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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 760523

CARMEN C. CHAVEZ,

Appellant

v.

THE CONTINENTAL LIFE INSURANCE COMPANY,

Appellee

JOINT APPENDIX

William B. Moore
PHILLIPS, KENDRICK, GEARHEART
& AYLOR
P.O.Box 847 Courthouse Station
Arlington, Virginia

Counsel for Appellant

Edward A. Marks, Jr.
SANDS, ANDERSON & MARKS
1420 Fidelity Building
Richmond, Virginia

Counsel for Appellee

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

TABLE OF CONTENTS

APPENDIX PAGES

1. MOTION FOR JUDGEMENT FILED AUGUST 21, 1974 1-2

2. GROUNDS OF DEFENSE FILED AUGUST 29, 1974 3-5

3. MEMORANDUM OPINION OF JUDGE PERCY THORNTON, JR. DATED DECEMBER 9, 1975 6

4. FINAL ORDER ENTERED DECEMBER 29, 1975 7-8

5. NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR DATED JANUARY 6,1976 9

6. EXCERPT FROM ENDORSEMENT NUMBER 7 OF INSURANCE POLICY DESCRIBING PERMANENT TOTAL DISABILITY 10

7. EXCERPTS FROM TRIAL TESTIMONY .....

8. TESTIMONY OF FRANCISCO CHAVEZ 11-28

9. TESTIMONY OF JAMES JOSEPH SHINER 29-46

10. TESTIMONY OF CARMAN C. CHAVEZ 47-61

11. TESTIMONY OF OTTO ANDERSON ING 62-68

12. DISCUSSION BETWEEN COURT AND COUNSEL 69-74

MOTION FOR JUDGMENT

NOW COMES your plaintiff, Carmen Chavez, and files this her motion for judgment against the above-named defendant and in support thereof alleges as follows:

1. That on October 12, 1970 your plaintiff was injured in an automobile accident which resulted in injuries to her back, neck, chest and legs.

2. Since the date of the accident your plaintiff has undergone extensive medical treatment and hospitalization and has been unable to resume the activities and duties that she was able to do prior to October 12, 1970.

3. Prior to October 12, 1970 your plaintiff was employed and since the date of the accident has been unable to do any work, though she has on several occasions attempted to return to work with resulting setbacks in her medical condition.

4. Your plaintiff's husband, Francisco Chavez, is an employee of Eastern Airlines. He was so employed on October 12, 1970 and at that time was a participant under a voluntary accident insurance plan which was operated and conducted by your defendant.

5. Under this particular plan your plaintiff's husband paid certain amounts and such coverage included your plaintiff as a beneficiary.

6. Your plaintiff did contact said carrier concerning payment under the aforesaid plan and in due course your plaintiff was examined by a physician designated by the defendant. Upon information and belief the physician made a report, which plaintiff has not seen, and defendant has refused coverage, as indicated in the attached letter. Upon information and belief the defendant

has waived any requirement of notice of the accident and the physical condition in any proof of loss, your plaintiff having filled out and completed those forms which were furnished by the defendant.

7. Upon information and belief under the definition applied to said plan your plaintiff is permanently and totally disabled having been unable, from the date of said accident on October 12, 1970 until presently, to engage in every occupation or employment for compensation or profit for which she is reasonably qualified by reason of her education, training or experience and said disability has continued for a period of more than twelve (12) consecutive months, and therefore under the definition used in said plan is total, continuous, and therefore permanent.

8. Your plaintiff further alleges that this action is timely filed in accordance with the laws of Virginia.

WHEREFORE your plaintiff moves for judgment against the above-named defendant in the sum of $50,000.00 together with interest thereon from the 12th day of October, 1970.

_____
By Counsel

PHILLIPS, KENDRICK, GEARHEART & AYLOR

BY: _____
William B. Moore
Counsel for Plaintiff

GROUNDS OF DEFENSE

Defendant, by counsel, comes and says that the grounds of its defense to the plaintiff's motion for judgment are as follows:

1. It has no direct knowledge of the truth of the allegations of paragraphs 1 and 2 but has been advised by plaintiff of the facts therein stated.

2. It denies the allegations of paragraph 3 thereof with respect to the abilities of the defendant after injury and up to the filing of this action.

3. It admits that Francisco Chavez was a participant as an employee of Eastern Air Lines in a voluntary accident insurance plan under policy No. GSR 20 25 issued by defendant to Eastern Air Lines, Inc., and that plaintiff was an additional insured in such plan as an eligible dependent of the said Francisco Chavez.

4. It admits that plaintiff, through the said Francisco Chavez, did make a claim for benefits under said policy by letter dated the 5th day of June, 1972, which date was the first knowledge of defendant as to either plaintiff's injury or the said claim, some nineteen months after her alleged injury.

5. It further admits that operating under a full reservation of all rights it took a proof of claim dated the 10th day of July, 1972 and a statement from plaintiff dated July 20, 1972.

6. It further admits that on or about the 13th day of February, 1973, at its request, plaintiff was examined by O. Anderson Engh, M.D., at Anderson Clinic, Arlington, Virginia, and that based upon his report and other medical reports, including one by James J. Scheiner, M.D., dated the 12th day of July, 1972, it denied compensation to plaintiff on the ground that she was not totally and permanently disabled as that term is restricted and defined in the policy of insurance, by letter dated the 14th day of March, 1973 to Francisco Chavez who had presented the claim on behalf of the plaintiff.

7. It reiterates that all action taken by it was taken under an express reservation of all rights and could not amount in any respect to a waiver.

8. It denies that plaintiff was or is permanently and totally disabled, and says that any disability resulting from the accident of October 12, 1970 was purely temporary.

9. Plaintiff denies the allegation of paragraph 8 of the motion for judgment and says that the plaintiff's claims are barred by the contractual provisions of the policy and/or by the statutes for such cases.

10. It will rely upon all further defenses lawfully available to it which may be disclosed by the evidence or upon

discovery, reserving the right to alter, amend or supplement this statement at any time to rely thereon.

Respectfully,

THE CONTINENTAL INSURANCE COMPANY

By Counsel

EDW. A. MARKS, JR.
ARCH WALLACE, III
ALBERT M. ORGAIN, IV
SANDS, ANDERSON, MARKS & CLARKE
1420 Fidelity Bldg.
Richmond, Virginia 23219

CERTIFICATE

I hereby certify that a true copy of the foregoing pleading was mailed, postage fully prepaid, this 29th day of August, 1974 to William B. Moore, Esquire, P. O. Box 550, Fairfax, Virginia, counsel of record for the plaintiff.

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA
FAIRFAX AND PRINCE WILLIAM COUNTIES

ARTHUR W. SINCLAIR
BARNARD F. JENNINGS
JAMES KEITH
WILLIAM G. PLUMMER
LEWIS D. MORRIS
PERCY THORNTON, JR.
BURCH MILLSAP
JAMES C. CACHERIS
JUDGES

9302 Peabody Street
Manassas, Virginia 22110
December 9, 1975

EDWARD A. MARKS, JR., Esquire
Attorney at Law
P. O. Box 1998
Richmond, Virginia 23216

WILLIAM B. MOORE, Esquire
Attorney at Law
Post Office Box 847, Courthouse Station
Arlington, Virginia 22216

RE: CHAVEZ vs. THE CONTINENTAL INS. CO.
Law No. 6740

Gentlemen:

It is my decision to deny the motion to set aside the verdict and grant a new trial as I am still of the opinion that the plaintiff has failed to present a case within the coverage of the policy. Common sense dictates that education, training and experience of the plaintiff does not totally limit her gainful occupation or employment as a hairdresser.

Mr. Marks is requested to prepare the final order.

Sincerely yours,

PERCY THORNTON, JR.

PTJr.:d

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

CARMEN C. CHAVEZ

Plaintiff

v. AT LAW NO. 6740

THE CONTINENTAL INSURANCE COMPANY

FINAL ORDER

On the 25th day of September, 1975 came the plaintiff in proper person and by her attorney, and came also the defendant, by its attorneys, and thereupon came a jury, to-wit: James Caplen, Harry Felton, Frank R. McGhee, Walter C. Bladen, Eva Wood, Medford Cosner and Macon Piercy, who were sworn well and truly to try the issue joined in this case, and the Court, having fully heard the plaintiff's evidence, and that of one witness called by the defendant, sustained the motion of the defendant to strike the plaintiff's evidence as to it, and the jury was altogether discharged from rendering any verdict herein.

Whereupon the plaintiff moved the Court to reconsider its action upon the said motion to strike, and for leave to file a formal written motion to that end, and a brief in support thereof; and the Court granted the leave requested for the filing of said motion and said brief, with leave to the defendant to reply thereto, and withheld summary judgment in favor of the defendant pending consideration by the Court of its opinion on the said motion to reconsider.

