

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

BROWARD DIVISION

CASE NO. 97-6617 CIV-ROETTGER  
MAGISTRATE SELTZER

VINCENT BILELLO,

Plaintiff,

v.

THE PAUL REVERE LIFE INSURANCE  
COMPANY,

Defendant.

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**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

*I. Introduction*

The Plaintiff, Vincent Bilello, D.C., seeks to recover individual disability insurance benefits due him by the Defendant, Paul Revere Life Insurance Company of America (hereinafter "Paul Revere"). Paul Revere advertised and sought out perspective high income clients, including Dr. Bilello, to insure against permanent disability. Dr. Bilello was issued an insurance policy for individual disability benefits on September 25, 1988 which states in pertinent part that in the event that you are unable to perform the important duties of your occupation and you are under the regular and personal care of a physician, Paul Revere will pay Dr. Bilello a monthly disability benefit.

Dr. Bilello paid his premiums until he became disabled as defined by the policy. Dr. Bilello has been diagnosed with a compression neuropathy of the right and left median nerve, internal derangement of the left wrist as well as with dynamic instability of the right and left wrist. He was also diagnosed with TFC (triangular fibrocartilage) pathology, continued bilateral wrist pain second to the pathology and right wrist pain. Dr. Bilello was a chiropractor performing manual manipulations which required intense

stress to be placed on his wrists. Dr. Bilello applied for the income benefits which were promised under the terms of the policy. Recognizing that Dr. Bilello was totally disabled from his former occupation as a chiropractor, Paul Revere paid full benefits for more than two years. Though Dr. Bilello's condition remained the same, Paul Revere suddenly ceased paying benefits, claiming that Dr. Bilello was only partially disabled and that his occupation was actually that of a business owner/administrator. This action was instituted by Dr. Bilello seeking the benefits due him under the insurance contract.

## II. Facts

### A. Background

Dr. Bilello received his formal training in chiropractic medicine from New York Chiropractic College. There are two different philosophies to chiropractic treatment, manual manipulation and the activator method. Manual manipulations involve positioning the patient into certain positions and physically applying a thrust of pressure to certain parts of the body. The activator method instead uses a medical device, called an activator, to treat the patient. Dr. Bilello was trained in the former technique. He has never been trained in the use of an activator. Dr. Bilello completed his training in 1981 and graduated as a Doctor of Chiropractic.

Dr. Bilello worked hard in his profession and built up a thriving practice with three locations. In the two years immediately prior to his disability, the main office of his chiropractic practice saw more than five thousand patients in each year at this office alone. Although there were other chiropractors working at the three locations, Dr. Bilello treated the greatest proportion of patients. In a normal thirty hour work week, Dr. Bilello would spend twenty-five hours performing patient manipulation, three hours reviewing patient files, and two hours performing basic administrative duties.

In order to guard against a potential loss of income from a disability, Dr. Bilello purchased an individual disability policy from the Defendant on September 25, 1988 under policy number 0102359113<sup>1</sup>. The purpose of the policy was to provide lifetime income disability benefits of \$10,100 per month to Dr. Bilello in the event that he became disabled and unable to practice in his profession as a chiropractor.

In early 1994, Dr. Bilello noticed a problem. After performing several

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<sup>1</sup> The policy is attached as **Exhibit A**.

manipulations over the course of a day, his hands would become numb. Although this had been occurring intermittently, the problem was becoming worse. At first, Dr. Bilello treated himself with ultrasound, paraffin, and splints.

### **B. Medical Treatments**

By September 1994, the pain had become so intense that he sought treatment from a hand surgeon, Dr. Deepak Kapila. Dr. Kapila diagnosed Dr. Bilello with compression neuropathy of the right median nerve, internal derangement of the right wrist, compression neuropathy of the left median nerve and internal derangement of the left wrist. He also recommended that Dr. Bilello discontinue performing any manipulations at this time<sup>2</sup>. Dr. Bilello returned for a follow-up visit in November 1994. Dr. Bilello reported that his condition seemed to be improving because the numbness and tingling in both hands had diminished. Dr. Kapila advised Dr. Bilello to continue to abstain from performing manipulations.

Dr. Bilello's pain was still present when he returned in February 1995. In addition to the work restrictions, Dr. Kapila ordered emg's and nerve conduction studies. In March 1995, Dr. Kapila saw Dr. Bilello for the final time. Based on the results of the tests and Dr. Bilello's pain and discomfort, Dr. Kapila recommended arthroscopic surgery<sup>3</sup>.

Dr. Bilello decided to get a second opinion before he had the operation performed. Dr. Paul Dell, Professor and Chief of Hand and Microsurgery at the University of Florida, was recommended to him as one of the top hand surgeons in the State of Florida. Dr. Dell agreed that Dr. Bilello needed an operation to potentially correct the problem<sup>4</sup>.

Dr. Dell performed the operation on June 8, 1995<sup>5</sup>. Unfortunately, the surgical procedure did not alleviate Dr. Bilello's pain. In Dr. Dell's words:

Q What was the outcome of the surgery, were you pleased with the results?

A Not as happy as I would be. He continued to complain of pain and has continued to complain of pain on the left side.

Q The complaints of pain following the surgery, were they different

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<sup>2</sup> The September 15, 1994 report of Dr. Kapila is attached as **Exhibit B**.

<sup>3</sup> A copy of the March 16, 1995 report of Dr. Kapila is attached as **Exhibit C**.

<sup>4</sup> The March 22, 1995 report of Dr. Dell is attached as **Exhibit D**.

<sup>5</sup> The operative report is attached as **Exhibit E**.

in kind or degree from his complaints prior to the surgery?

A I'm not sure that I helped him surgically, so I would say they're about the same.

Deposition of Paul Dell, M.D., pg. 13, lines 2-11.

Dr. Dell also described what Dr. Bilello was feeling.

Q What kind of symptoms would you expect from somebody who has, to use your word, a bit of fraying of the scapholunate ligament?

