

LEGAL ALERT

August 5, 2010

MICHIGAN SUPREME COURT RESHAPES NO-FAULT ACT'S SERIOUS IMPAIRMENT THRESHOLD

By: William L. Henn, Attorney

The Michigan Supreme Court has issued its long-awaited decision in *McCormick v Carrier*. Although the case was argued in the Supreme Court in January 2010, the Opinion was not issued until July 31—the final day of the Court's 2009-2010 term. It is a very lengthy opinion by Supreme Court standards. Justice Cavanagh wrote for the majority. Justices Hathaway and Kelly joined in full, and Justice Weaver joined in significant part. Justice Weaver also issued a separate concurrence, as did Justice Hathaway. A scathing dissent that is considerably longer than the majority opinion was authored by Justice Markman and joined by Justices Corrigan and Young.

Writing for the majority, Justice Cavanagh identified the principal issue in the case as the “proper interpretation of the ‘serious impairment of body function’ threshold for non-economic tort liability under MCL 500.3135.” It comes as no surprise to most that the “proper interpretation” according to the Court's current majority creates a very different threshold than the one established

only six years ago in the *Kreiner v Fischer* decision. The opinion bluntly announces that *Kreiner* was wrongly decided, and is therefore now overruled.

What remains in *Kreiner*'s stead is a much less rigid, far more nebulous standard for “serious impairment of body function.” A substantial portion of the majority opinion is dedicated to examining the language of the statute, identifying where the majority believes that *Kreiner* had misinterpreted that statute, and creating the new test for applying the “serious impairment of body function” threshold. A discussion of this analysis follows immediately below.

Mark Your Calendar!

On August 24, Smith Haughey will be hosting an informational webinar about this Supreme Court decision. Additional information on this webinar, as well as registration information will be distributed in the coming days.

BACKGROUND

Rodney McCormick was working as a truck loader for General Motors Corporation when a coworker backed a truck into him, knocked him over, and then drove over his left ankle. The accident occurred in January 2005. McCormick was diagnosed with a fracture of his left medial malleolus. He eventually had metal hardware surgically inserted into his ankle, and

was restricted from weight-bearing activities for one month, followed by multiple months of physical therapy. His metal hardware was removed in a follow-up surgery in October 2005.

At his employer's request, McCormick underwent a medical examination in November 2005. The physician, Dr. Drouillard, indicated that the

plaintiff could return to work but that he could not stand or walk for prolonged periods of time.

About two months later—approximately one year after the accident—the plaintiff’s surgeon cleared him to return to work without restrictions, noting that McCormick had an “excellent range of motion,” and that his x-ray showed “solid healing with [no] degenerative joint disease of his ankle.”

When the plaintiff returned to work just a few days later, he complained of difficulty walking, climbing, and crouching due to continuing ankle pain. In March 2006, his employer required him to undergo a functional capacity evaluation (FCE). The FCE determined that McCormick was unable to perform the range of tasks that his job required—climbing, standing, walking and heavy lifting—due to ankle pain, a moderate limp, difficulty bearing weight on his ankle, and shoulder pain (unrelated to the accident). The report indicated that McCormick’s range of motion in his left ankle was not within normal limits and that difficulty climbing and lifting weights had been reported and observed.

In May 2006, about two months after the FCE and approximately one and one-half years after the accident, Dr. Drouillard performed a second evaluation of McCormick. Dr. Drouillard once again reported that McCormick could return to work. The report stated that McCormick complained of ankle and foot pain, but that “no objective abnormality” could be found to correspond with the subjective complaints.

A month later, McCormick underwent an MRI, which showed some post-operative scar and degenerative tissue formation around his ankle. At McCormick’s request, a second FCE was performed in August 2006. It concluded that, in spite of McCormick’s subjective complaints, and that the range of motion in his left ankle was still not within normal limits, he could return to work

without restriction. When the plaintiff returned to work shortly thereafter, he was assigned to a different job which he was able to perform, at the same level of pay.

By the time McCormick returned to work in the summer of 2006, he had already filed suit against his employer seeking recovery for non-economic damages pursuant to the No-Fault Act. At his deposition, he testified that when the accident occurred, he was a 49-year-old man, and his normal life before the incident “mostly consisted of working 60 hours a week as a medium-duty truck loader,” golfing on the weekend, and regularly fishing from his boat in the spring and summer. He indicated that he was able to fish at pre-incident levels within approximately eighteen months of the incident, but that he had only golfed once since returning to work. He testified that he was able to drive and attend to personal needs without assistance, and that there had been no impact on his relationship with his wife. He testified that life continued to be “painful,” but was nevertheless “normal,” even if somewhat “limited.”