And the Court being now advised of its opinion doth deny

the said motion to reconsider and grant a new trial, and doth now Adjudge and Order that the plaintiff recover nothing of the defendant about her said action, and that the defendant do recover of the plaintiff its costs in this behalf expended, to all of which action of the Court the plaintiff objects upon all grounds shown in the record.

Dec. 29, 1975

/s/ Thornton

Judge, Circuit Court of the County of Prince William

I ask for this:

_____ p.d.

Seen and Objection Noted:

_____ p.q.

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

Now comes the plaintiff, by counsel, and assigns the following errors and grounds of appeal in the above captioned case:

1. That the Court erred in striking the plaintiff's evidence.

2. That the Court erred in admitting testimony as to plaintiff's employment or occupation other than that which she was equipped and qualified to do by virtue of her training, employment or education.

3. That the Court erred in denying plaintiff's Motion for Reconsideration.

4. The Court erred in its interpretation as to the meaning of the insurance policy.

_____
By Counsel

PHILLIPS, KENDRICK, GEARHEART & AYLOR

BY: _____
William B. Moore
Counsel for Plaintiff

I hereby certify that I did on the 6 day of Jan., 1976, mail a true copy of the foregoing Notice of Appeal and Assignment of Error to Edward A. Marks, Jr., counsel for defendant.

_____
William B. Moore

ENDORSEMENT NO. 7

PERMANENT TOTAL DISABILITY

"Permanent Total Disability means such disability commencing within 180 days from the date of accident and continuing for twelve consecutive months, which shall prevent the Insured from engaging in any occupation or employment for which he is fitted by reason of education, training and experience for the remainder of his life."

NOTE: At this point Mr. Moore and Mr. Marks confer.

MR. MOORE: Your Honor, we have agreed on this policy as far as --

MR. MARKS: Sure. We have also agreed on the application records, I think, haven't we, Mr. Moore? Showing he took it out in 1965 and added his wife to it in 1970?

MR. MOORE: January, 1970.

MR. MARKS: That is right.

THE COURT: We will receive that then as Plaintiff's Exhibit Number 1.

Q Pursuant to that, did they furnish you with a booklet which described the coverages that you had under that policy?

A Yes.

Q Was this a voluntary type of accident insurance program?

A Yes.

Q They withhold money from your pay, is that right?

A That's right.

Q What information do you have as to whether

1 or not Eastern Airlines maintains any insurance representative
2 or agent in the company that handles these insurance matters?
3 A Well, I do know we have an insurance
4 administration office. And the only one I know is in Miami.
5 Q In that office they handle insurance
6 matters related to this insurance policy?
7 A I believe so, yes.
8 Q Does Eastern Airlines withhold the money
9 from your pay check?
10 A Yes, sir.
11 Q Do they then forward that on to the insurance
12 company?
13 A That is correct.
14 Q I wanted to ask you if you can identify,
15 can you identify this as a copy of a letter that you received
16 from Eastern Airlines?
17 A Yes. I remember receiving this letter.
18 Q What is the date of that letter?
19 A November 30, 1970.
20 Q That makes reference to emergency care,
21 Arlington Hospital.
22 A Yes, sir.
23 Q Was that treatment for Carmen Chavez?
24 A Yes, sir.
25 Q Do you recall whether or not that treatment

1 was related to the accident she had on October 12, 1970?
2 A Yes, it was.
3 Q Can you briefly describe what the problem
4 or situation was?
5 A Well, she was hit or she hit the wheel of
6 the car, her chest was real swelled up and one night she was
7 bleeding, I guess, because of her condition, you know, and
8 one of my neighbors took her over to the Arlington Hospital
9 to the emergency room.
10 MR. MOORE: Your Honor, I would like to
11 go ahead and offer this in evidence then.
12 THE COURT: Any objection to the document?
13 MR. MARKS: No, sir.
14 THE COURT: It will be so received as
15 Plaintiff's Exhibit Number 2.
16 Q Mr. Chavez, related to that accident, were
17 there certain pictures that I requested that you take?
18 A Yes, sir.
19 Q Of the automobiles?
20 A Yes, sir.
21 Q Did you take those at my request at the
22 time the accident occurred?
23
24 NOTE: Photographs are shown to counsel.
25

1 A By the doctor, yes, sir.
2 Q Mr. Chavez, are you familiar with your
3 wife's condition immediately after the accident?
4 A Immediately after the accident, yes, sir.
5 Q Would you please describe what her condition
6 was then.
7 A Immediately after the accident, she spent
8 about three and a half weeks in bed. She had a month, the
9 bump she had on the head, she had a cut on her right eyebrow,
10 she also had bruises on her chest, stomach, arms, legs, and
11 her chest was real, she hit her chest against the wheel of
12 the car and it swelled up so much that she was unable to eat
13 any solid food other than liquids for almost three weeks.
14 After that, in the meantime her regular family doctor was
15 taking care of her. After that we went to her doctor which,
16 because of her being so stiff and unable to move around, he
17 sent us over to the Fairfax Hospital, which we went there for
18 two and a half to three months. She was getting physical
19 therapy sometimes every day, sometimes three and four days
20 a week. After that she was in, she wasn't improving too
21 much. She wasn't getting any better. So our family doctor
22 recommended that we see another doctor. So then we went to
23 see Dr. Shiner.
24 Q Can you then describe what difficulties and
25 problems she has and had since the time that she saw Dr.

1 Shiner and that was approximately, when did she first start
2 seeing Dr. Shiner?
3 A That was around four months later after the
4 accident. Where she wasn't able to move too much. She was
5 very stiff from her neck all the way down to her legs, and
6 she wasn't able to walk too well, and she just could not
7 move around. She had to stay in bed most of the time.
8 And so we went to see Dr. Shiner. And the
9 first thing he did was he put her in the hospital. At the
10 Northern Virginia Doctors' Hospital, which she stayed almost
11 a month in traction and other therapy.
12 And when she got out from that Northern
13 Virginia, she was much better than what she was when she went
14 in. She was able to move and work, but not really well, you
15 know, but much better.
16 Q After she was released from the hospital,
17 she continued under Dr. Shiner's care?
18 A She has been under Dr. Shiner's care ever
19 since. Ever since.
20 Q Is she still under Dr. Shiner's care?
21 A Yes.
22 Q Would you describe after she was released
23 from the hospital you said she was better but not well. Would
24 you describe then and if you can relating, it may be twenty
25 years or time frames, what difficulties and problems she had,

whether she was making any improvement. Then lead us up to today as to what problems and difficulties she has from your observation.

A Well, right after she got out from the hospital, she was able to move around better, but then we had to look, trying to, kept taking care of her from there on, and we were going back to him to check every couple of weeks or whatever was necessary. And, well, she had problems working and standing up too much or sitting down for too long and --

Q What can you say about today? What activities can or can she not do? Can you describe what her abilities are?

A Activities like sports activities?

Q Any household activities.

A As long as she has plenty of rest, she can do little things around the house. Like before usually she used to clean the house in five hours. Now it takes three days. What she does is like when she is going to mop, mop the kitchen floor or vacuum, clean it or something like that, she has to do a little bit for a little while, then stop, lay down, and take a break or sit down and rest and then go back and do a little bit more. She cannot try to force herself to do too much like ironing clothes, she cannot do that. She's not able to do it. She can do it for a few

1 minutes, but once in a while she has tried to force herself
2 doing some of the house cleaning and what happens, she starts
3 getting stiff from her neck down to her wrist, then the
4 pain she have on her back especially one that she have on the
5 left side starts growing stronger and deeper and when that
6 happens she feels like she is going to faint. She starts
7 sweating and she usually, when that happens, she layes on the
8 floor because she is afraid she is going to faint, which she
9 have actually faint from that pain. And as long as she do
10 these things very slow and take it easy and don't try to do
11 too much, she's not too bad.
12 Q Are you familiar with any attempt she made
13 to return to work?
14 A Yes. She made four attempts, four times,
15 four different dates to go back to work. Three times at
16 Hecht Company, where she was working before the accident,
17 and all three times she called me no more than three hours
18 after she was working because she was suppose to start to be
19 working there. She asked me to come over and pick her up.
20 All three times I went to pick her up and she was, the first
21 two times I remembered she was able to walk from the beauty
22 shop to the car very slow and she was, I could tell she was
23 in great pain and very stiff, but she made it to the car.
24 Now the third time I picked her up at the Hecht Company I
25 had actually to carry her through the lobby to my car

1 because she was so stiff and she could hardly move her
2 legs. I had to lift her up and put her in the car.
3 Q Did she attempt to go back to work after
4 that?
5 A I don't recall how many, maybe two months,
6 I don't recall how many she went, and she tried to go back to
7 work again at the Dale City Beauty Shop. She got a job
8 there. And she went there the first time and she only lasted
9 for around three hours. One of the girls that worked there
10 had to give her a ride home because I was working that day.
11 And she just was unable to stay more than three hours on the
12 job.
13 Q When did it come to your attention that you
14 should notify the defendant insurance company?
15 A Well, right after she tried the fourth time
16 to go back to work, wasn't able to do it the way we thought
17 she would, you know, we were hoping for her to get well,
18 anyway, and after she tried the fourth time, then I think
19 maybe a couple weeks later something like that I decided to
20 write to the insurance company and notify them of her condi-
21 tion.
22 Q Had you had any discussion with Dr.
23 Shiner?
24 A Well, no. No.
25 Q You had not.