A They would have pain and weakness with use.

Q Would those symptoms be as extensive as the ones reported to you by Dr. Bilello?

...

A Well, he has sort of a low-grade pain, and then there's spikes of activities as he describes them.

Q What do you mean by spikes of activities?

A They just get worse when he's using his hands for certain activities. It's hard – pain is such a subjective complaint, it's hard to put a handle on that.

Deposition of Paul Dell, M.D., pg. 17, lines 1-6, 11-19.

Dr. Dell continued his treatment of Dr. Bilello which included non-steroidals, low stress activities for his left hand and wrist, Vicodin, paraffin baths, Relafen, Depomedrol and Xylocaine injections, Ultram, and a Neoprene splint. However, nothing seemed to help.

Q Is there any indication from your records that the steroid treatment helped Dr. Bilello's complaints of pain in his wrist?

A It has not.

Deposition of Paul Dell, M.D., pg. 37, lines 2-5.

Since Dr. Bilello's condition remained unchanged, he saw Dr. Anne Ouellette, a prominent hand surgeon at the University of Miami, for another opinion. The only option she gave him was to have another surgery<sup>6</sup>.

Paul Revere also had Dr. Bilello examined by its doctor, Paul Zidel, M.D., however, it neglected to inform Dr. Zidel what Dr. Bilello's occupation was. Dr. Zidel had no way to know if Dr. Bilello could perform his occupation given his condition.

Q Were you told or was it in any of your records that you are to

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<sup>6</sup> The February 28, 1996 report of Dr. Ouellette is attached as **Exhibit F**.

examine this individual in the context of employment?

A Apparently not. Oftentimes, and like I said, in this particular case, which I only have a vague recollection, I cannot tell if he brought the records or they were sent to me. If they were sent to me, oftentimes there was a cover letter of who sent them, if there are any specific questions that they would like answered during the IME.

I do not see any records of such. It may be somewhere, but not right here.

Deposition of Paul Zidel, M.D., pg. 20, lines 1-12.

Though Dr. Zidel did not have an employment context in which to base an opinion, he did agree with the treatment given up to the point of his examination.

Q Prior to January 18<sup>th</sup>, 1996, did you agree with the treatment that doctor Bilello had received medically up to that point?

A Yes.

Q Given the medical records and your examination of doctor Bilello, did you agree with the ultimate conclusions that the prior doctors had come to?

A Yes.

Deposition of Paul Zidel, M.D., pg. 12, lines 14-22.

Dr. Zidel did form an opinion as to the cause of Dr. Bilello's pain.

Q To what do you attribute the alleged pain that doctor Bilello complained of with the forced wrist extension?

A Probably ligament injury and synovitis.

Q The synovitis was mild, from what you detected?

A That's only on surface examination. I believe Doctor Dell's operative report says there is moderate to marked amount of synovites.

That's why I mentioned I would myself like to see the pictures, if he took any.

Q Do you have any reason, any understanding of why the surgery may not have been successful, assuming doctor Bilello's complaints are accurate and truthful?

A Well, if the TFC was frayed, that presents a difficult problem. Just Like a pair of jeans that's frayed, you can't sew it really, so you shave it. And the results in my opinion are unpredictable, depending on how it heals.

The same thing with synovites, being a layer of inflammation within the wrist. And if we're not sure of the exact cause, then that certainly helps explain why he did not improve dramatically.

Deposition of Paul Zidel, M.D., pg. 45, line 25; pg. 46, lines 1-25.

Q Do either of the findings of fraying of either of these ligaments, are those findings consistent with the extent of the complaints by doctor Bilello concerning his wrist extension and the pain he suffers allegedly in his wrist when he leans on them or puts pressure on them?

A Yes.

Q The scapholunate or the TFC or both?

A It could be both, usually scapholunate.

Q Let me ask you this: Would you have expected to find a greater degree of fraying in light of the extent of doctor Bilello's complaints?

...

A Yes. But that's not inconsistent. I would have expected it to be worse.

Deposition of Paul Zidel, M.D., pg. 54, lines 21-25; pg. 55, lines 1-8, 11-12.

In his report to the Defendant, Dr. Zidel concluded: "I feel he is able to work with restricted demands in terms of forced wrist extension<sup>7</sup>." However, as explained *supra*, he had no vocational context when he rendered this opinion. His opinion about whether Dr. Bilello could work changed when he was given a vocational context.

Q Can you explain to me what you mean by "forced wrist extension?"

A Basically, if you move your wrist down, you check the motion. At the extremes it doesn't hurt. If you apply a force and it creates some of the symptomatology or pain or instability, it's so noted.

Q Have you ever gone to a chiropractor?

A No.

Q Have you ever seen a chiropractor work?

A No.

Q Do you know what their work entails, vis-a-vis, the strain on their wrists?

A Not in detail.

Q If it's impossible to practice chiropractic without forced wrist extension, do you feel doctor Bilello can work as a chiropractor?

...

A Wrist flexion.

Q Right. Would you agree it's impossible for him to do that job because he cannot do the wrist flexion?

A If you're asking me if a patient can't do a particular maneuver that's part of his job and therefore he can't do his job, I mean, that's a logical conclusion, yes.

Q The reason I ask that is because I was very unclear when I read the forced wrist extension and now you clarified it.

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<sup>7</sup> The January 18, 1996 report of Dr. Zidel is attached as **Exhibit G**.

Basically you're saying you can put no weight to force your wrist to where it goes past naturally, is that correct?

A Yes.

Q If it's impossible to do your job without putting weight on your wrist, then you can't do your job, right?

A If part of your job entails a maneuver that caused pain, weakness, then I would assume he can't do his job.

Q Other than a passing understanding of what chiropractors do, did you have a vocational context in which to render an opinion as to whether doctor Bilello could or could not perform his occupation?

A No.

Q Do you have an opinion whether or not he can or he cannot perform his occupation as a chiropractor?

