

J. C. v. Richburg Builders

(October 9, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

J. C.

Opinion No. 37R-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Richburg Builders/Acadia

For: Patricia Moulton Powden
Commissioner

State File No. K-06947

**RULING ON CLAIMANT'S MOTION FOR RECONSIDERATION, OR IN THE
ALTERNATIVE, FOR ABEYANCE AND REOPENING**

Introduction

Claimant moves for reconsideration, or in the alternative, for abeyance and reopening of the Department's August 15, 2006 decision regarding the determination that the Claimant's September 23, 2005 fusion surgery was not reasonable medical treatment. Claimant asserts that the Department must reconsider or delay its decision because the Claimant has maintained an improved condition since the September 23, 2003 fusion surgery. Claimant argues that, in light of precedent and relevant expert testimony, this sustained improvement weighs heavily when assessing the reasonableness of the contested surgery. As such, Claimant contends that the Department should reconsider its decision or reopen the Claimant's medical records for expert medical reevaluation.

Background

When considering the conflicting expert opinions, the Department applied the following four-factor test found in *Miller v. Cornwall Orchards* in its August 15, 2006 decision: 1) length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. Opinion No. WC 20- 97 (1997).

Focusing on the third and fourth criteria, the Department reasoned that the factors more heavily favored the Defendant. The Department found the Claimant's treating physician's recommendation for surgery was unpersuasive for two main reasons. First, prior test results failed to indicate the surgery was reasonable. Second, the treating physician failed to thoroughly review all of the Claimant's medical records before recommending surgery. Additionally, after further testing and careful review of all medical records, the Defendant's experts found that cervical fusion surgery was not reasonable medical treatment pursuant to 21 V.S.A. § 601. As a result, the Department held Claimant's cervical fusion surgery to be not reasonable under the Act.

Analysis

Claimant now argues that his sustained, post-surgical improvement tips the balance in favor of finding that the cervical fusion surgery was a reasonable medical treatment. (Claimant's Motion at 4.) While Claimant is correct that a positive post-operative result is one factor to be considered, it does not "dictate a result." *R.W. v. Holstein Associates of USA*. Opinion No. 02-05WC (2005). It is simply one factor to be considered and in this case an unreliable one because it is largely based on subjective reports.

Although it is true that "[a] treatment does not become unreasonable simply because it will not resolve all the claimant's complaints, it cannot be accepted as reasonable when it lacks an objective basis or foundation." *Clement v. National Hanger Corp.*, Opinion No. 15-02WC (2002). Even if I accepted Claimant's report that the surgical result has been promising, this one factor does not overcome the *Miller* analysis, which leads to the conclusion that the surgery is not compensable.

Conclusion

Therefore, Claimant's Motion for Reconsideration or, in the Alternative, for Abeyance and Reopening is DENIED.

Dated at Montpelier, Vermont this 9th day of October 2006.

Patricia Moulton Powden
Commissioner

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DEPARTMENT OF LABOR**

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J. C.

By: Margaret A. Mangan
Hearing Officer

v.

Richburg Builders

For: Patricia Moulton Powden
Commissioner

State File No: K-06947

Hearing held on January 24, 2006 in Montpelier, Vermont
Deposition of Dr. Phillips taken on January 30, 2006
Record closed on June 20, 2006

COUNSEL:

Christopher J. McVeigh, Esq., for the Claimant
Eric A. Johnson, Esq., for the Defendant

ISSUES:

1. Whether Acadia waived its right to discontinue payment.
2. Whether Claimant's cervical fusion surgery is reasonable medical treatment.
3. Whether Claimant is entitled to additional Permanent Partial Impairment Benefits as a result of his cervical fusion surgery.
4. Whether Claimant is entitled to attorney fees and costs.