1 A No, I did not. But, of course, I talked
2 to her sometime when she went to see Dr. Shiner sometime I
3 would go in, sometimes I would stay in the waiting room, but
4 after she tried to go to work for the fourth time, or the
5 last time, she went back to Dr. Shiner and she mentioned
6 something to me like he says that --
7 MR. MARKS: If Your Honor please --
8 THE COURT: Objection sustained.
9 Q Don't comment any more on what somebody else
10 has said.
11 A Oh.
12 Q Particularly Dr. Shiner. He will be here
13 to testify. At that time there was a contact made with Dr.
14 Shiner by you or by your wife.
15 A Yes. Yes. By her.
16 Q And that was for the purposes of discussing
17 her condition, is that right?
18 A That is correct, yes.
19 Q And then did you, following that, what, if
20 any action, did you take insofar as notifying the defendant
21 company?
22 A Well, I wrote a letter myself to the
23 insurance company, to the address shown on that booklet that
24 I had.
25 Q Did there come a time when they responded

as far as whether or not your claim would be approved or denied?

A Well, no. They wrote me two or three times and they sent me medical forms for the doctor to fill in, and they asked for hospital bills, things like that. For a period of three or four months we supplied them with everything they asked me.

Q In other words, they sent you certain forms that you completed and turned in?

A That's right. Yes, sir.

Q Had you received any form from that prior to that time?

A No. Not that I know.

Q Did there come a time then that they requested that she be examined by Dr. Ing?

A Yes. We received a letter one day saying that they have made an appointment for her with Dr. Ing. I don't recall the date, at such a date, such a time.

Q Do you recall how long after the time when you first notified them that they made this appointment?

A See, I recall it was around from the first time -- I notified them --

Q You notified them approximately what date?

A It was maybe, I believe it was around 7-8 months after that. 6-7 months.

1 Q Six or seven months after you notified them
2 that they then made an appointment with Dr. Ing, is that
3 correct?
4 A Yes.
5 Q You had first sent your letter to them about
6 what month? Do you have a copy of that letter?
7 A The one thing --
8 MR. MARKS: Did you want to introduce
9 that? You can ask him if that is a copy of it.
10 MR. MOORE: All right.
11 Q Is that a letter that you wrote?
12 A Yes, sir.
13 Q Did you also receive this letter back from
14 them?
15 A Yes, sir.
16 Q In between there was correspondence that you
17 had with the defendant company?
18 A Yes, sir.
19 THE COURT: That will be received as
20 Plaintiff's Exhibit Number 12 and 13, I believe.
21 Q Did you then comply with all of the
22 requests that you got from the company?
23 A Yes.
24 Q In one letter did they indicate to you that
25 they were reserving their rights under the policy against you?

1 Q After the accident, for any period of time.
2 A Yes. For a little while. She was discharged
3 from working.
4 Q She was walking.
5 A Walking.
6 Q Riding in cars?
7 A Yes.
8 Q Going to the doctor's office for instance?
9 A That's right.
10 Q She was not confined to bed in any way.
11 A She was part of the time. But, of course,
12 she did went out with me to the doctor and she did move
13 around.
14 Q She did go to the store.
15 A No.
16 Q With you.
17 A No. I go to the store.
18 Q She does not do any shopping?
19 A No. I do the shopping.
20 Q Always?
21 A Most always, yes.
22 Q Have you been doing it ever since you were
23 married?
24 A No. Ever since the accident I do it like
25 the grocery shopping. I do the grocery shopping. She cannot

1 lift anything heavy, so I do the grocery shopping.
2 Q All right. Let me ask you this question:
3 Did she go to the store with you in the car?
4 A She have, yes.
5 Q How often?
6 A Maybe --
7 Q Does she go with you now?
8 A Yes.
9 Q Does she tell you what to buy?
10 A Well, she wants something to buy, yes, she
11 tells me what to buy.
12 Q Who decides what you are going to eat at
13 your house? Do you decide or does she?
14 A Both decide.
15 Q That is a mutual thing, is it?
16 A That's right.
17 Q Does she cook?
18 A Yes, she cooks. I help her.
19 Q How long has she been doing the cooking,
20 doing some of the cooking?
21 A Some of the cooking, well, you mean right
22 after the accident or how many years?
23 Q When did she start in after the accident?
24 A For the last, I would say about year and
25 a half or so. Maybe two. Well, year and a half.

1 Q Maybe two?
2 A All right.
3 Q She has been doing the cooking more and
4 more, has she not?
5 A I wash the dishes, though.
6 Q I what?
7 A I do the washing.
8 Q All right. Let me ask you this question,
9 Mr. Chavez. She went to the hospital right after the acci-
10 dent, did she not?
11 A Immediately, right after, immediately,
12 yes.
13 Q She was looked over and they told her that
14 they could find no reason why she should not go home. Isn't
15 that right?
16 A Well, I went there and picked her up,
17 brought her home.
18 Q When did you pick her up?
19 A That same day of the accident, the evening.
20 Q How long was she at home before she went
21 back to the hospital?
22 A Well, from the day that she spent three
23 weeks, three and a half weeks in bed. And maybe it was
24 a month and a half or so before she started going to the
25 Fairfax Hospital.

1 Q She walked out to the car from your house?
2 A You mean from the house to the car?
3 Q Yes. From your house to the car.
4 A Oh, yes.
5 Q She walked from the car into the hospital?
6 A That's right.
7 Q She was put to bed in the hospital, was
8 she not?
9 A Yes.
10 Q She was given an intensive course of
11 physical therapy?
12 A That is correct.
13 Q All right. This consisted of some traction
14 and some heat treatment and things of that kind, is that
15 correct?
16 A That is correct.
17 Q During that time did you go to see her?
18 A Well, the first, when she was going to
19 Fairfax Hospital she was going as an outpatient.
20 Q All right. She had been going back and
21 forth, had she not?
22 A That's right.
23 Q When she got there, she would have a
24 physical therapy treatment, then go home again?
25 A That's right.

1 drive then.

2 Q She was a licensed driver?

3 A Oh, yes.

4 Q Does she still have a license?

5 A I think she still has a license.

6 Q All right. How far through school did she

7 go?

8 A High school.

9 Q She graduated from high school?

10 A High school back in her country, Colombia.

11 Q Colombia, that is in South America?

12 A South America, yes, sir.

13 Q When were you married?

14 A We were married about over thirteen years

15 ago.

16 Q That would have been in what, 1962?

17 A '62, yes.

18 Q Where were you married?

19 A Washington.

20 Q Washington, D. C. At that time was she

21 living in the District?

22 A She was, yes. Yes, sir.

23 Q You were living in the District?

24 A I was living there, also.

25 Q All right, sir. Then what was she doing

at the time of your marriage from the standpoint of work?

1 A She was working as a hair dresser.
2 Q Where?
3 A At the time she was working at the Ambassador
4 Beauty Shop in Silver Spring, Maryland.
5 Q Has she ever done any work other than
6 hair dressing?
7 A No, not that I know.
8 Q Not that you know, except the work around
9 the house, of course.
10 A That's right. Around the house.
11 Q Can she read and write English with no
12 great problem?
13 A She can read it, but I don't think she can
14 write it too well. Neither do I.
15 Q Now, Mr. Chavez, after you got the letter
16 which has been marked as Exhibit A, a form was sent in that
17 response, was it not, in that letter for you all to fill out,
18 have the doctor fill out?
19 A I believe so, yes.
20 Q I will ask you to look at this and tell us
21 whether or not that is the form that was filled out and sent
22 in?
23 A Yes. That looks like the one.
24 MR. MOORE: That is.
25 MR. MARKS: That is it. We will offer that.

that right, with a car, I take it?

A That's right.

Q How far did you have to walk to get to the car?