A It depends on the maneuvers that are required that he needs to do. I felt that the recommendation would be a restriction of the demands of the maneuvers that cause pain. Whether that would disable him from the work he does would be beyond my knowledge of the requirements of his occupation.

But I believe I mentioned that, yes, I mentioned that I would recommend restriction on the demands of his forced wrist extension.

Q Correct. This sentence is a qualifier, that if he has to do – if his work demands forced wrist extension, that's a qualifier on the first half of that sentence, would you agree?

A Yeah.

Deposition of Paul Zidel, M.D., pg.27, lines 17-25; pg. 28, lines 1-8, 16-19, 22-25; pg. 29, lines 1-25; pg. 30, lines 1-13.

Dr. Zidel's examination did not reveal any new options to Dr. Bilello. He did not want to have another surgery. The first surgery did not help, there was no guarantee that another surgery would help, and there was the potential for permanent, irreversible injury during surgery. Dr. Bilello went back to Dr. Dell. However, Dr. Dell had also run out of options outside of surgery, which would "limit his ability to perform his job<sup>8</sup>." His only course of action, outside of fusing his wrists, was to refrain from performing the manipulations required by his occupation.

In an attempt to understand what Dr. Bilello could and could not do, the Defendant sent Dr. Bilello for an Upper Extremities Functional Capacity Evaluation<sup>9</sup>. One of the conclusions of this report was: "The prognosis for the client returning to his occupation is poor." The recommendation was: "The client is feasible to return to work

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<sup>8</sup> The June 28, 1996 report of Dr. Dell is attached as **Exhibit H**.

at the light work level 4 hours daily, if medically released.” Although these two statements seem to be contradictory, Dr. Bilello was never medically released to return to work at even a light work level. His medical condition would not allow him to work four hours daily which made the likelihood of him returning to his occupation poor.

Dr. Dell saw Dr. Bilello again on December 20, 1996<sup>10</sup>. As of this date, Dr. Dell concluded, with respect to Dr. Bilello, that “[h]e remains disabled, unable to do his work as a chiropractor in terms of manipulations. It is unlikely that other surgery will help him to be able to do that kind of manipulative work.”

Q Doctor, when you saw Dr. Bilello on December 20<sup>th</sup>, 1996, at that time did you inject Dr. Bilello’s hand?

A Yes.

Q And at that time, Doctor, did you have any opinions within a reasonable degree of medical probability as to whether Dr. Bilello was disabled from his profession as a chiropractor?

A Yes.

Q And what was that opinion, Doctor?

A I thought he was not able to return to work doing that type of job.

Q At that time, Doctor, on December 20<sup>th</sup>, 1996, did you have any opinions within a reasonable degree of medical probability as to what treatment or care or modalities of treatment that you could offer to Dr. Bilello for his pain in his hand?

A Pretty much we were backed up into a corner because there is an operation I could offer him which is a partial fusion of his wrist.

A partial fusion gets rid of the instability but at the expense of motion. If that were successful, then he would be restricted in his range of motion secondary to the fusion.

He would not be able to get into the various posturing of his wrist that he needs to do to do his job, so I didn’t think I was going to be able to help him get back to his job as a chiropractor if I fused part of his wrist.

Q Doctor, within a reasonable degree of medical probability if Dr. Bilello has a wrist fusion, would he be able to perform as a chiropractor?

A No.

Q Doctor, from the time you first started treating Dr. Bilello to the time you last saw him, has he at any time been returned by you to work as a chiropractic physician performing spinal manipulations and adjustments?

A No.

Q Does he remain disabled as of this date [May 6, 1998]?

A Yes.

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<sup>9</sup> The April 15, 1996 report is attached as **Exhibit I**.

<sup>10</sup> A copy of the report is attached as **Exhibit J**.

Deposition of Paul Dell, M.D., pg. 52, lines 23-25; pg. 53, lines 1-25; pg. 54, lines 1-13.

Dr. Bilello was also examined by Felix Freshwater, M.D., another distinguished physician<sup>11</sup>. Dr. Freshwater concluded:

“The objective magnetic resonance imaging studies are consistent with severe injuries to this patient’s wrist that would prohibit him from using his hands in day-to-day activities as a chiropractor. The surgery performed by Dr. Dell was palliative at best. At this time, there is no surgical procedure available to Dr. Bilello that would enable him to function as a chiropractor because the only means of treating his pain is to fuse his wrists. Clearly, this would not allow him to perform chiropractic manipulations.”

January 13, 1998, report of Dr. Freshwater, pg. 2.

In his deposition, Dr. Freshwater elaborated on his findings and put them into a vocational context.

Q What are the objective complaints that would go with a stretching of the scapholunate ligament, at least to the extent that’s reflected in this report?

A There’s none that I can specifically localize. I think I mentioned the clicking but I can’t – clicking is something that I can go ahead and feel or hear objectively. Clicking is an abnormality in the wrist, but I can’t tell you that it came from the scapholunate ligament as opposed to triangular fibrocartilaginous complex or the – it just shouldn’t be there, and it can’t be faked.

Q Which of Doctor Bilello’s subjective complaints are you able to objectively substantiate?

A All these different stretching, scarring and tearing on the MR. It doesn’t get any more objective than that.

Q Do they substantiate the clicking?

A They correlate with the clicking. In other words, clicking is coming from there being something out of alignment, something that is torn and then to see an MR report saying that there is something torn, there is something stretched, compliments it.

Q What about the pain Doctor Bilello complains of?

A Well, pain is subjective but when you see the MR reports, you’re – the first feeling is the man is entitled to pain.

Q Based on this report, would you expect the pain to be constant or to become worse with certain types of use or pressure on the wrists?

A The pain whether – there’s no way of saying if it’s going to be constant, a dull aching pain or if it’s going to be nonexistent, but certainly with more use, with a greater load, there’s going to be more pain.

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<sup>11</sup> The January 13, 1998 report of Dr. Freshwater is attached as **Exhibit K**.

Deposition of Felix Freshwater, M.D., pg. 28, lines 7-25; pg. 29, lines 1-20.