EXHIBITS:

1. Joint Medical Exhibit. Volumes I, II, and III.
2. Deposition of Joseph M. Phillips, M.D.

STATEMENT OF FACTS:

1. Claimant began working for Richburg Builders on or about July 1994. At all times relevant to this action, Defendant Richburg Builders was Claimant's "employer" and Claimant John Chittenden was Defendant's "employee" within the meaning of the Vermont Workers' Compensation Act, 21 V.S.A. § 601.
2. Acadia was the workers' compensation carrier on the risk in the calendar year 1996.
3. On or about August 5, 1996, Claimant reported to his supervisor that he hurt his back while carrying shingle bundles up a ladder to the roof of a two-story pitched colonial house. Claimant felt a pull in his lower back and leaned forward with shingle bundle resting against his neck. Claimant was forty-seven years old at time of injury.
4. The Department received the Employer's First Report of Injury (Form 1) on October 4, 1996. The injury noted on the Form 1 was for Claimant's back.
5. Claimant later corrected the date of injury from June 5, 1996 to August 5, 1996.
6. The parties entered into an Agreement for Temporary Total Disability Compensation (Form 21) for coverage beginning October 21, 1996. Acadia did not investigate prior medical records or challenge the work-related causation of the neck pain that was being treated in addition to the lower back pain.
7. After suffering the work-related injury, Claimant continued working for Richburg Builders until he stopped on October 22, 1996. He never returned to work for Richburg Builders. Claimant did not return to work in 1997, 1998, 1999, and 2000.
8. Claimant had an MRI of his lumbar spine taken on January 8, 1997. The radiologist concluded that Claimant's MRI showed evidence of a herniated disc at the L5-S1 level. On or about January 10, 1997, Claimant was referred to neurosurgeon Dr. Phillips by Dr. John A. Savoy who wanted a second opinion on findings of Bilateral S1 radiculopathies.
9. Claimant had an MRI of his cervical spine taken on March 11, 1997. The radiologist concluded that there was no evidence of a herniated disc or spinal stenosis. He did find mild to moderate vertebral joint spurring at the level of C5-6.
10. On April 2, 1997, after reviewing Claimant's MRI of his lumbar spine, Dr. Phillips began treating Claimant for a work-related injury resulting in lower back and neck pain. Dr. Phillips diagnosed Claimant with stenosis of the L5-S1 level and thickening of the yellow ligament at L4-5. Dr. Phillips recommended a

laminectomy, L4 through L5, with foraminotomies to decompress all roots responsible for Claimant's array of symptoms.

11. First Surgery: On May 6, 1997, Dr. Phillips performed the first lumbar spine surgery (L4-S1 foraminotomies) on Claimant for low back symptoms. Postoperatively, Claimant's pain relief lasted about three months.
12. Second Surgery: On January 22, 1998, Dr. Phillips performed the first of four cervical surgeries: a C2 decompression. Claimant did not obtain much pain relief. Acadia did not investigate prior medical records or challenge the work-related causation of neck pain. Acadia paid medical, surgical and temporary total disability benefits associated with that surgery.
13. On May 14, 1998, Dr. Susan Hetman of Immediate Health Care, performed a Permanent Partial Impairment Evaluation of Claimant that rated him with a 10% whole person permanent impairment for his lumbar spine injury.
14. Dr. Mark Bucksbaum performed an examination of the Claimant on August 4, 2000, that resulted in a rating of 15% whole person impairment for his cervical spine injury.
15. Acadia filed an Agreement for Permanent Partial Disability Compensation (Form 22) starting on July 11, 2000. Acadia accepted the whole person impairment ratings for the lower back and cervical injury for a total rating of 25%.
16. Third Surgery: On June 2, 1998, Dr. Phillips performed a second cervical surgery that involved bilateral ganglionectomies at the C2 level. Claimant obtained better results but the pain relief was short-lived. Acadia paid medical, surgical and temporary total disability benefits associated with that surgery.
17. Fourth Surgery: On November 12, 1998, Claimant's third cervical surgery involved foraminotomies at the C4-5, 5-6, and 6-7 levels and was performed by Dr. Phillips. Claimant noted no improvement in neck pain and arm symptoms. Acadia did not investigate prior medical records or challenge the work-related causation of neck pain. Acadia paid temporary total disability benefits.
18. After the third cervical surgery provided no pain relief to Claimant, during a follow-up examination on June 16, 1999, Dr. Phillips noted that he was "certainly of the mind not to advocate surgical considerations at all."
19. On October 18, 1999, Claimant hurt his back while lifting a trash can at home. He went to Dr. Phillips who, after reviewing an MRI showing a more "lateralized disc herniation" at L4-L5, recommended a second lumbar surgery.
20. Fifth Surgery: On January 20, 2000, Claimant underwent a fifth surgery, a second lumbar surgery performed by Dr. Phillips. This fifth surgery involved a microdiscectomy and repeat laminectomy at the L4-5 level. Acadia paid

medical, surgical and temporary total disability benefits associated with that surgery.