A Not very far. Maybe 100 feet.

Q She wasn't in a wheel chair, was she?

A No.

Q She was walking along, along with you.

A Along with us.

Q How long did you all stay down there?

A About twenty days.

Q During the time you were down there, what all kind of things did you do?

A Well, I did a lot of things. I did a lot of things, but she spent most of the time in the house. She was so sick she could hardly move. Because she usually gets -- on our way we have to spend two or three hours sitting on the chair. Sitting too long she becomes very sick. On the airplane, although she got up and walked along the aisle for a little while, when she got to Bogota, she was so sick there that she was able to go out maybe one or twice she went out with us to sightsee from the car.

Q What did she do while you all went out sightseeing in the car?

A She was there at the house. I don't know

1 - - - - - - - - - - - - -
2 WITNESS STOOD ASIDE.
3
4
5
6
7
8
9
10 JAMES JOSEPH SHINER, introduced on behalf
11 of the plaintiff, having been first duly sworn, testified
12 as follows:
13 DIRECT EXAMINATION
14 BY MR. MOORE:
15 Q Please state your full name and address
16 where your office is located.
17 A James Joseph Shiner, 8301 Arlington
18 Boulevard, which is the address of my office.
19 Q What is your specialty?
20 A I am an orthopedic surgeon.
21 Q Would you please describe briefly what an
22 orthopedic surgeon is?
23 A An orthopedic surgeon is that type of
24 specialist that deals with treatment and disorders of
25 afflictions of bones, joints, ligaments, nerves and tendons.

1 Q Where did you receive your medical degree?
2 A From the University of Cincinnati.
3 Q Where did you do your internship?
4 A San Francisco University Hospital --
5 MR. MARKS: I don't want to cut you off
6 at all. I concede the doctor's qualifications as
7 an orthopedic surgeon.
8 MR. MOORE: I would like the jury to hear
9 what his qualifications are.
10 MR. MARKS: Fine.
11 THE COURT: We don't want to go into a
12 lot of detail on them.
13 Q Where did you commence your practice?
14 A I'm sorry. I did not hear.
15 Q Where did you commence your practice?
16 A In Arlington, Virginia.
17 Q How many years have you been practicing?
18 A Approximately six years in this area.
19 Q What hospitals are you associated with?
20 A With most of the hospitals in that area,
21 Arlington and Northern Virginia Doctors' Hospital,
22 Alexandria Hospital, National Orthopedic Hospital, Prince
23 William.
24 Q Are you a Diplomate or Fellow?
25 A Yes. I am a Diplomate of the American

1 Academy of Orthopedic Surgeons.

2 Q Would you explain what that is.

3 A That is an organization which you are elected

4 to after completing a specified training in orthopedi c

5 surgery, having passed the examination and limit your practice

6 entirely to orthopedic surgery.

7 Q Is that an honor?

8 A So to speak.

9 Q Have you written any articles?

10 A I have written many articles, yes, sir.

11 Q In what areas?

12 A In orthopedic surgery and research and

13 drugs.

14 Q About how many articles?

15 A Oh, ten-fifteen.

16 Q Have you done any lecturing?

17 A I have lectured quite a bit, yes, sir.

18 Q Where have you lectured?

19 A Georgetown. I have lectured at Johns

20 Hopkins. I have lectured in Texas, in this area as well.

21 Q Did you have an occasion to treat Carmen

22 Chavez for injuries that she sustained in an automobile

23 accident on the 12th day of October 1970?

24 A Yes, I have.

25 MR. MOORE: Your Honor, I assume he is

1 As well as the injury to the spine, she
2 also sustained abrasions and contusions to her legs. And,
3 as stated, she was unable to walk without limping, and she
4 developed swelling of her left shoulder, swelling above the
5 right eye, and they had to take her by ambulance to the
6 Fairfax Hospital emergency room, and later that day she was
7 seen by her personal physician, Dr. Piedra, who instituted,
8 had instituted treatment consisting of medication and physical
9 therapy at the Fairfax Hospital for approximately two
10 months. Unfortunately during this period of time there was
11 no relief in her symptoms and orthopedic consultation was
12 requested.
13 Q At the time that you saw her, what were
14 the complaints that she had?
15 A When I saw her initially she was complain-
16 ing basically of pain and stiffness in the neck, in the
17 thoracic spine, as well as the lumbar spine. That is all
18 areas of the spine from the neck down to the lower pelvis.
19 Q Did you conduct any tests on her, and, if
20 so, what did they indicate?
21 A A complete detailed orthopedic examination
22 and a neurological examination was performed on that date.
23 The positive objective findings at that time indicated that
24 she was in quite a bit of distress, and there was quite a bit
25 of pain and spasm, which is tightening of the muscles, in the

1 neck and the thoracic region of the spine, which is the
2 region of the shoulder blades. And this had produced quite
3 a significant decrease in motion, because of the spasm she was
4 unable to move the neck and back in various planes.
5 Q Would you please describe your subsequent
6 course of treatment.
7 A Because of the fact that she had had this
8 accident several months prior to the time I had seen her, she
9 had had no relief from the treatment that had been prescribed
10 by Dr. Piedra, had still exhibited multiple complaints and
11 quite a bit of difficulty, and she was actually incapacitated,
12 I recommended at that time that she be admitted to the
13 hospital for intensive course of treatment and for further
14 evaluation, if necessary.
15 She was admitted to the Northern Virginia
16 Doctors' Hospital on January 24, 1971, three days after I had
17 seen her. She remained there until February 12, 1971. During
18 her stay in the hospital she was treated with traction, bed-
19 rest, medication, physical therapy twice a day, and also she
20 received several injections into various areas of the back
21 which were quite tender, injection of novocain and cortisone.
22 She seemed to improve somewhat and was able to be discharged
23 from the hospital. But following discharge from the hospital
24 her symptoms recurred. She continued to have pain and
25 stiffness. She continued to have episodes of dizziness. She

1 fell several times, and she continued to require quite a bit
2 of medication, even after discharge from the hospital. And
3 she required marked restriction of activities. She was unable
4 to do any lifting, bending, participation in athletics,
5 that sort of thing, and she had been under my care -- I
6 have been seeing her since 1971. On numerous occasions I would
7 say roughly at least once a month or so, except for several
8 periods where she was pregnant, and I believe she left the
9 country on a couple of occasions, she still continues to
10 require medication, she still exhibits on physical examination
11 evidence of spasm and tenderness basically in the lower
12 cervical area of the neck and the area between the shoulder
13 blades.
14 Q Were there X-rays taken of her spine on
15 various occasions?
16 A Yes. X-rays have been taken on several
17 occasions.
18 Q Were the indications abnormal condition on
19 them?
20 A The X-rays have not revealed any evidence
21 of any broken bones. There have been no evidence of any
22 fractures or dislocations.
23 Q Have you prescribed for her drugs and, if
24 so, what type?
25 A. She has had various medications, but at the

1 January 27, 1971 in this respect?
2 MR. MOORE: All right, sir. Thank you.
3 A All right. That X-ray was normal.
4 That is correct. This Xray, taken at the Northern Virginia
5 Doctors' Hospital, this was normal.
6 Q What was your diagnosis of her condition?
7 A My initial diagnoses when I first saw
8 her were that she had sustained what we call acute, which
9 means sudden, onset as well as chronic, which means long
10 lasting duration, musculo-ligamentous strain of the cervical
11 spine, that is the neck, the thoracic spine, which is the
12 region of the shoulder blades, and the lumbar spine, which
13 is the region of the pelvis.
14 She also, as a result of the injury, had
15 sustained abrasions and contusions, and had what we call, what
16 we call the term post-concussion syndrome. When anybody has
17 injury to their neck which causes a snapping to the neck and
18 also the head, they sort of shake up the brain and they
19 develop symptoms of dizziness, weakness, nausea, vomiting,
20 and headaches, which she exhibited from this injury.
21 Those were the diagnoses.
22 Q Doctor, would you describe what a sprain
23 is and what happens, or strain.
24 A A sprain, referring to a stretching of
25 muscles and ligaments, not an actual, it can include a tear,

1 but not a complete tear of these muscles and ligaments. They
2 are stretched beyond their capabilities, and this leads to
3 hemorrhage and leads to the development of scar tissue if
4 it is a severe case, because when the muscles are torn or
5 stretched instead of healing properly, scar tissue develops
6 which is weaker than normal tissue. It's less elastic.
7 It doesn't stretch any more, and it is very sensitive,
8 which produces continued complaints as we have seen here.
9 Q Was this your diagnosis of Mrs. Chevez?
10 A Yes. That is the ultimate diagnosis.
11 Q Does scar tissue ever heal or go away?
12 A Well, occasionally if there is a small
13 amount of scar tissue it will produce no noticeable effect,
14 because the other muscles are so large and can take over,
15 But when you have a lot of scar tissue which predominates
16 in the area of injury, then it doesn't go away and will
17 produce permanent symptomatology.
18 Q Do you have an opinion with a reasonable
19 degree of medical certainty as to whether or not the injuries
20 that Carmen Chavez suffered on the 12th day of October,
21 1970, are permanent?
22 A Yes.
23 Q Would you please state what your opinion is
24 and the reason for that opinion.
25 A Well, I believe, I know that she does have