Q How did Doctor Bilello explain to you, if at all, what his job duties were?

A He discussed him having to perform, I think the term is manipulation, of doing things to people's necks and spines which involved a vigorous physical activity which he was no longer able to do because of the pain that he experienced in his wrists, and he was able to demonstrate the position that he had to attempt to hold his wrists for doing these things which was no longer feasible.

Deposition of Felix Freshwater, M.D., pg. 17, lines 17-25; pg. 18, lines 1-2..

Q Did you ever tell Doctor Bilello what your final conclusions were?

A I know that I told him that I didn't think that he would be going back to doing manipulations as a chiropractor and I remember we had a discussion about where else he could go looking for other opinions and I suggested the Mayo Clinic in Rochester,

Q What did you discuss with Mr. Greenberg?

A The fact that I didn't think that Doctor Bilello was capable of returning to work as a chiropractor doing manipulations.

Q Did Doctor Bilello complain of constant pain in the wrist or only after he had been exerting pressure on them for a while?

A I don't recall discussions about the frequency or the temporal nature of the pain.

Q If the pain exists only after he's been using his wrists for awhile and exerting substantial pressure on his wrists for awhile, would your opinion change?

...

A No.

Q Even if Doctor Bilello could work three or four hours a day?

A Again, he could be working three or four hours a day doing acupuncture, but if he does or attempts to do a manipulation and something pops or clicks and he ends up with pain, then he's a goner for the rest of the day, the rest of the week, maybe the rest of month.

So what you describe doesn't work out in a linear fashion.

Deposition of Felix Freshwater, M.D., pg. 23, lines 12-25; pg. 24, lines 2-13.

### **C. Paul Revere's Claims Handling**

By the end of 1994, it became evident to Dr. Bilello that he was not going to heal quickly. Because he was unable to work, Dr. Bilello applied for the income disability

benefits which were promised under the terms of the policy<sup>12</sup>. Dr. Bilello naturally listed “Chiropractor” as his occupation. That is what his degree said and the profession he had been practicing for the past thirteen years. Under the Occupational Description section, Dr. Bilello described his duties as manipulation-25 hours per week, patient review-3 hours per week, and office management-2 hours per week.

When the initial claim form was received by Paul Revere, the claim was processed with the determination that Dr. Bilello’s occupation was a chiropractor. It was randomly assigned to Claims Examiner David Claprod.

Q Would you agree that after reading this occupational description, that Dr. Bilello’s occupation is defined as a chiropractor?

A He’s telling us his occupation is that of a chiropractor.

Q Do you see anything in that occupational duties that would cause someone to question his occupation was that of a chiropractor?

A He’s listed his occupational title a chiropractor physician. Nature of employer’s business is chiropractor treatments. At this point I would have no reason to question what he has listed on his form.

Deposition of David Claprod, pg. 40, lines 11-25; pg. 41, line 1.

The purpose of Dr. Bilello’s policy was to protect him in the event that he became disabled and unable to earn a living. Under the terms of the policy, Dr. Bilello would be totally disabled if he was “unable to perform the important duties of Your Occupation<sup>13</sup>.” Logically, to determine that a claimant is entitled to benefits, the claimant must be totally disabled. The first step is to determine what the “important duties of Your occupation” are. The next step is to determine whether the claimant can perform these duties. If he cannot perform the important duties, he is totally disabled and entitled to benefits.

Determining Dr. Bilello’s occupational duties is the most important part of the claims process.

Q I’m looking at the claim form here, I think it’s the same one you have. I’m just trying to hone in, a little bit. Would you agree the occupational duties have a little more importance than some of these things to eligibility for benefits? I mean the claim form as a whole is important, I understand that. But there are certain things that are more important such as the occupational duties, versus are you eligible for state disability insurance. Things like this. This is pretty much the meat and

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<sup>12</sup> The initial claims form is attached as **Exhibit L**.

<sup>13</sup> See, Exhibit A.

potatoes of the claim form, is it not?

A The disability policy is based on your inability to perform the duties of your occupation, so I would tend to say that the occupational description is a major part of understanding the claim.

Deposition of David Claprod, pg. 26, lines 19-25; pg. 27, lines 1-12.

The importance of knowing the occupational duties of a claimant was also explained by another Paul Revere employee, Sergio Cabanas, who is a Field Claim Consultant.

Q Isn't it also true that you have to have an understanding of the vocational duties of an individual before you can match up the medical problems and how they affect his occupation, you must have an understanding of not only the medical duties but also the vocational duties, isn't that true?

A It would assist in a determination for the most part.

Q It's actually crucial, is it not? I'll use the example, my wife's a ballet dancer. If she breaks an ankle, she's totally disabled. If I break an ankle, it doesn't hurt me.

The vocational duties of an individual are crucial in determining whether or not someone falls under the policy, are they not?

A In most cases, yes. The reason I throw in a qualifier, if God forbid, something happened to your wife that's a lot more drastic than a fractured ankle, it might be so obvious that she wouldn't be able to do anything really, so I wouldn't necessarily be doing an analysis whether she was a ballerina dancer versus sweeping floors or whatever.

Q That's a fair point. But would you agree in most cases you need to have the vocational context to examine the medical records?

A It would be helpful, yes.

Deposition of Sergio Cabanas, pg. 86, lines 22-25; pg. 87, lines 1-25; pg. 88, line 1.

In conjunction with the claims examiner, a medical specialist case manager, Susan Pierson-Bacon, and rehabilitation counselor, Caroline Bouchard. Their job, in a nutshell, was to look at a claimant from a vocational standpoint and determine if there is some way to help him return to his pre-disability occupation, or some other occupation. Each had their own idea of a chiropractor's occupational duties.

Q What is your understanding when a chiropractor says that 25 hours a week of a 30 - hour week are spent doing manipulations? What's your understanding about what a manipulation is from a chiropractor's point of view?