The trial court granted summary disposition to McCormick’s employer for the reason that McCormick had recovered well and consequently could not meet the serious impairment threshold of MCL 550.3135(1). A split panel of the Court of Appeals affirmed, concluding that under *Kreiner’s* interpretation of the serious impairment threshold, McCormick’s impairment did not affect his ability to lead his normal life because he could care for himself, could fish and golf, and could work at the same rate of pay.

The Supreme Court initially denied leave to appeal, but then due to a change in the composition of the Court, reversed itself on plaintiff’s motion for reconsideration and granted leave.

THE MAJORITY’S LEGAL ANALYSIS

After tracing the history of the serious impairment threshold, the majority opinion sets out on a lengthy discussion of

how the threshold should be applied, and more specifically how the threshold should be applied differently than *Kreiner* had required. The legal

analysis is divided into two major sections. The first stands alone, and addresses when a court may decide the threshold issue as a matter of law. The second section is further divided into three subsections, each corresponding with one of the three prongs of the “serious impairment of body function” test.

1. For the Judge or Jury?

The first issue that a court must resolve is whether the “serious impairment of body function” question can be decided by the court as a matter of law, or whether it must instead be submitted to the jury. The statute itself, MCL 500.3135(2)(a), addresses this point. Under that statutory language, and as reiterated by *McCormick*, a court may decide the “serious impairment” question only where there is no factual dispute regarding “the nature and extent of the person’s injuries” that is material to determining whether the threshold standards are met. If there is a material factual dispute about the nature and extent of the injuries, then the court cannot decide the “serious impairment” question as a matter of law, but must submit it to the jury for resolution.

Because the statute itself addresses the circumstances under which it is appropriate for the court to decide the issue as a matter of law, this portion of the *McCormick* decision is not any sort of radical change. We anticipate, however, that because of the significant loosening of *Kreiner’s* restrictive “serious impairment of body function” test, discussed below, it is far more likely that a case will contain factual disputes about either the “nature and extent of the person’s injuries,” or whether even uncontested injuries are “material” to the determination of “serious impairment of body function.”

There can be little doubt that one object of the *McCormick* majority’s opinion is to reduce the number of no-fault cases that are decided (and usually in favor of the defense) by the trial court as a matter of law. For example, in a lengthy footnote, the majority opinion observes—without actually deciding—that MCL 500.3135(2)(a) could be unconstitutional as an infringement on the Supreme Court’s inherent and exclusive power to create procedural rules, if the statute is

interpreted in a way that requires trial courts to “(1) resolve material, disputed facts with regard to issues *other* than the nature and extent of the injury, such as the extent to which the injury actually impairs a body function or the injured party relied on that function as part of his or her pre-accident life, or (2) decide whether the threshold is met even though reasonable people could draw different conclusions from the facts.” It is more than evident that this footnote is intended as a warning to lower courts who might be tempted to treat as matters of law a variety of the questions that will necessarily arise under the new serious impairment test.

2. “Serious Impairment of Body Function”

In cases where the court may decide whether the threshold has been met as a matter of law, the next inquiry is whether the person has suffered a “serious impairment of body function.” That term is defined in the statute as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” This definition creates three prongs necessary before a court can find that there has been a “serious impairment of body function”: (1) an objectively manifested impairment (2) of an important body function that (3) affects the person’s general ability to lead his or her normal life. The *McCormick* decision addresses each of these three prongs individually.

a. An Objectively Manifested Impairment

To satisfy the first prong, the person must demonstrate an impairment that is “commonly understood as one observable or perceivable from actual symptoms or conditions.” The proper inquiry under the new test is whether the *impairment* is objectively manifested, not whether the injury or its symptoms are objectively manifested. In emphasizing the distinction between “impairment” and “injury,” the Court observed that cases following *Kreiner* appear to have required an objectively manifested injury. *McCormick* expressly overturns any such decision. *See, e.g., Netter v Bowman*, 272 Mich App 289, 305; 725 NW2d 353 (2006) (overturned by *Kreiner*).