21. Claimant returned to work in July 2000. Claimant was self-employed performing light carpentry, household repairs, lawn mowing and other small-scale household jobs, despite continuing back pain and headaches.
22. In December 2002, Claimant returned to Dr. Bucksbaum for pain treatment. Dr. Bucksbaum changed Claimant's medication and recommended Claimant return to Dr. Phillips for further evaluation.
23. Dr. Bucksbaum ordered an MRI of Claimant's cervical spine that was taken on April 4, 2003. The MRI revealed degenerative disc changes at the C5-6 and C6-7 levels, but the cord and canal were normal with no indication of cord compression or abnormal intramedullary signal.
24. Dr. Phillips recommended cervical fusion surgery for pain reduction after conducting a physical exam of Claimant on May 6, 2003 during which he noted that Claimant had "diminished absent biceps" reflexes on the right. Dr. Phillips recommended an anterior discectomy fusion to relieve symptoms relating to reactive muscle spasm associated with microscopic instability at that level.
25. July 31, 2003, Acadia sent Claimant to Dr. Gennaro for an Independent Medical Examination (IME) and for second opinion on the recommended cervical fusion surgery. Dr. Gennaro examined all prior medical records and noted most recent examination by Dr. Phillips was missing. On the information provided, Dr. Gennaro opined that he did not have adequate information to make the "conclusion whether or not surgery would be beneficial to this gentleman. I am not convinced that cervical radiculopathy is fully established and would recommend that he undergo an EMG nerve conduction study."
26. On August 8, 2003, Dr. Gennaro received the missing pages from Dr. Phillips's report and again Dr. Gennaro reached the same conclusion. Contrary to Dr. Phillips's report, Dr. Gennaro found no indication of an absent biceps reflex (even though there are indications of weakness), disc herniation, thecal sac or nerve root encroachment that would suggest surgery would provide relief. Dr. Gennaro concluded that there is "insufficient evidence to support that additional surgical procedure such as the recommended anterior inner body fusion discectomy at C5-6 with a fusion is likely to mitigate his symptoms." Furthermore, Dr. Gennaro noted, "multiple previous surgical interventions to this Claimant's neck create well-understood conditions that repeat surgery has a much higher risk of complications."
27. Dr. Ball reviewed Claimant's medical history and conducted a physical examination on December 12, 2004. Dr. Ball concluded that Claimant's x-rays show no significant central canal stenosis, no evidence of instability, and no radicular or myelopathic symptoms. Thus, Dr. Ball opined that "the likelihood of surgery helping here is not high."