A There's a wide range of ways and philosophies and techniques for

manipulations. I wouldn't venture to say I'm familiar with all of them. But manipulation is putting pressure on bone, or moving bones is the way the chiropractors typically refer to it. Sometimes they're doing manual techniques, which is what Dr. Bilello explained to me was his preferable, you know, his philosophical approach. And that means using force to move bones to manipulate them using your own body with the other person's body.

Deposition of Caroline Bouchard, pg. 31, lines 19-25; pg 32, lines 1-11

Q Chiropractors have a variety of different ways of performing their work; isn't that true?

A Correct.

Q Manipulations can include other methods other than using your hands and things like that; is that true?

A Correct.

Q Did you have an understanding that that was what Dr. Bilello was trained in and practice, was a very physical form of the chiropractic treatment with his hands and the kneading and things of that nature and bone placement and things like that.

A Yes.

Q Did you have an understanding that that was his – that was his area as opposed to some of the other areas of specialty in chiropractics?

A Yes.

Deposition of Susan Pierson-Bacon, pg. 40, lines 19-25; pg. 41, lines 1-13.

After the initial claim form was received, medical records were requested from his treating physician at the time, Dr. Kapila. Based on the claim form and the medical records received, Dr. Bilello's claim was approved. His disability date was determined to be in September 1994 and he began receiving benefits after the sixty day waiting period listed in the policy.

Dr. Bilello continued treating with his physicians, described *supra*, and he continued receiving his disability checks on a regular basis. Then, on October 19, 1995, the Defendant received a phone message from Dr. Dell suggesting that surveillance be conducted<sup>14</sup>. This was a strange message given the fact that the Defendant received a fax on October 16, 1995, which was dated October 13, 1995, with Dr. Dell's monthly progress report<sup>15</sup>. The progress report continued to certify that Dr. Bilello was disabled.

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<sup>14</sup> The October 19, 1995 phone message is attached as **Exhibit M**.

<sup>15</sup> The October 13, 1995 progress report is attached as **Exhibit N**.

The phone message caused Dr. Bilello's claim to be referred to the Special Investigation Unit (SIU) so surveillance could be conducted. Surveillance was conducted on Dr. Bilello which was written up in a report dated January 16, 1996. After receiving the report, the Defendant continued to pay the claim.

Q As of the time of February '96, you have had at least one report from SIC dated 1/16/96, and a letter of 12/12/95. Forget about that third report or the third SIC document right now.

But in February '96, you have the January 16<sup>th</sup> report from SIC and you have the December 12<sup>th</sup>, '95 letter to Covino; correct?

A I see that prior to the monthly claim form that I previously described of February 1<sup>st</sup>, '96, correct.

Q And obviously, there is nothing up until February of '96, that caused you to stop paying benefits; isn't that true?

A I don't see any actions that I took to deny benefits to Dr. Bilello.

Deposition of David Claprod, pg. 171, lines 17-25; pg. 172, lines 1-9.

Dr. Zidel performed his examination, discussed *supra*, of Dr. Bilello on January 18, 1996 which is around this same time period. After receiving his IME, the Defendant continued to pay the claim. The Defendant's next action was to send Dr. Bilello for a Functional Capacity Evaluation, discussed *supra*. After receiving this report, the Defendant continued to pay benefits. Moreover, in Mr. Claprod's opinion, the FCE supported a finding of disability.

Q After your review of the functional capacity exam, you felt that the functional capacity exam supported Dr. Bilello's claim for total disability, did you not?

A I think I phrased this rather carefully to Dr. Bianchi due to the fact that I have no medical training or I'm not a doctor. So I, when I looked at it, I said, I used the word "appear" to support an impairment. So by using the word "appear," that would be my non medical opinion to support an impairment, but I don't see any words of total disability. I just see "it appears to support an impairment that prevents the insured from performing the physical manipulations required by a chiropractor." And then I leave it at that.

Deposition of David Claprod, pg.190, lines 15-25; pg. 191, lines 1-6.

Total disability benefits continued to be paid throughout Mr. Claprod's involvement with Dr. Bilello's claim.

Q In fact, in your entire involvement in this file right to the very end,

you paid monthly benefits every month you were involved in this file?

A Up to this point in time that's correct. That's what the file reflects.

Q You're going to limit it to April. You're not sure that you – Do you know whether or not you ever denied Dr. Bilello's claim for total disability benefits?

A Yes.

Q You know that you did or did not?

A I know affirmatively that I did not deny benefits in any way, shape, or form to Dr. Bilello.

Q All the way to the end. So I'm trying to – you've been helpful in the past of saying, listen, I don't see anything in the file that reflects I cut him off. Therefore I didn't. But, in fact, you know for a fact you never cut him off; correct?

A With my involvement in the file, that's correct.

Deposition of David Claprood, pg. 187, lines 17-25; pg. 188, lines 1-15.

In approximately November 1996, Dr. Bilello's claim was taken over by another claims examiner, Diane Cahill. Up to this point, there had never been a problem with Dr. Bilello's claim. From the time of her first involvement, Ms. Cahill seemed to be questioning this claim, though none of her predecessors had. As early as November 22, 1996, Ms. Cahill questioned whether Dr. Bilello was totally disabled as well as his prior occupational duties<sup>16</sup>. Ms. Cahill looked at the IME and FCE, the same information in the Defendant's possession for at least seven months, and determined that Dr. Bilello was partially disabled at best. In her Field Transmittal (Exhibit O), she instructed the field consultant to offer four months of benefits at fifty percent.

To support her decision, Ms. Cahill sent a field consultant, Sergio Cabanas, out to meet with Dr. Bilello. The case was requested to be handled on a priority basis as of December 17, 1996; he was to expedite the handling of the case. Mr. Cabanas met with Dr. Bilello on December 18, 1996. He did not know why the case was assigned on a priority basis.

Q Based on your review of the documents in preparing for your deposition today, do you know of any red flags that were given two years into this claim involvement?

A Based on my independent recollection, no.