What this shift in emphasis is likely to mean in practice can be seen in the majority's discussion of the meaning of the term "impairment." The Court explained that the term "impairment" means "weakened, diminished, or damaged" or "functioning poorly or inadequately." The Court noted that while an "injury" is the actual damage or wound, an "impairment" generally relates to the *effect* of the damage. Therefore, the focus is not on the injuries themselves, but on how the injuries affected a particular body function.

In keeping with this new emphasis, the Court observed that medical documentation is not *always* required to establish an objectively manifested impairment. In other words, the Court appears to be making the point that damage to, or the weakening or diminishing of, a body function can be objectively observed without some physical injury being identified on an x-ray or in an MRI report or other medical record. Although the Court indicated that medical testimony will "generally be required" to establish an impairment, it nevertheless did not make any attempt to define the sort of case where medical testimony would not be required. Presumably, that question is left to be fought about by the parties and resolved by the trial courts in individual cases.

b. Of an Important Body Function

Where an objectively manifested impairment of a body function has been demonstrated, the next prong requires the court to evaluate whether the impaired body function is "important." *McCormick* defines "important" as "[m]arked by or having great value, significance, or consequence." The majority opinion observes that whether a body function has great value, significance, or consequence will vary widely depending on the person. As a result, this inquiry is inherently subjective, and will have to be determined on a case-by-case basis, accounting for the relationship of the body function to the specific individual's life. The Court was careful to note that an "important" body function is not "*any* body function," but underscored that the test does not require an impairment of the "*entire* body function."

Although *McCormick* itself suggests that this particular prong does not represent a change from *Kreiner*, even a cursory review of *Kreiner* reveals that it said very little about this part of the test, and did not so much as hint that the "importance" of a body function was a subjective standard that would vary from person to person. In fact, an important point to note is that in discussing the three "prongs" of the test, both *Kreiner* and *McCormick* assumed that the case would be one that the trial court could decide as a matter of law. Recall, however, that *McCormick* provides a stern warning to trial courts against resolving any material issue of fact, including (1) genuine questions about the extent to which the injury actually impairs a body function or the injured party relied on that function as part of his or her pre-accident life, or (2) whether the threshold is met even though reasonable people could reach different conclusions. It remains to be seen, in light of the now purely subjective nature of the "important body function" test, exactly how a challenge to the "important body function" prong of a plaintiff's case could ever *not* involve a material issue of fact required to be resolved by a jury.

c. That Affects the Person's General Ability to Lead His or Her Normal Life

The third and final prong in the analysis requires the court to determine whether the impairment "affects the person's general ability to lead his or her normal life." To flesh out the meaning of this phrase, *McCormick* turns to a series of dictionary definitions.

First, the Court observed that "affect" is defined as "[t]o have an influence on; bring about a change in."

Second, the Court defined "ability" as "[t]he quality of being able to do something," and noted that "able" is defined as "having sufficient power, skill, or resources to accomplish an object."

Third, the Court determined that the adjective "general" refers to "some parts of a thing," and is not limited only to one specific detail or particular part of a thing.

Construing those three terms, as defined, together, the *McCormick* majority concluded that to “affect” the person’s “general ability” to lead his or her normal life is to “influence some of the person’s power or skill, i.e., the person’s capacity, to lead a normal life.”

Next, the Court tackled the meaning of “to lead his or her normal life.” The majority defined “lead” as “[t]o pass or go through; live.” Thus, the Court concluded that “to lead his or her normal life” is to live, or pass life, in his or her normal manner of living. The Court observed that this test will be necessarily subjective, person specific and fact specific, and will require a comparison of the plaintiff’s life before and after the incident. The Court emphasized that the person’s general ability to lead his or her normal life need only be affected in some way, not destroyed entirely. In other words, the impairment need not completely prevent someone from engaging in an activity or lifestyle element that was part of pre-incident life.

The Court also cautioned that the word “general” modifies “ability,” not “affect” or “normal life.” Based on this observation, the opinion states that the statute only requires that some of the person’s *ability* to live in his or her normal manner of living has been affected, not that some of the person’s normal manner of living has itself been affected. What the Court appears to be driving at is that there is no “quantitative minimum as to the percentage of a person’s normal manner of living that must be affected.” Stated differently, even a

small change in a person’s normal manner of living can be actionable, so long as some of the person’s *ability* to live in his or her normal manner has been affected.