28. Claims adjuster Susan Ward for Acadia filed, and the Department received on December 4, 2003, a Denial Of Workers' Compensation Benefits (Form 2) to deny the cervical fusion surgery recommended by Dr. Phillips. The denial was based on Dr. Gennaro's finding that fusion surgery would not provide pain relief for the Claimant. This denial was not based upon causation.
29. Claimant's other treating physician, Dr. Bucksbaum, ordered Claimant to undergo MRI's, on April 4, 2003 and on March 25, 2004. The comparison report by the radiologist showed no cord compression or abnormal intramedullary signal. The radiologist concluded, "stable appearance of disc/osteophytes in the lower cervical spine. No evidence of new disc herniation. No visible impingement of the spinal cord."
30. Dr. Drukteinis, Board certified in Psychiatry and Neurology with added qualifications in Forensic Psychiatry, conducted a psychiatric evaluation of Claimant on March 22, 2004 at the behest of Susan Ward, claims adjuster from Acadia. After evaluating Claimant's entire medical history, a one-and-a-half hour interview, and administration of ten psychological tests, Dr. Drukteinis concluded, "the patient is likely to be preoccupied with bodily functions and health, tending at times to overreact to real illness and to express excessive complaints about relatively minor ailments. Not untypically, he will exhibit symptoms somewhat dramatically, gaining attention and support of others in the process. These displays suggest that the patient gains some special rewards in being ill and in distress."
31. On April 28, 2004, Acadia resumed payment of temporary total disability benefits, although it did not file a new Form 21.
32. Claimant saw Dr. Phillips complaining about frequent urination. Dr. Phillips suggested that it was related to cervical condition. He diagnosed radiculopathy and recommended cervical fusion surgery.
33. The report from Dr. Phillips's physical examination of Claimant on February 23, 2005, states that in general Claimant's biceps reflexes are good with the exception of "some diminished biceps on the right compared with the left." Dr. Phillips recommends nerve conduction velocity studies to determine whether to rule out carpal tunnel syndrome as a possible source of Claimant's various array of symptoms; he refers Claimant to Dr. Ayers. Dr. Phillips again recommends a cervical fusion for pain.
34. Dr. Ayers performed an ENMG nerve conduction study. In his March 7, 2005 evaluation he concluded that there was no evidence for peripheral compression neuropathy, plexopathy or radiculopathy.

35. Dr. Gennaro conducted a second IME on April 22, 2005, almost two years after Claimant's first IME with Dr. Gennaro. Dr. Gennaro noted that Claimant's physical condition and diagnostic studies were unchanged but his symptomatic complaints had intensified. Dr. Gennaro reiterated his earlier opinion that cervical fusion surgery would be unlikely to help Claimant's symptoms because Claimant has diffuse cervical degenerative disk disease, has had multiple surgeries on his cervical spine, changes in his cervical musculature, and EMG nerve conduction studies on multiple occasions have not demonstrated peripheral nerve compression neuropathy, cervical radiculopathy, or upper extremity polyneuropathy. Dr. Gennaro opined that Claimant was at a medical end result with the exception of on-going palliative care for his chronic pain condition. Because Claimant had reached maximum medical improvement with sustained a residual partial permanent impairment for both his cervical and lumbar spines, he rated Claimant at an 8% permanent impairment according to the AMA Guides Fifth Edition—DRE Cervical Category II and an 8% permanent impairment --DRE Lumbar Category II, for a combined whole person impairment of 15%.
36. Dr. Phillips asserts that Claimant's complaint of urinary frequency probably does not come from his lumbar spine but is "more likely from the cervical area" on May 10, 2005. However, Dr. Phillips does not provide any explanation for this assertion but that Claimant may have a small bladder. Dr. Phillips does note that he will proceed with the fusion surgery to alleviate Claimant's neck pain.
37. Effective May 29, 2005, Acadia Claims adjuster Susan Ward filed an Employer's Notice of Intention to Discontinue Payments (Form 27) based upon Dr. Gennaro's finding that Claimant had reached a medical end result. Additionally, the Form 27 stated that there was "no additional Permanent Partial Disability due." The Commissioner approved the Form 27 on May 26, 2005.
38. On July 7, 2005, in a supplemental letter to his review of Claimant's medical records to Attorney Johnson, Dr. Gennaro cites the results of the EMG study and MRIs to refute Dr. Phillips reasoning. Dr. Gennaro also opines that Claimant's symptoms result from Claimant's depressive disorder, somatization, and symptom magnification.
39. Sixth Surgery: On September 23, 2005, Dr. Phillips performed a fourth cervical surgery on Claimant. On the pre-operative statement, Dr. Phillips described condition as cord compression and radiculopathy despite results of MRIs, EMG, x-rays and medical expert opinions to the contrary. Although Claimant still has headaches, Claimant claims more range of movements in his neck, less pain, and lower intake of oxycodone after the cervical fusion surgery.
40. On November 18, 2005, Dr. Bucksbaum performed another examination of Claimant and increased the previous whole person impairment rating to 21% due to the additional surgery performed on January 20, 2000.