Deposition of Sergio Cabanas, pg. 73, lines 20-25; pg. 74, line 1.

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<sup>16</sup> The November 22, 1996 Field Transmittal is attached as **Exhibit O**.

After his meeting with Dr. Bilello, Mr. Cabanas never personally made a decision as to what Dr. Bilello's occupation was.

Q Do you consider Vincent Bilello to be a business owner, a chiropractor or both?

A I haven't made any such determination. I reported what he indicated to me.

Deposition of Sergio Cabanas, pg. 116, lines 8-11.

When Mr. Cabanas was asked if he had personally made a determination as to whether Mr. Bilello was totally disabled, Mr. Cabanas responded:

A I was going to add to that that every case is different. I stay clear of making those claims determinations. I let the home office make that decision in consultation with our medical department and law department, whoever else they need to consult with.

Again, I'm not acting as the lone wolf making the claims determinations here in the field.

Q I'm asking you for your opinion as someone who worked in the industry five years and understands the policy. It's simply a hypothetical given. I want to know what your opinion would be.

...

A Even in this case, I haven't really reached an opinion one way or another. Whether you're asking me here to my opinion, I haven't really made a decision on that.

Deposition of Sergio Cabanas, pg. 113, lines 10-25; pg. 114, lines 1-2.

On January 22, 1997, Dr. Bilello's claim for total disability was officially denied in a letter authored by Ms. Cahill<sup>17</sup>. According to the letter, the denial of total disability benefits was based on the following: 1) Dr. Dell's records, especially a letter dated November 14, 1995; 2) Dr. Zidel's report; 3) the Functional Capacity Assessment; 4) his ownership of three offices; 5) Mr. Cabanas' report; and 6) his reported income to the IRS. The decision regarding this claim was made by Ms. Cahill and her manager, Kristine Bostek.

Q In rejecting his claim for total disability benefits, was that your decision or Diane Cahill's?

A It was a decision made by both of us.

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<sup>17</sup> The January 22, 1997 letter is attached as **Exhibit P**.

Q What do you base your assessment of lack of entitlement to total disability benefits? How did you arrive at your decision?

A I'm looking for Diane's letter to Dr. Bilello, which clearly outlines

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Q If you – is there anything beyond that, or is there parts of that you agree with and other parts that you don't. That's what I want to know.

What did you base your denial on? Not what she –

A I supported Diane's position in her January 22, 1997 letter to Dr. Bilello.

Q All right. In its entirety?

A Yes.

Deposition of Kristine Bostek, pg. 28, lines 13-25; pg. 29, lines 1-6.

Although Ms. Bostek made the decision in conjunction with Ms. Cahill, she did not know what his occupation or occupational duties were.

Q Did you have any understanding of what his occupation was when you spoke to him?

A He advised me he was a chiropractor.

Q Did your impression regarding what his occupation was ever change?

A I never had an impression regarding his occupation.

Q Did your understanding of what his occupation was ever change?

A That was not clearly documented going forward in the file.

Q Did you at any time ever form an understanding about what Dr. Bilello's occupation was?

A At the time that I spoke to him in December of '96, he told me he was a chiropractor performing manipulations. That was my understanding of his occupation at that time.

Q Has it ever changed through today's date?

A Yes.

Q What do you now consider Dr. Bilello's occupation to be?

A I don't know.

Deposition of Kristine Bostek, pg. 36, lines 23-24; pg. 37, lines 1-23.

Q How many hours a week did Paul Revere later learn Dr. Bilello spent administering his offices?

A I don't know that answer.

Q Do you know if that answer was ever found out?

A I don't know.

Q Don't you think that would be significant, how many hours he spent administering his three offices?

A Yes.

Q If it was simply the two hours a week stated in the occupational description, and nothing more, would that change your opinion as to whether or not Dr. Bilello was a chiro slash business owner versus a chiropractor?

A I don't know.

Deposition of Kristine Bostek, pg. 62, lines 7-23.

Dr. Bilello's disability claim was based on a contract. As discussed *supra*, in order to determine whether or not a claimant is entitled to benefits, the occupation and the important duties of that occupation must be known. Ms. Bostek determined that Dr. Bilello was not entitled to benefits without knowing either his occupation or his duties.

Ms. Cahill based her denial, at least in part, on medical records which were in the possession of the Defendant seven to eight months prior to her denial. *See*, Exhibit O. The medical information had previously been interpreted as supporting Dr. Bilello's claim for total disability. This begs the question, what changed? When she was specifically asked what part of the FCA supported a denial, Ms. Cahill was evasive and never answered the question<sup>18</sup>.

Ms. Cahill also cited Dr. Bilello's ownership of three clinics as a basis for denial, yet the Defendant never made a determination as to what his duties were at the three clinics. Ms. Cahill referenced part of Mr. Cabanas' report which stated that Dr. Bilello had been performing a number of manipulations in certain years. Dr. Bilello was referring to the number of manipulations performed at the clinic as a whole, not his individual number of manipulations. The Defendant never asked Dr. Bilello about this in an attempt to clear up the discrepancy. Ms. Cahill referred to the fact that Dr. Bilello made money from his clinics in years he was collecting disability. The money received was earned by Dr. Bilello prior to his disability; it was passive income which does not affect his entitlement to benefits.

Q If someone cannot perform the duties of their occupation, yet still receives income, is the income relevant?

A If they meet the definition of total disability under their contract, no, it is not.

Deposition of Kristine Bostek, pg. 45, lines 6-10.

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<sup>18</sup> Deposition of Diane Cahill, pg. 79, lines 5-24; pg. 80-87; pg. 88, lines 1-19 attached as **Exhibit Q**.

