compensation judge's decision; our reference here is to the first Finding 10.

[4] Sweep v. Hanson Silo Co., 391 N.W.2d 817, 39 W.C.D. 51 (Minn. 1986).

Substantial Evidentiary Support

In support of his construction of the stipulation at issue, the compensation judge cited five "primary evidentiary factors": (1) pre-October 1988 medical records and reports evidencing Home's reimbursement for cervical as well as lumbar treatment expenses; (2) the employee's May 1986 and August 1987 claims against both insurers for benefits related to "back" injuries; (3) National's claims adjuster's May 17, 1988, letter to Home's attorney, implying that Home might be expecting to reimburse half of all medical expenses; (4) National's attorney's November 25, 1987, letter to Home's attorney, implying that the two insurers intended to split payment of the medical bills; and (5) the testimony of National's claims adjuster Renate Richter, whose presumption was that the language "back injury" in the stipulation encompassed the whole back, particularly in light of the fact that National had received Dr. Davis's IME report indicating that it was responsible for only 33% of the employee's permanent partial disability, which National had been willing to compromise to 50%. Home contends that records of its initial reimbursement for neck treatment are properly rebutted by the testimony of claims representative Spurbeck that such payments were made under a mistake of fact. Home suggests further that the judge's focusing on the employee's allegation of a mere "back" injury even against National in two of his claim petitions unfairly ignores numerous other pleadings in which the employee clearly distinguished the 1985 injury as one also including a neck injury. Home also suggests that the post-stipulation letters from National's claims adjuster Richter and attorney McManus prove no liability on the part of Home. Finally, Home contends that the actual testimony of Ms. Richter as to the meaning of "back" in the stipulation was an improper offering of a legal opinion and that the opinion of Dr. Davis on which that testimony relied was without adequate foundation. We are not persuaded.

We agree that the post stipulation letters of National's agents to Home's attorney, while they purport to hold out National's expectation of 50/50 reimbursement, do not, very persuasively at least, demonstrate Home's understanding or acceptance of a corresponding obligation. The other three factors listed by the judge appear to us more substantial, however. Evidence that Home initially reimbursed half of the employee's neck-related expenses could be considered by the compensation judge to be evidence that Home understood an obligation to do so under the stipulation. Ms. Spurbeck's testimony that that early reimbursement was made under a mistake of fact was evidence that the compensation judge, as finder of fact, had full discretion either to credit or not to credit in construing the parties' apparent agreement under the stipulation. See Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988) (assessment of a witness's credibility is the unique function of the trier of fact). The only pleading specifically referenced by Home as an example of one in which the employee's neck condition is distinguished from his back condition is the 1988 stipulation itself, which clearly has little usefulness as extrinsic evidence for its own construction. Nor do we consider the testimony of Ms. Richter, as to her understanding of the term "back" at the time of the 1988 stipulation, a legal opinion improperly offered. That testimony was in this case consulted only as secondary extrinsic evidence–i.e., only after the terms themselves of the stipulation were found to be ambiguous under a more strictly legal construction. Once the judge found it necessary to resort to extrinsic factual evidence in order to construe the agreement implied in the stipulation, the testimony of participants in that agreement as to what they understood to be the meaning of its terms was all properly considerable. That the judge elected to credit and to weigh Ms. Richter's

testimony more heavily than he did Ms. Spurbeck's was the reasonable prerogative of the judge. We conclude that it was not unreasonable for the compensation judge to construe the stipulation as he did.

Having construed the stipulation in favor of National, the compensation judge awarded National the contribution/reimbursement requested. Home also contends, finally, that, even aside from any issues as to construction of the stipulation, the judge's award of benefits for any contribution to a neck injury by Home was itself unsupported by substantial evidence. Home argues (1) that National introduced in support of its position no medical records contemporaneous with the 1977 work injury or its treatment, (2) that the employee testified that he had no neck-related injury in 1977, and (3) that the medical opinions of Drs. Davis and Johnson, that the employee sustained a neck injury at that time, are without adequate foundation, in light of the employee's testimony and in the absence of any records contemporaneous with the injury. Once again, we are not persuaded.

The employee rendered his testimony in September 1987. Most accurately, his testimony at that time was not that he had sustained no neck-related injury in 1977 but that he "d[id]n't recall" "any pain in the upper back or in the neck," "[n]ot as far as I can remember." A year less distant from the injury, however, in October 1986, the employee evidently reported to both Dr. Davis and Dr. Johnson that his 1977 injury had cervical components. These doctors' records are fairly detailed, and there is no reason to suppose that specific materials like these were invented or otherwise reported by mistake. Particularly given the sequence of the two medical reports and the employee's deposition, it was not unreasonable for the compensation judge to credit the medical reports as evidencing more accurate recollection on the part of the employee, contrary to Home's argument as to foundation. While we acknowledge that the 1986 medical reports of Drs. Johnson and Davis are fairly minimal evidence of neck injury in 1977, we conclude that they are, based as they are on the employee's own history of his condition, sufficiently substantial evidence to support the compensation judge's award of contribution in this case. See Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985) (a trier of fact's choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence). This is particularly true in that the 1988 Stipulation for Settlement has been construed to imply a concession by Home of liability for neck-related benefits.

Because they were legally proper and not unreasonable in light of the evidence, we affirm the compensation judge's construction of the employee's 1988 Stipulation for Settlement and the judge's consequent grant of National's Petition for Contribution and/or Reimbursement. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.