41. Dr. Gennaro opined that Claimant's cervical fusion surgery could not be determined successful until a full year passed without a decrease in the initial post-operative relief that Claimant experienced.

CONCLUSIONS OF LAW:

1. Claimant argues that Acadia did not meet its burden of proof to discontinue payments; the Department erred when it approved Acadia's Form 27, because Acadia waived its opportunity to deny payment by not filing within 21 days; and, the cervical spine fusion is reasonable medical treatment.
2. Claimant seeks a determination that his cervical fusion surgery (the sixth surgery) was compensable medical treatment for his work-related injury; payment, pursuant to WC Rule 40, of all medical bills associated with that surgery; an increase in his Permanent Partial Impairment rating, and, if successful; an award of fees and costs of litigation and on-going medical treatment.
3. Defendant argues that it did meet its burden of proof with reasonable evidence standard, the Department correctly approved Acadia's Form 27 because it was reasonably supported, that both Dr. Ball and Dr. Gennaro's opinions against fusion surgery satisfy the adequate reasonable evidence standard stated in Rule 18.1100 and Rule 18.1200.

Whether Acadia waived its right to challenge causation.

4. The waiver doctrine is designed to compel parties to assert rights promptly and to guard against loss of evidence, faulty memory, and general staleness of a claim or defense. A party who fails to act when that party had the information available or could have the information available is held to have waived her rights, "the burden of establishing waiver is on the party asserting it." *Eastman v. Pelletier*, 114 Vt. 419, 423 (1946).
5. Once a carrier has accepted a claim, the burden of proof is on the carrier to establish the propriety of terminating temporary benefits. *Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974).
6. A waiver is a voluntary relinquishment of a known right, and can be express or implied. *Green Mountain Ins. Co. v. Maine Bonding & Cas. Co.*, 158 Vt. 200, 206 (1992).
7. Workers' Compensation Rule 3.900 requires the carrier to do one of three things within 21 days of receiving notice or knowledge of injury: 1) determine compensation is due and execute an appropriate compensation agreement and begin paying benefits immediately, 2) determine that no compensation is due and notify the claimant and this office in writing of its denial and provide supporting documentation, or 3) request an extension.

8. Acadia had access to all medical records but did not raise the causation issue until nine years after accepting claim. Failure to prepare or sign a Form 21 in April 2004 does not absolve Acadia of its responsibility to challenge causation at the outset of the claim. Acadia's failure to promptly comply with the Department's requirements for filing forms cannot be accepted as a defense. See *W.P. v. Madonna Corporation*, Opinion No. 18-06WC, (2006). That failure to advance the defense was the voluntary relinquishment of a right and, therefore, a waiver.
9. Acadia had ample apparent factual information and time to investigate this claim and to challenge causation of the work-related injury to Claimant's cervical spine. Acadia did not do so and thus, waived the right to challenge the compensability of any treatment for Claimant's cervical spine prior to Claimant's cervical fusion surgery on September 23, 2005.

Whether the sixth surgical procedure is compensable

10. Claimant is seeking payment for a cervical fusion surgery. He relies upon the opinions of Dr. Phillips and Dr. Bucksbaum to support his position that such a surgery is reasonable and necessary and related to the original work-related accident.
11. Defendant Richburg Builders argues that Claimant's cervical fusion surgery is not reasonable, necessary, or related to the work accident. The Defendant relies upon the opinions of Dr. Gennaro and Dr. Ball.
12. Under the workers' Compensation Act, the employer must furnish "reasonable surgical, medical and nursing services to an injured employee." 21 V.S.A. § 640(a).
13. Since the outset of this claim, Acadia has fulfilled its duty under § 640(a). However, it now challenges the compensability of what would be a sixth surgical intervention.
14. In determining what is reasonable pursuant to 21 V.S.A. § 640(a), the decisive factor is not what the Claimant desires or believes to be the most helpful. Rather, it is what is shown by competent expert evidence to be reasonable to relieve his symptoms and maintain his functional abilities. *McGraw v. Numaco, Inc.*, Op. No. 48-02WC (2002) (citing *Quinn v. Emery Worldwide*, Op. No. 29-00WC (2000)).
15. In this case, Claimant underwent three cervical surgeries since his injury, but each of these surgical interventions failed to provide more than temporary relief of his symptoms. Therefore, given the previous failed surgeries, contradicting opinions from qualified experts, and the discrepancies between Dr. Phillips's diagnosis and the results of x-rays, MRIs, and a nerve conduction test, the

fourth cervical fusion surgery cannot be characterized as reasonable. *Colbert v. Starr Farm Nursing Home*, Op. No. 05-01WC (2001).