#### IV. Summary Judgment Standard

A moving party is entitled to summary judgment if the pleadings, affidavits and other supporting papers show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R.Civ.P., 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L.Ed. 2d 265, 106 S.Ct. 2548 (1986). “The burden of establishing the absence of a genuine issue of material fact is on the party seeking summary judgment.” United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of America, 894 F.2d 1555, 1557 (11<sup>th</sup> Cir. 1990)(citations omitted). Once this burden has been met, the adverse party must show there remains a genuine issue for trial. Fed.R.Civ.P., 56(e). “The court must view all evidence in the light most favorable to the non-movant and must resolve all reasonable doubts about the facts in favor of the non-movant.” United of Omaha Life Ins. Co., 894 F.2d at 1558.

A genuine issue of material fact exists when “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248, 91 L.Ed. 2d 202, 106 S.Ct. 2505 (1986). “The mere existence of a scintilla of evidence in support of the [nonmoving party’s] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party].” Id at 252. “ If a review of the evidence presented reveals that the non-movant has failed to produce evidence sufficient to support a jury verdict in his favor, then summary judgment should be granted.” United of Omaha Life Ins. Co., 994 F.2d at 1558.

#### V. Dr. Bilello is Totally Disabled from his Occupation as a Chiropractor Under the Terms of the Paul Revere Policy

After paying this claim for more than two years, Paul Revere terminated payment of the claim by proclaiming that Dr. Bilello’s occupation as of the onset of his disability was actually a chiropractor/business owner and that he was only residually disabled from this occupation. In effect, Paul Revere inserted a new issue into this claim two years later. The new issue raised by Paul Revere is: What was Dr. Bilello’s occupation, immediately preceding his disability, under the terms of the policy<sup>19</sup>?

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<sup>19</sup> Dr. Bilello would not be entitled to benefits under the residual clause of the policy if his occupation was determined to be a chiropractor/business owner because he earns more than 80% of his pre-disability income as an administrator/owner. Therefore, this issue is dispositive of this case.

The first step in answering this question is to look at the definition of occupation in the Paul Revere policy<sup>20</sup>.

“Insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties. Ambiguities are interpreted liberally in favor of the insured and strictly against the insurer who prepared the policy.”

Prudential Property and Casualty Ins. Co. v. Swindal, 622 So.2d 467, 470 (Fla. 1993)(citations omitted); see also, Firemen’s Fund Ins. Co. v. Boyd, 45 So.2d 499 (Fla. 1950).

However, the Paul Revere policy has essentially left the term occupation undefined.

“Florida law is equally well settled that insuring or coverage clauses are construed in the broadest possible manner to effect the greatest amount of coverage.”

Westmoreland v. Lumbermens Mut. Casualty Co., 704 So.2d 176, 179 (Fla. App. 1997); accord, Harnett v. Southern Ins. Co., 181 So. 2d 524 (Fla. 1965).

The Florida Supreme Court recently addressed this situation in Berkshire Life Ins. Co. v. Adelberg, 698 So.2d 828 (Fla. 1997). Adelberg’s policy also left the term occupation undefined. The Court applied the principles set forth in Swindal and Harnett, *supra*, and interpreted the contract in favor of coverage for the insured.

“In this case, the policy defined ‘total disability’ as ‘your inability to engage in your occupation,’ but contained no further definition of the term ‘your occupation.’ Thus, we find that Berkshire’s failure to limit the term occupation with any qualifying word other than ‘your’ in Adelberg’s policy **must be interpreted in favor of coverage for Adelberg.**”

Adelberg, 698 So.2d at 830.

In this case, Paul Revere effectively left the term occupation undefined. The failure to define this key term has created an ambiguity. Dr. Bilello chose to define his occupation as a chiropractor which was the activity that was the source of his livelihood. Paul Revere chose to define his occupation as a chiropractor/business owner by including

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<sup>20</sup> The policy states: “Your Occupation” means the occupation in which You are regularly engaged at the time You become Disabled. See, Exhibit A. The policy defines a term by restating the term to be defined in the definition which does nothing to clarify the intended meaning of the term (occupation means occupation). In effect, Paul Revere has left the term “Your Occupation” undefined.

incidental management duties<sup>21</sup>. Two recent cases<sup>22</sup> have specifically addressed this issue, Shapiro v. Berkshire Life Ins. Co., 1999 U.S. Dist. LEXIS 11789 (S.D.N.Y. August 3, 1999) and Giampa v. Trustmark Ins. Co., 1999 U.S. Dist. LEXIS 8051 (D. Mass. February 26, 1999)<sup>23</sup>.

In Giampa, the insured was a chiropractor who owned more than one facility. Id at \*1. Prior to his disability, he spent the majority of his time treating patients and the remainder of his time managing his chiropractic facilities. Id at \*1. His disability left him unable to treat patients, so he expanded his management duties after the disability. Id at \*1-2. The defendant argued that Giampa's occupation included both management and treatment duties, therefore, he was only residually disabled. Id at \*7. Applying the rule of *contra proferentem*, the Court stated:

“In light of this rule that total disability policies should be liberally construed, I conclude that a person in Giampa's position, who is disabled from engaging in eighty-five to ninety-five percent of his previous substantial and material duties as a treating chiropractor, is entitled to coverage under the total disability provision even if his disability does not prevent him from performing an incidental job duty.”

Id at \*19.

In Shapiro, the insured was a dentist who owned more than one facility. Shapiro, *supra*, at \*2. Like Giampa and Bilello, he spent the majority of the time treating patients and the remainder of the time managing the facilities prior to his disability. Id at \*13. The defendant refused to evaluate the claim as a total disability claim and instead would only evaluate the claim as a residual claim because Shapiro was able to continue as a manager/administrator of his facilities. Id at \*7. The Court applied the rule of *contra proferentem* and found Shapiro to be totally disabled from his occupation as a dentist.

“Plaintiff performed the function of a dentist who treats patients, and the fact that he (i) had ownership interests in his and other dental practices, and (ii) performed managerial and administrative duties for those

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<sup>21</sup> Dr. Bilello can perform managerial/administrative functions, therefore, under Paul Revere's definition, he would only be residually disabled.

<sup>22</sup> The full cases are attached as **Exhibits R and S** respectively.