1 a permanent disability in reference to her spine. The reasons
2 being the orthopedic injuries, sprains, strains, fractures,
3 that sort of thing, may take anywhere up to a year to heal.
4 If they do not heal within a year, then the probability of
5 them healing is essentially nil. And by the fact that it has
6 lasted for almost five years now, and the fact that on
7 physical examination her objective findings substantiate her
8 complaints of pain, stiffness, et cetera, then she definitely
9 does have a permanent disability.
10 Q Doctor, I show you this Exhibit B of the
11 defendants, which is the form I guess was submitted to you
12 by Mr. Chavez. On there are shown certain findings that you
13 made. I believe that is dated July 10, 1972. Directing your
14 attention to the item which describes how long has patient
15 been continuously totally disabled, I guess it is unable to
16 work, isn't it? You have undetermined. Would you please
17 explain what you mean by that.
18 A Undetermined refers to the fact that I had
19 no idea how long her symptoms would develop at that time.
20 Because it was less than a year since the time of the injury,
21 and she was still having quite a bit of problems. Now if
22 the, if this had been dated, let's say October --
23 Q Doctor, if I made --
24 MR. MARKS: It was more than a year.
25 I'm sorry. I thought the accident. I'm

1 is that right?
2 A No. That is correct. No.
3 Q Do you have any other indication in your
4 file there that indicates as to what the policy definition
5 of disability was?
6 A Yes, I do.
7 Q Do you have a copy of that there?
8 A Yes.
9 Q Might I ask you in referring to that,
10 whether you have an opinion with reasonable medical certainty
11 as to whether or not such permanent disability commenced
12 within 180 days from the date of the accident, October 1970,
13 and continued for twelve consecutive months which prevented
14 Carmen Chavez from engaging in any occupation or employment
15 for which she was fitted by reason of education, training and
16 experience?
17 A Yes.
18 Q Would you please state what that opinion
19 is and the reason for that opinion.
20 A The opinion is she did have a permanent
21 total disability which commenced about 180 days from the date
22 of the accident and lasted at least twelve consecutive months.
23 The reason being because the automobile accident -- because
24 prior to the automobile accident she never had any problem
25 with her spine and all the injuries that she related to me,

that we treated, that she received treatment from me, were as a result of that accident.

Q Doctor, why and how do you relate the activities of a hair dresser with her inability to perform those activities as being prevented or precluded her indicated by her physical condition, can you explain how the two relate?

A Hair dressing is an occupation which basically consists mainly of standing and manipulating the arms upwards and downwards and various rotations as well as bending over and stooping down and all these positions are intimately related to the spinal function. And if the spine has been injured and the muscles around it, one cannot pursue this type of occupation with any ease or facility.

Q Would indication that she would be unable to do that would be the pain that she might receive from attempting to do that?

A Pain and stiffness and weakness, numbness, yes.

Q Do you have an opinion with reasonable medical certainty that the accident which occurred on October 12, 1970, was the sole cause of that disability that you have just described?

A Yes, it was.

Q What do you mean by permanent?

1 A Permanent means life long.
2 Q How long do you estimate her life expectancy
3 to be?
4 A I would imagine at least thirty-thirty-
5 five years more.
6 Q What, if any, prognosis can you make for
7 the future and any pain that she might have in the future?
8 A It is within reasonable certainty that
9 she will continue to have problems with, especially with
10 exertion or activities, bending, lifting, stooping and also
11 with inclimate weather. She has been followed over the past
12 five years. She continues to require medication, heat, and
13 restrictive activities.
14 Q Now, you have mentioned certain times that
15 she might have pain or difficulty. Will this be continuous
16 or might it be interrupted, or how would you describe the
17 continuity of the pain or difficulty she might have?
18 A This type of problem usually produces an
19 intermittent type of symptomatology. It might improve some-
20 what during warm weather and during restrictive activities.
21 It is usually intermittent.
22 Q What, if any, effect,might her pregnancy
23 have on her condition?
24 A Pregnancy? In this type of problem
25 frequently actually is beneficial to musculo-ligamentous

1 injuries and arthritis because during pregnancy the harmone,
2 especially cortisone in the pregnant individual is quite
3 elevated, and as you probably know, cortisone is one of the
4 drugs that is used specifically for arthritis and musculo-
5 skeletal injuries, and since the level is so high, the body
6 at that time, it produces an alleviating effect on the
7 symptoms. And frequently people have no problems at all
8 during pregnancy.
9 MR. MOORE: All right. No further
10 questions.
11
12
13 CROSS-EXAMINATION
14 BY MR. MARKS:
15 Q Dr. Shiner, you saw the lady for the first
16 time when?
17 A January 20, 1971.
18 Q All right, sir. And you almost immediately
19 thereafter put her in the hospital.
20 A That is correct.
21 Q At that time the X-rays of her cervical
22 spine showed normal.
23 A Yes.
24 Q Have they ever shown anything but normal?
25 A They have always been normal, I believe.

1 have been, to my attention at that time. In other words, a
2 year after I had been seeing Mrs. Chavez.
3 Q All right, sir.
4 A On or about that time.
5 Q It was undetermined in July, 1972 then?
6 Why was it undetermined?
7 A Undetermined on this type of document is
8 a standard terminology that we use. And as indicated, this
9 form was filled out by my insurance clerk in the office.
10 Q Signed by you.
11 A No. It was signed by her.
12 Q You did not sign it, either?
13 A I beg your pardon? It is not signed by
14 me. That is not my signature. And she uses this term
15 undetermined, and we rarely ever put down permanent on this
16 type of form unless that insurance clerk would come to me and
17 ask me. It is a standard term for this type of form.
18 Q Is it not true that you assume the
19 responsibility for what your clerk puts on these forms?
20 A Yes.
21 Q Do you ever read them?
22 A Very rarely.
23 Q Let me ask you this, Doctor: Just exactly
24 what limitations on Mrs. Chavez' activities are there that
25 you have imposed?

1 A All right. Essentially she is to avoid
2 lifting, and by lifting I mean anything over fifteen or twenty
3 pounds.
4 Q Heavy lifting?
5 A That's right. Or moderate lifting.
6 Moderate. She is unable to participate in athletics such as
7 bowling.
8 Q Bowling? Running?
9 A Tennis, Soccer or anything.
10 Q All right. What else?
11 A She is unable to do heavy house work, any-
12 thing that requires a lot of bending or stooping, climbing,
13 jumping, running.
14 Q All right. Is that substantially the
15 limitation?
16 A Prolonged standing.
17 Q All right.
18 A Prolonged sitting. That's about it.
19 Q How much knowledge do you have, Dr. Shiner,
20 the type of things that women do productively for money?
21 A Quite a bit.
22 Q Do you go in for rehabilitation sort of
23 stuff at all?
24 A Of course.
25 Q I thought probably you did. What types of

activities can she perform on a commercial basis?

MR. MOORE: I am going to object, Your Honor. It is related to what -- unless he is going to tie in where she was trained and her occupation, the only evidence presented so far is she has been for eleven years a hair dresser, that she was trained for that. Now I don't believe that is our criteria. It is some other occupation, unless it is directly related to that. I don't believe it is relevant or material.

THE COURT: I will allow the question to stand.

Q Doctor, what sort of activity of the type women normally engage in for money can she do?

A She would have to assume a position on a part-time basis. She is not able to work full time. And it would be a sedentary type of occupation, probably as a receptionist, or something which involves basically sitting for a few hours at a time.

Q Could she do clerical work at a desk?

A At a desk, yes, sir.

Q You mentioned receptionist.

A As long as it did not involve too much bending.

Q Could she do bookkeeping?

1 A Yes.
2 Q Could she teach hair dressing?
3 A Could teach hair dressing? That, I don't
4 know.
5 Q Why not?
6 A It would be a demonstrative type teaching.
7 Q Is there any other activity of a commercial
8 basis you think she could engage in?
9 A Nothing that I can think of right now.
10 Q Could she cook?
11 A Sure.
12 Q All right. Is she able to make beds?
13 A Limitedly, yes.
14 Q Can she do hostess work?
15 A In a restaurant, you mean?
16 Q Yes. That is a form of a receptionist.
17 A Yes. It is part-time. She could do that.
18 Q All right. Fine. So, she is not totally
19 restricted from any useful activity, is she.
20 A Not totally, no. For certain things, correct.
21 Q She may work, according to you on a partial
22 basis.
23 A Yes.
24 Q And at such activities as you have described
25 A That is correct.