Lastly, the Court observed with respect to this prong that the statute does not contain an express temporal requirement as to how long an impairment must last in to have an effect on the person’s “general ability to live his or her normal life.” So, even short-term impairments of a person’s ability to live in his or her normal manner can give rise to viable causes of action.

To conclude its discussion of this prong, the *McCormick* majority commented extensively on how its interpretation differed from the *Kreiner* majority’s interpretation. A few important points of clarification emerge.

First, whereas *Kreiner*’s focus was on “how [a person’s] life has been affected, by how much, and for how long,” the new *McCormick* focus is on how an impairment affects a person’s “ability to live his or her life.”

Second, *Kreiner* had imposed a requirement that the impairment affect the person’s ability to conduct the “course or trajectory” of that person’s “entire normal life.” *McCormick* bristles at the concepts of “trajectory” and “entire normal life,” contending that those terms suggest permanence that is not found within the statute, and thereby create “a judicially constructed house of cards.”

APPLICATION OF THE NEW TEST TO MCCORMICK

Having done away with *Kreiner*, the majority opinion proceeds to apply the new test to McCormick’s case. It announces at the outset of the analysis that McCormick has met the serious impairment threshold as a matter of law.

The majority first concludes that there is no factual dispute material to determining whether the serious impairment threshold has been met. Although it acknowledges that the defendant disputes the extent to which McCormick suffers residual impairment, the Court observes that McCormick is not alleging that any residual

impairment affects his general ability to lead his pre-incident life. Therefore, the Court concludes that residual impairment is immaterial to the threshold question.

Concerning the first prong of the test, the Court concludes that the plaintiff has shown an objectively manifested impairment of body function based on his broken ankle and the symptoms or conditions that someone else would perceive as impairing body function, namely walking, crouching, climbing and lifting weight. As for the second prong, the opinion cursorily concludes that the plaintiff’s testimony established

that “being unable to walk and perform other functions were of consequence to his ability to work.” As a result, the second prong had been satisfied.

Regarding the third prong, the majority holds that the impairment affected his general ability to lead his normal life because it influenced some of his capacity to live in his normal, pre-incident manner of living. For support, the Court recited that prior

to the incident, plaintiff worked 60 hours per week, and secondarily played golf and fished. The opinion comments that after the incident, “at least some” of his capacity to live in this manner was affected.

And with that relatively perfunctory application of the new test to McCormick’s case, the Court closed the book on *Kreiner*.

THOUGHTS MOVING FORWARD

There is no question that the *McCormick* test lacks the structure of *Kreiner*. Gone is the preference for objective evidence of impairment that *Kreiner* embodied. We are on the brink of a period where no-fault litigation will be dominated by fluid concepts such as “some capacity,” “subjective normal life” and “subjectively important body function.” Although both *Kreiner* and *McCormick* interpret the same statute, the new *McCormick* test will expand the universe of compensable no-fault claims, and at the same time shrink the number of cases that may be decided as matters of law by the court.

One lesson to be taken away from the Court’s decision to decide the serious impairment question as a matter of law *in favor of* McCormick is that defendants and their attorneys will need to keep in mind that if the evidence is not adequate to mandate summary disposition for the defense, then at a minimum the defense will want to have in place sufficient evidence to create a material question of fact to preclude summary disposition in favor of the plaintiff. In this sense, the *McCormick* majority’s stern warning to trial courts about improperly resolving issues of fact material to the serious impairment test can work in favor of

defendants seeking to avoid summary disposition against them on the serious impairment issue.

Stepping back for a moment, it is easy to envision how defendants will have to fight to keep the *McCormick* test from completely swallowing the much discussed legislative “compromise” that ushered in the era of no-fault law. The idea back then was that in exchange for the efficient payment of first-party benefits, some third-party claims (regardless of their merit) would have to be precluded outright. If *McCormick* is construed by courts broadly, then in practical terms there may not be much left of the so-called compromise. So, unless the Supreme Court overturns *McCormick*, or unless the Legislature amends the No-Fault Act in a way that supersedes *McCormick*, what remains for defendants and their attorneys is to fight the battles necessary to preserve the compromise and to keep *McCormick* from becoming the “no claim is too small to be compensated” precedent.

As always, should you have any questions, please do not hesitate to contact one of Smith Haughey’s automobile negligence attorneys.

Bill Henn represents clients in appellate matters throughout Michigan. He can be reached directly at 616.458.5456 or whenn@shrr.com.