<sup>23</sup> Although neither of these cases is specifically based on Florida law, the legal principles that the decisions are based on are the same under Florida law (i.e. policy provisions are given their plain and ordinary meaning and ambiguities are construed liberally in favor of coverage to the insured). The decisions would have been the same had the Courts been applying Florida law, therefore, these two cases are extremely persuasive authority.

practices, does not alter the fact that those activities were not the primary functions of plaintiff's occupation as a dentist. The insurance policy purchased by plaintiff was intended to insure him against being unable to perform the duties of a dentist, the most important of those being the physical and surgical aspects of the practice. See Mowers v. Paul Revere Life Ins. Co., 27 F.Supp. 2d 135, 142 (N.D.N.Y. 1998)(finding, in a case where the insured was a chiropractor, that 'the important functions of a chiropractor involve manipulating patients and helping to lift patients on and off of the treatment table'). Plaintiff's injuries, including severe discomfort in his elbow and neck, prevent him from performing those functions.

The fact that plaintiff may be capable of earning a living by means of the continuance of his dental practice and his functioning as an owner and administrator of that practice does not alter this result. Disability policies are designed to indemnify against loss of capacity to work, not against loss of income."

Id at \*13-14.

Applying the rule of *contra proferentem* in conjunction with the principles of the Giampa and Shapiro cases, the only conclusion that can be reached is that Dr. Bilello's occupation under the terms of the Paul Revere was a chiropractor. This conclusion is further bolstered by Paul Revere actions in this case. Paul Revere admitted that Dr. Bilello's occupation was a chiropractor and that he was totally disabled by paying his disability benefits for more than two years.

Once an insurance company begins paying a claim, it has the burden of proof to show that the insured's entitlement to benefits has ceased. Aetna Life Ins. Co., Inc. v. Fruchter, 283 So.2d 36 (Fla. 1973). If an insurance company begins paying a disability claim, it cannot cease payments until it can prove, by a preponderance of the evidence, that the claimant is no longer disabled. This is long-standing Florida law.

"Where, however, it is established, as in this case, that a permanent and total disability existed within the purview of the policy and the insured seeks relief from continuation of payment of indemnities theretofore paid under and within the purview of the policy the burden is on the insurer to establish by the preponderance of the evidence that the condition of the insured is such that he no longer comes within the purview of the policy in this regard. See, New York Life Ins. Co. v. Lecks, 122 Fla. 127, 165 So.50; Devoe v. The Mutual Life Ins. Co. of New York, 103 Mont. 599, 64 Pac. (2<sup>nd</sup>) 1071."

The Mut. Life Ins. Co. of New York v. Ewing, 10 So.2d 316, 318 (Fla. 1942).

Paul Revere cannot meet this burden in this case. Paul Revere had all of Dr. Bilello's claim information in its possession months before the claim was denied. The claim was paid based on this information; it proved that Dr. Bilello was totally disabled. Since payment has been made, Paul Revere must now prove, by a preponderance of the evidence, that Dr. Bilello has recovered to the degree of ability to allow him to perform chiropractic manipulations. There is no logical way that this same information could now prove that Dr. Bilello is no longer disabled.

“Further, Principal Mutual continued to make payments to Martin fourteen months after the initial twenty-four month period, which amounted to an acquiescence in Martin's claim of disability. Afterwards, it was Principal Mutual's burden to show, with due regard to income earned at the time of the accident, that Martin's total disability no longer continued. Aetna Life Insurance Co. v. Fruchter, 283 So.2d 36 (Fla. 1973).

Principal Mut. Life Ins. Co. v. Martin, 585 So.2d 474, 475 (Fla. App. 1991).

Applying the law set forth *supra*, Dr. Bilello's occupation under the terms of the policy was a chiropractor. Paul Revere acquiesced to this fact by paying him. If it now wants to challenge this fact, the burden is on Paul Revere to prove that his occupation is something different. As discussed *supra*, Kristine Bostek testified that she did not know what she considers Dr. Bilello's occupation to be. Paul Revere has no evidence to prove that Dr. Bilello's occupation was anything other than a chiropractor.

Q And in your review of the file you couldn't find anywhere where anyone discussed with him what his prior duties were before his disability; is that right?

A Yes, I couldn't find where anyone had discussed that.

Deposition of Caroline Bouchard, pg. 54, lines 17-22.

There is no genuine material fact in dispute. Paul Revere does not have any information to prove that Dr. Bilello's occupation was anything other than a chiropractor, as evidenced by the testimony of its claims personnel. Dr. Bilello is entitled to judgment as a matter of law.

## VI. Conclusion

Dr. Bilello was a chiropractor when he became disabled in September 1994. His major occupational duty was performing manipulations on patients. This is what he put

on his claim form and this is what Paul Revere used to determine his occupational duties. Dr. Bilello submitted medical documentation from several respected physicians which were all consistent in showing that Dr. Bilello was disabled. Paul Revere's medical information showed that Dr. Bilello was disabled.

Dr. Bilello's claim was denied based on information which had previously been used in the determination that Dr. Bilello was totally disabled. In addition, Paul Revere claimed that Dr. Bilello's occupation was something other than a chiropractor. No one ever knew what the occupational duties were of this "other" occupation. The determination was made that whatever the duties were of this "other" occupation, Dr. Bilello could perform them, at least on a partial basis.

Paul Revere terminated Dr. Bilello's benefits contrary to long standing Florida law and legal principles that are at the heart of contract law nationwide. In addition, they terminated his benefits without any information proving that he was no longer entitled to benefits. This was done because the claims examiners making these determinations were not trained by the Paul Revere to handle this claim properly. The result is that Dr. Bilello's benefits were terminated when, by law, he was entitled to them. Paul Revere breached its contract with Dr. Bilello.

*Respectfully submitted,*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this \_\_\_\_day of December, 1999, to: Mark D. Greenberg, Esq., and Leonor M. Lagomasino, Esq., 799 Brickell Plaza, Suite 700, Miami, Florida 33131.

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