1 Q That is the reason, is it not, why on
2 Exhibit B you have said that she was partially disabled?
3 Not that she was totally disabled?
4 A We are talking in terminology now in terms
5 of physical impairment. She is partially disabled. We have
6 to define what we are talking about between physical disabili-
7 ty and physical impairment.
8 Q Yes.
9 A Now she has been given a rating of disability
10 of physical impairment, partial physical impairment.
11 Q Yes, sir.
12 A But she is totally disabled for her
13 occupation.
14 Q For hair dressing, pure and simple.
15 A Right.
16 Q All right. And certain other types of
17 restrictions you described: Sports, jumping --
18 A She is totally disabled for those things
19 as well.
20 Q Lifting, heavy lifting, and things of that
21 kind.
22 A That is correct.
23 Q Bowling and so on.
24 A Right.
25 Q All right. Go ahead, You were going to

1
2 CARMEN C. CHAVEZ, the plaintiff herein,
3 having been first duly sworn, testified as follows:
4 DIRECT EXAMINATION
5 BY MR. MOORE:
6 Q Mrs. Chavez, will you please state your
7 full name and address.
8 A Carmen Cecelia Chavez. I live 4646 Evandale
9 Road, Woodbridge.
10 Q How long have you resided there?
11 A It will be six years.
12 Q How many children do you have?
13 A Two.
14 Q Directing your attention to the 12th day of
15 October, 1970, were you involved in an automobile accident?
16 A Yes, I was.
17 Q Would you please describe the accident and
18 what happened to you inside the car as a result of the
19 collision of the two vehicles.
20 A I was driving on 95 north, and there were
21 these men working on the road, and one of the men come right
22 close to my car and I had to go to a complete stop, and I
23 was hit by a car on the rear of my car. And I was, you know,
24 thrown in the car, and I hit the front rearview mirror, and
25 I cut my eyebrow, and I had bumps on the back of my head, and

1 a big one in the front. And I had bruises on my arms, my
2 legs, my chest, my stomach.
3 Q What did the impact of the collision do to
4 you as far as throwing you around?
5 A I don't understand.
6 Q What did the impact of the accident do to
7 you, if anything, so far as your position in the car?
8 A Well, I was, you know, thrown like, you
9 know, to the back and the front.
10 Q Would you describe then how you were injured
11 or what, if any, injuries you received at that time that were
12 painful?
13 A Well, I was, you know, taken to the Fairfax,
14 you know, I was limping and my front head, you know, they
15 have to extract mirror, you know, pieces of glass from the
16 mirror. And from that, you know, I have stiff neck and my
17 whole back hurts, too, you know, down to the, down here. I
18 don't know how to say it. You know, I just was pain all
19 over.
20 Q You were released from the emergency room?
21 A Yes.
22 Q What course of treatment or what happened to
23 you after that time that you were released from the emergency
24 room, as far as your physical condition and what you did and
25 what happened to you?

A Well, the difficulties I have is I cannot do too much at a time, you know. I'd say vacuum upstairs, I have to relax and take it easy. And then, you know, continue to do it, but I cannot go and do the whole works. If I continue then I know the next day I am going to be as stiff, and I just have to relax and sometimes it takes three days for me to, you know, go back to normally.

Q What is your background as far as education and training?

A Well, I have high school and then I have training for hair dressing.

Q How long did you train for hair dresser?

A Little more than a year.

Q Where did you go to school for that?

A In South America.

Q You graduated from school in South America?

A Yes.

Q In what country is that?

A Colombia.

Q Since you have been in this country, what have you done as far as employment?

A Just hair dressing.

Q Any other job or position you have held?

A No.

Q Would you describe the nature of the

activities that you do or perform under the description of hair dresser?

A Well, I have to stand on my feet for long time. Sometimes, you know, I go eight hours without sitting. And I have to raise my hand for long periods, and I have to move around quite a lot.

Q Have there been times that you have attempted to return to work since the accident?

A Yes, I have.

Q Would you please describe those and what happened.

A I have tried. I really three times at Hecht, which was where I was working before and two after I, you know, I really don't know say how many hours exactly, but after a few hours I will get this pain in my back will start, you know, getting so deep then my back is start bothering me and my neck is start getting so stiff that I just couldn't take it, and I just have to quit. I just have to leave whatever I was doing and go home.

Q Where had you worked as a hair dresser since you had been in the Washington, D. C. area and in this country?

A I worked for Beauty Salon for almost seven years, and then I worked before in Maryland in the Ambassador Beauty Salon. I worked for three and a half or four years.

1 Q Then after that?
2 A Beauty Salon at the Ambassador.
3 Q When you attempted to go back to work after
4 the accident, where did you attempt to go as far as working?
5 What places?
6 A After I went to Hecht, you know, I was
7 there for three times. And then I tried to get something
8 close home. And I went to the Dale City Beauty Shop and I
9 went to work there. And I just got very sick and one lady,
10 she took me home. She said she would take me home, and she
11 took me home.
12 Q Reference has been made to your not driving.
13 What, if any, reason is there for your not driving? You
14 drove before the accident.
15 A Yes. But I haven't drive it because I
16 get, you know, for driving too long in the car I can get
17 sick. My back, it starts bothering me. And if we have to go
18 to some place that is going to take more than forty or forty-
19 five minutes, my husband has to stop so I can rest and walk
20 around and then we continue.
21 Q Was there any time when Dr. Shiner advised
22 you with respect as to your condition and whether or not you
23 might expect any change; if so, do you recall when that was?
24 A Yes. One time I was talking to him he says
25 to me, Carmen, you just have to learn to live with your

1 pains. I don't recall when it was, but, you know, exactly the
2 date, but he has told me that.
3 Q Do you recall approximately when the year
4 was or month?
5 A No. I couldn't say that. I can -- it
6 has been so many years now.
7 Q But you discussed that with your husband
8 at that time, is that right?
9 A Yes. Oh, yes. I told him when I come out
10 of the office.
11 Q It was your husband that prepared the forms
12 that were submitted to the defendant's insurance company, is
13 that right?
14 A Yes. Yes.
15 Q He did that on your behalf?
16 A Yes.
17 Q Are there any other activities that you
18 are presently unable to do around the house?
19 A Well, I really, you know, I'm unable to do
20 things, but I cannot do it for too long or, you know, I get
21 too, well, I can never finish if I try too hard to do any-
22 thing.
23 Q Have you been released by Dr. Shiner?
24 A No.
25 Q When was the last time that you saw him?

I think two months ago.

MR. MOORE: No further questions.

CROSS-EXAMINATION

BY MR. MARKS:

Q Mrs. Chavez, when did you leave Colombia and come to this country?

A That was in October, I believe, 1958 or '57.

THE COURT: I'm sorry, Mrs. Chavez, you will have to speak a little louder. We have to hear, please, ma'am.

A I'm sorry. It was October, 1958.

Q Where did you settle when you first came? Where did you live when you first came here?

A I come to a friend's place.

Q I mean in what area? Washington?

A In Washington.

Q Washington, D. C?

A Yes.

Q When did you finish high school?

A In '57.

Q '57.

A Yes.

Q Had you had any employment at all during

1 your school year?
2 A No.
3 Q You lived at home?
4 A Yes.
5 Q Between 1957 and the time you came to this
6 country, did you have any employment?
7 A No.
8 Q What were you doing, going to school?
9 A I was going to beauty school.
10 Q Going to beauty school. I see. So when
11 you came here then, you went to work as a hair stylist?
12 A Hair dresser.
13 Q Have you ever done any manicuring work?
14 A Excuse me?
15 Q Have you ever done any manicuring work?
16 A Oh, yes.
17 Q When have you done that?
18 A You know, the beauty business, you have to.
19 When you are a hair dresser, you have to, you know, to learn.
20 I don't know in this country, but in my country you have to
21 learn to do manicuring.
22 Q You are able to do that, are you?
23 A Yes.
24 Q You know how. You know how to do manicuring.
25 A Yes.

Q Have you ever done it commercially?

A No.

Q For money?

A Sometimes I will do some girls, but I rarely have.

Q You rarely have?

A Yes.

Q Have you done any hair work in your home?

A In my home?

Q Yes.

A No.

Q Nobody ever came to you?

A No. No.

Q No friends?