16. The determination is one made at the time the treatment recommendation is made. *Jacobs v. Beibel Builders*, Op. No. 48-02WC (2002). Reasonable medical treatment is what competent medical evidence proves will relieve symptoms from a work-related injury or restore a claimant's functioning capacity. See *Britton v. Laidlaw Transit*, Op. No. 47-03WC (2003).

17. Claimant went ahead with the cervical fusion surgery on September 23, 2005 and asks that Defendant to pay for it. The Claimant contends, with expert opinion that the cervical fusion surgery was reasonable and successful and therefore is compensable.
18. Weighing both the credibility of the proffered witnesses and the persuasive effect of the submitted evidence is clearly within the realm of the trier of fact. See *America Bruntaeger v. Zeller*, 147 Vt. 247, 252 (1986).
19. Both Claimant's treating neurosurgeon, Dr. Phillips and his treating pain management physician, Dr. Bucksbaum support the cervical fusion surgery.
20. The Defendant in the present case argues, with expert opinion, that the cervical fusion surgery was not likely to improve Claimant's condition, making it unreasonable and therefore not compensable. Defendant's experts, orthopedic surgeon Dr. Gennaro and neurosurgeon Dr. Ball, concur that Claimant's medical history and the results of his physical examinations and diagnostic tests do not reasonably support the recommended cervical fusion surgery. Dr. Gennaro opined that Claimant's cervical fusion surgery could not be determined successful until a full year passed without a decrease in the initial post-operative relief that Claimant experienced. Defendant claims that it is too early to determine whether the pain relief from the cervical fusion surgery Claimant is experiencing is temporary, comparing it to the five prior surgeries.
21. In considering conflicting expert opinions, this Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Op. No. WC 20-97 (1997); *Gardner v. Grand Union Op.* No. 24-97WC (1997).
22. All physicians who rendered opinions in this case are equally qualified based on exemplary professional training and experience.
23. For the Claimant, Dr. Phillips has been the primary treating physician since April 2, 1997 and Dr. Bucksbaum has been treating Claimant since February 2002. Although the Department typically grants a great deal of deference to Claimant's treating physician's opinion, this deference is neither absolute nor guaranteed, and a Claimant's desire for a certain procedure, coupled with a willing physician, "cannot justify an order from this Department that the employer pay for it." *Martin v. Bennington Potters*, Op. No. 42-97WC (1997). Usually deference is given to the primary treating physicians; but given three unsuccessful cervical surgeries these criteria are not dispositive in this case.