A No. I don't, if any friends wants for me to do their hair, they will come to the place. Mrs. Walker, I did her hair once at her home, but that was before the accident.

Q All right. Fine. What sort of employment have you sought to get or to try to get and do since the accident?

A Hair dressing.

Q That's all? Nothing else?

A No.

Q Tell us exactly what you find you cannot do

1 at this point, that you know how to do.
2 A That I know how to do?
3 Q Yes. What do you find that you cannot do
4 that you know how to do?
5 A Well, if you mean manicure, I cannot do
6 manicuring. I cannot bend for too long, you see, manicuring
7 requires for you to bend down for long times. Since I have
8 weakness on my left arm and my two fingers get numb, you see,
9 I hold them for too long, I cannot do that.
10 Q What else can you not do that you know
11 how to do?
12 A Well, I just prepare to do hair dressing.
13 I'm not a real estate lady. I just don't know what there is
14 to do.
15 Q You have not tried to do any employment of
16 any kind other than hair dressing?
17 A Right.
18 Q You have not sought to do anything other
19 than hair dressing, which you found that you could not do.
20 A Working out of the house, no.
21 Q You have done your house work.
22 A I do my house work, but I have to do it over
23 a period of time. I cannot do, you know, say I am going to
24 clean the hall upstairs on one day. I cannot do that. I
25 have to take my time and, you know, by now in five years I

1 know my limits, so I know what I can do each day.
2 Q And what you can't do.
3 A And how to do it.
4 Q You made a trip to Bogota.
5 A Yes.
6 Q That was some twenty days all told, was
7 it?
8 A Yes.
9 Q You also made a trip to Disney World.
10 A Yes.
11 Q Were you able to do the things on the trip
12 to Disney World that you wanted to do?
13 A No. We planned to stay in Disney World for
14 five days, and, you know, to do that you have to do a lot of
15 walking.
16 Q I didn't know that.
17 A We did quite a bit of walking then, you
18 know, we have the baby, and, of course, my boy is a big help
19 to me, because, you know, he is thirteen now and even before,
20 you know, when I just start getting sick, he's helping me
21 with cleaning, bathroom, vacuum cleaning --
22 Q Of course he is around the house you're --
23 A When we went to Disney World my husband, he
24 rented a wheel chair and he carried me around. And my boy would
25 push the baby on the carriage. So I will wait for them to

go do the things they want to see. I wait for them with the baby. And when I went to Bogota, Dr. Shiner, as you know, told me to take breaks. So I will get up and walk. But when I get there I was sick. I was limping quite a bit.

Q I take it you consulted Dr. Shiner before you went to Bogota?

A I don't remember but -- I say not consult me. When I went over there he told me --

Q He told you then.

A He told me when we take long trips, you know, to take breaks.

Q Move around some. Not sit too long, and all the rest of these things.

A Yes. And then when I get to Bogota, I was not feeling well. I was limping. And the two first days I spent just lying in bed and being waited on. I know the first two days, yes, and then I just have to rest and I just not, weren't to go out much. I did go out for a couple times, but not too far away. And, you know, just stay around the house.

Q Were those two trips the one to Orlando and the one to Bogota the only trips you all have made?

A Yes, sir. That's it.

Q You have gone nowhere by automobile?

A We have gone by automobile. I don't remember where it was. I know I have had a trip, it was a

1 think it was in July.
2 Q Let's go from there then. Have you had
3 company at home?
4 A Yes.
5 Q Do you do the cooking?
6 A Yes. If I have company and I'm going to
7 do the cooking, it's the only thing I do, so I can rest and
8 I will be able to take care of the company.
9 Q I see what you mean. All right. Now, Mrs.
10 Chavez, when your husband in June of 1972 wrote to the
11 insurance company, did you know he was writing? Did he
12 tell you he was going to do it?
13 A Yes, he did.
14 Q All right. And at that time did you think
15 that you were totally and permanently unable to perform any
16 occupation of any kind?
17 A Well, yes, sir, because if you are not able
18 to do what I have to do in my house, how can I go and work
19 outside?
20 Q What medical man had told you at that
21 time that that was your situation? Dr. Shiner told you?
22 A What do you mean?
23 Q That you were totally unable to perform any
24 occupation or employment and would be the rest of your life?
25 A Well, he didn't say exactly, you know, it

1 Q It is bound to have been before, before
2 1973 and in 1972 sometime?
3 A Yes. Uh huh.
4 Q All right. That is all I was trying to
5 find out.
6 A All right.
7 Q Now, Mrs. Chavez, at that time obviously
8 nobody had told you that you could not go to work. Isn't
9 that right?
10 A Well, it was one thing Dr. Shiner told me
11 yes, he did, he said you will just have to quit working.
12 You just have to quit, stop your work.
13 Q When was this?
14 A I believe when I went back, you know, from
15 the last time I tried to work.
16 Q What I am trying to find out from you, Mrs.
17 Chavez, is this: You say you tried three times to go back to
18 work at Hecht's.
19 A Yes.
20 Q Had anybody told you at that time that you
21 were incapable of performing any of the jobs that you were
22 going to be called upon to do, or had Dr. Shiner told you not
23 to go back to work?
24 A He said that I was unable to do it, you
25 know, for the way he says I have to learn to live with my

1 Q All right.
2 A And but I still not able to raise my hand
3 for long time and even though my left side, when I was holding
4 something and I have the pain, I have to throw away whatever
5 I have, which I have two cans of milk, I have dropped vases
6 and, not long after I come out of from the hospital was when
7 for the first time I faint from the pain of my left side.
8 Q One moment, if you please, ma'am. I am
9 trying to find out, I think I have asked the question so you
10 should understand it, how long after you came out of the
11 hospital was it that you first went back to try to work?
12 You should be able to tell us that.
13 A I don't recall, but I say my husband --
14 I don't recall when exactly. I really can't tell you. Two
15 or three months after. I don't remember.
16 Q Was it in 1971? Let's start with that.
17 A No.
18 Q You got out of the hospital in February of
19 '71.
20 A Yes. And I tried to go back to work in
21 I believe '71 then. All right.
22 Q All right. And how long was it after you
23 went the first time in 1971 that you tried the second time?
24 A Probably couple of months.
25 Q All right. That would still be in 1971,

1 ~~A No, I couldn't find anything.~~

2 Q Was she at that time in your considered
3 medical opinion based upon your years of experience and your
4 training and the examination that you gave her, incapable of
5 performing occupation or employment for which she was fitted,
6 from the standpoint of experience, training or education?
7 Granted, if you will, that she is a high school graduate.

8 A From the examination I felt that she was
9 able to carry on employment. I don't feel that even though
10 my examination was negative that it would be a good plan for
11 her to perform any activities that were of a real strenuous
12 nature. I feel that various types of sedentary jobs, that
13 she could perform. As I have stated before, though, they
14 could not be anything strenuous, that I would recommend.

15 Q Can you tell us briefly what type of things
16 you mean by sedentary occupations? As opposed to your
17 strenuous jobs?

18 A I feel that a person could be a receptionist.
19 Of course I realize there was some language difficulty here.
20 It would have to be something in which she didn't have to be
21 pulling out a lot of drawers or bending over and doing a
22 great deal of stooping or lifting.

23 Q Would you, Doctor, have given her clearance
24 to go back to work at that time? In some activity of the
25 type you have described?

1 ~~A I am going to ask you to repeat that~~
2 ~~question.~~
3 Q Would you at that time, following the
4 examination, had she asked you, given her clearance to
5 attempt working commercially or in business in a sedentary
6 type of activity?
7 A I would have to say on the basis of her
8 complaints I would have hestitated in having her go back into
9 any activities which would be strenuous.
10 Q How about non-strenuous? How about
11 sedentary?
12 A I felt she could perform sedentary work.
13 Q Doctor, in the course of your consideration
14 of this lady's problem, did you have available to you cer-
15 tain hospital records and reports of Dr. Shiner and so on?
16 A Yes.
17 Q Did you consider them in your efforts to
18 arrive at a considered opinion on the lady's case?
19 A Yes.
20 Q So that these were taken into consideration,
21 is that correct?
22 A Yes.
23 MR. MARKS: You may take the witness, Mr.
24 Moore.
25

1
2 ~~CROSS-EXAMINATION~~
3 ~~BY MR. MOORE:~~
4 Q Doctor, do you know what her occupation
5 was before the accident?
6 A No.
7 Q Do you know what her education or training
8 was?
9 A Well, I was under the impression that she
10 come from a foreign country. I could be wrong and I --
11 maybe I'm mistaken about it. And I thought probably, of
12 course, it has been a few years, two years ago since I saw
13 her, I'm not entirely, I don't entirely recollect what she
14 was doing at that time.
15 Q Do you have any idea as to, your report
16 makes no reference to any occupation. Is that right?
17 A That's right.
18 Q Is it fair to say then that at that time
19 you did not interrogate or ask her about any of these
20 activities at that time?
21 A I think that is correct.
22 Q Did you take down the medical history that
23 you got from her or did you have someone in your office do
24 that?
25 A No. I wrote it down myself and then I had