24. Because the opinions of the treating physicians, Dr. Phillips and Dr. Bucksbaum are contested by highly qualified experts, this decision turns on the third and fourth criteria, whether the opinion of primary treating physician, Dr. Phillips, offers more convincing reasoning and has greater objective support than the opinion of the other physicians who have evaluated this claimant. This decision will also depend upon the comprehensiveness of the examinations.
25. A thorough analysis reveals that the factors weigh in Defendant's favor.
26. Dr. Phillips recommended cervical fusion surgery to relieve Claimant's symptoms based on the medical history he has with the Claimant, on physical examinations, and on his evaluation of test results.
27. Claimant's medical history includes three prior cervical surgeries performed by Dr. Phillips in 1998. All three surgeries failed to provide long-term relief. After the third cervical surgery, Dr. Phillips noted on June 16, 1999 that he was "certainly of the mind not to advocate surgical considerations at all." But, Dr. Phillips changed his mind and recommended a fourth cervical fusion surgery because Claimant was suffering from a "progressive neurologic condition" evidenced by an absent bicep reflex, radiculopathy, and cord compression. Contrary to Dr. Phillips's opinion, the results of the EMG nerve conduction study performed by Dr. Ayers, at the request of Dr. Phillips, demonstrated normal EMG nerve conduction and indicated no cervical radiculopathy, plexopathy, peripheral neuropathy, or evidence of peripheral compression neuropathy. The radiologist concluded that the test was unlikely to support a finding of diffuse sensory polyneuropathy.
28. The basis for Dr. Phillips recommendation is less than persuasive. Not only did test results fail to support his conclusion that cervical surgery was reasonable, but also, Dr. Phillips did not thoroughly review all Claimant's medical records. Dr. Phillips conceded that he reviewed some of the Claimants medical records.
29. Dr. Gennaro concluded that there was "insufficient evidence to support that additional surgical procedure, such as the recommended anterior inner body fusion discectomy at C5-6 with a fusion, is likely to mitigate his symptoms."
30. Furthermore, Dr. Gennaro noted that multiple previous surgical interventions to this Claimant's neck create well-understood conditions that repeat surgery has a much higher risk of complications. Additionally, Dr. Gennaro concluded that Claimant did not show a progressive neurological deficit—in fact, Dr. Gennaro found no change in Claimant's condition between the IME he conducted on July 31, 2003 and the IME he conducted on Claimant on April 22, 2005. When Dr. Gennaro compared the MRI performed on January 5, 2005 to previous MRI's conducted on March 25, 2004 and April 4, 2003 he noted that it showed cervical degenerative disc disease and an area of spurring which Dr. Phillips referred to as a possible source of pain, however, the radiologist indicated that there was no significant change in those levels since the previous MRI conducted in 2003.

31. At the request of Dr. Phillips, Dr. Ball reviewed Claimant's medical history and physically examined Claimant on December 12, 2004. Dr. Ball concluded that Claimant's x-rays show no significant central canal stenosis, no evidence of instability, and no radicular or myelopathic symptoms. Thus, Dr. Ball opined that "the likelihood of surgery helping here is not high."
32. Dr. Gennaro performed two IME's of Claimant and reviewed all medical records, including MRI's and x-rays. Dr. Ball completely reviewed all medical records, test results and he physically examined the Claimant. Both Drs. Gennaro and Ball opined against cervical surgery. The evidence clearly provides objective support against the reasonableness of Claimant's cervical fusion surgery.
33. The objective support for finding Claimant's cervical fusion surgery not reasonable medical treatment pursuant to § 640(a) as presented by Defendant's experts is most persuasive and their examinations were also the most comprehensive. Therefore, the carrier is not obligated to retroactively authorize the cervical fusion surgery. *Jacobs v. Beibel Builders*, Op. No. 48-02WC (2002).

Whether Claimant is entitled to additional Permanent Partial Impairment Benefits as a result of his cervical fusion surgery

34. Because Claimant's cervical fusion surgery is held to be not reasonable, Claimant is not entitled to additional Permanent Partial Impairment Benefits.

Whether Claimant is entitled to Attorney fees and costs

42. Because he has not prevailed, Claimant is not entitled to attorney fees and costs pertaining to his cervical fusion. 21 V.S.A. § 678 (a).

ORDER:

Therefore, based on the foregoing Findings of Fact and Conclusions of Law,

1. Defendant Acadia waived its right to dispute causation of Claimant's neck injury nine years after the fact.
2. Defendant is responsible for all legal and medical costs until the Claimant's cervical fusion surgery on September 23, 2005 and for ongoing medical treatment relating to this claim prior to the cervical fusion surgery. Defendant is also responsible for Claimant's permanent partial impairment rating prior to Claimant's cervical fusion surgery.
3. Claimant is not entitled to payment for legal and medical costs resulting from the cervical fusion surgery on September 23, 2005. Claimant is also not entitled to additional permanent partial impairment as a result of his cervical fusion surgery.

Dated at Montpelier, Vermont this 15th day of August 2006.

Patricia Moulton Powden
Commissioner