1 William and Northern Virginia Doctors?
2 A That's right.
3 Q Now, by activity of lifting and bending and
4 what somebody might do, I would assume that certain occupatior
5 that you would rule out or say she was disabled for, is that
6 right?
7 A I would say yes.
8 Q Would she be disabled then for purposes say
9 of filing in a library, books, or placing books or lifting
10 or things of that nature?
11 A Yes.
12 Q Would she be disabled for purposes of
13 filing material, pulling heavy drawers out and pushing back?
14 A Yes. If there was anything that carried
15 very much weight it would be difficult.
16 Q How about activities that involved long
17 periods of standing that caused her to have difficulty and
18 complaints?
19 A The basis of her complaints, prolonged
20 standing would be difficult.
21 Q How about one of the complaints and diffi-
22 culties that she had was that of the problem of say holding
23 her hands up or lifting them over her head or anything that
24 involved keeping her hands in a position for a long period of
25 time?

A Yes.

Q That would be one of the activities that you might consider to be disabling or not qualified for one that you would not recommend that she go back to work for, though?

A The basis of her complaints, prolonged activity, holding the arm in an extended direction would worsen the condition of her upper back.

Q And that would be your recommendation, that she not then go back to that type of activity but for some other --

A That is correct.

Q Doctor, you mentioned spasm. Would you just define for me what you mean by spasm.

A Spasm is an involuntary contraction of musculature.

Q What does that mean when you find that?

A A person cannot voluntarily produce spasms. Spasm is something that comes on involuntarily. If you have a disease of an area, if you have an injury to an area, the human being, and I guess it's true over the entire animal world, has a protection of what we call spasm. Probably the best description of it is the person who gets a charley horse, who is exercising in say too much running or too much strenuous activity, the muscles in the thighs or the legs will

A At the present time?

Q Yes.

A No.

Q I assume, Doctor, that injuries to the soft tissue of the muscle and the ligaments would not show up on X-ray, is that right?

A That is correct.

Q And that there are injuries that occur at these parts of the body which are very real and just are not illustrated or exhibited on any X-rays. Is that right?

A That's right.

Q Would this be a strain or sprain that one might have to these areas?

A Yes.

Q Is it fair to characterize this as an overstretching of these muscles and ligaments which perform the scar tissue, which would then not make it as elastic as it might otherwise have been?

A To simplify, a strain can produce muscle spasm.

Q Doctor, is it fair to say that you would be able to make a better evaluation if you had had more opportunity to see the plaintiff?

A Yes.

Q Is it fair also to say that your assumption

that has been previously made has been made without the benefit of two yeas of medical history that has subsequently occurred since your examination, this being September, over two years, September, 1975?

A Yes.

Q Doctor, were you aware of the fact that she had made four attempts to return to work?

A No, I didn't know it.

Q Are you aware that she is still unable to do heavy house work?

A I'm not aware of her condition right now.

Q Doctor, is it fair to say that as far as making an evaluation and diagnosis, that it is better to see a patient, it would be preferable to see a patient more than one time?

A Yes.

Q Doctor, I assume that you have not had the opportunity to consult with Dr. Shiner, is that correct?

A That is correct.

MR. MOORE: No further questions, Doctor. Thank you.

REDIRECT EXAMINATION

JURY OUT

training or experience for the remainder of her life.

MR. MOORE: That's right.

THE COURT: All right. Now we have eliminated, I don't think there is any question about eliminating hair dressing. She has had experience, obviously she had a high school education, and even your own medical testimony has indicated she certainly can do a job that does not require her great exertion.

MR. MOORE: Well, on a part-time basis, was all that he said, on that basis, because she couldn't sit for long periods of time.

THE COURT: The thing starts out permanent total disability.

MR. MOORE: That's right. It has to be. For there is nothing in her education, training, or experience that qualified her for anything to do with other than hair dressing or related to that. She cannot type. She speaks, you know, from listening to her testify, English as a second language. She has had no experience in that regard. She never has been employed in any other capacity. Nowhere is there any evidence --

JURY OUT

THE COURT: Quote me a case that is parallel to this, analogous to this, in which the Supreme Court has ruled that this should go to a jury or has ruled on it.

MR. MOORE: Just on the narrow question of --

THE COURT: Of whether this comes within the purview of permanent total disability as defined within this policy.

MR. MOORE: There is one New York case, Your Honor, I don't have any case in Virginia that I could refer to the Court, where it indicates that substantial --

THE COURT: If you didn't have the word any in here, you would be on good ground. It looks like to me, interpreting this from not only the legal significance of it, but that which ordinarily be common sense, which tells you here is the situation we have here, it is true, that occupation -- certainly homemaking is an occupation. Here a woman has had an accident, she has been pregnant, she apparently is able to carry on, at least to some degree her homemaking activities which is an occupation in itself.

MR. MOORE: Well, the occupation I believe

1 JURY OUT

2 in that sense, Your Honor, includes the one where
3 it is required that she receive remuneration;
4 certainly this one she was doing at the time of the
5 accident, which she now cannot do, is not fitted,
6 is not suited to carry on, is not able to. But, I
7 don't, I don't see that employment and occupation
8 are one and the same.
9 THE COURT: I grant you this is a little
10 different situation.
11 MR. MOORE: A housewife, I don't believe
12 we are really talking about that.
13 Your Honor, I don't have all of the case.
14 The case that I have in my notes indicate that the
15 total disability from performing any and every duty
16 pertaining to the insured's occupation is not to be
17 literally applied, means only inability to do
18 substantially all of the material and essential
19 duties necessary to the practical prosecution of
20 the insured's occupation or business in a usual
21 customary manner. That cite is a New York case
22 292 New York 419, 55 Northwest 2nd 483. I don't
23 have all of that case copied, Your Honor. I don't
24 think that you can take and separate those parts.
25 If you read that, it says permanent total disability

JURY OUT

means --

THE COURT: I understand.

MR. MOORE: Then they are defining that disability commencing within 180 days, which Dr. Shiner said it did, from the date of accident and continuing for twelve consecutive months, which the evidence indicated it was.

THE COURT: All right.

MR. MOORE: And which shall prevent the insured from engaging in any occupation or employment, which is for compensation.

THE COURT: All right. I concede that.

MR. MOORE: For which she is fitted by reason of education, training and experience. Now those three are conjunctive. If you separate them, if you say training, if you say education, if you say experience, all three of them relate to the hair dressing. All three of them are related to the activities that she was equipped to do at that time. There is no evidence that she was equipped, trained, or capable, or could really do anything else. Although there was some cross-examination that indicated there were other occupations that were unrelated to that, as far as what she was

JURY OUT

MR. MARKS: No, sir.

MR. MOORE: I would just point out, Your Honor, the way the policy is drafted it uses he, it does not use she.

THE COURT: I understand that.

The Motion to Strike is granted. I cannot believe that the evidence presented to the Court would bring it within the purview of the interpretation of this permanent total disability clause. If it did not have the word any in that provision, I think that the plaintiff's position would be sound. But, as I interpret "from engaging in any occupation or employment" it means, it seems to me, that he is not prevented from going into another field of endeavor, occupation or employment. As I interpret the case which was just handed me in this Travelers Insurance Company versus Brinkley, which I think the Court very aptly states in here, it seems to me that contracts of insurance should receive a reasonable construction so as to effectuate the purpose for which they are made. Legal effect should be given to the language and the object of the contract should be considered in interpreting it.

1 JURY OUT

2 I find that he has failed to present evidence
3 of sufficient probative value, it seems to me, to
4 send this matter to the jury, and I so rule as a
5 matter of law that he has failed to present
6 evidence to come within the purview of the permanent
7 disability provision of the policy.
8 MR. MOORE: Would the Court respectfully
9 note our exception.
10 THE COURT: All right. Bring the jury in,
11 please.
12 MR. MOORE: Your Honor, I did not get all
13 the cites of the cases that you were relying on.
14 There were two.
15 THE COURT: I am relying heavily on this
16 Travelers Insurance Company versus Brinkley, 166
17 Virginia 147. I think it is a fair interpretation
18 of the law. It certainly to me draws a parallel
19 between what we have here.
20
21 NOTE: At this point the jury is returned
22 to the courtroom. Whereupon the Court states:
23
24 BEFORE THE JURY
25