

ARTICLE

MICHIGAN SUPREME COURT DECISION IN *McCORMICK V CARRIER*

The Michigan Supreme Court has issued its decision in *McCormick v. Carrier*, ___ Mich ___ (Docket Number 136738, 2010) which reverses *Kreiner v. Fischer*, 471 Mich 109, 683 NW2d 611 (2004) as wrongly decided.

The opinion is very lengthy and is a 4-3 decision with a lengthy dissent.

MCCORMICK'S CLAIM

McCormick had a truck drive over his left ankle. He was taken to the hospital, x-rays showed a fracture of his left medial malleolus. He was released from the hospital that day and two days later metal hardware was surgically inserted into his ankle to stabilize bone fragments. He was restricted from weight bearing for one month after surgery and then underwent multiple months of physical therapy. The metal hardware was removed in a second surgery ten months after the first. A defense IME 11 months after the accident indicated the plaintiff could return to work but was restricted from prolonged standing or walking. Twelve months after the accident, the specialist who performed the surgeries cleared the plaintiff to return to work without restrictions and noted that he had an excellent range of motion and solid healing.

McCormick then returned to work one year after the accident for several days but had difficulty walking, climbing and crouching because of ankle pain and asked for a restricted job but was directed to cease work. He was then required to undergo a functional capacity evaluation 14 months after the accident which determined that he was unable to perform the range of tasks his job required including stooping, crouching, climbing, sustained standing and heavy lifting due to ankle and shoulder pain, a moderate limp and difficulty bearing weight on the left ankle. Sixteen months after the accident a second defense IME was performed which indicated that the plaintiff complained of ankle and foot pain but there was no objective abnormality to correspond with the subjective complaints and he was thus able to return to work. An MRI 17 months after the accident showed some post-operative scar and degenerative tissue around the left ankle. Another functional capacity evaluation was performed 19 months after the accident which affirmed that the plaintiff could return to work without restriction and was capable of performing the tasks required for his job, although he complained of occasional aching and tightness in the ankle and his range of motion was still not within normal limits. He then returned to work 19 months after the accident to a different job with the same pay and was able to perform the new job since that time.

In his lawsuit McCormick testified that his normal life before the incident was working 60 hours per week as a medium-duty truck loader and a weekend golfer and frequently fishing in the spring and summer from a boat. He admitted he was fishing at his pre-incident levels by the spring and summer of the year after the accident but only golfed once since returning to work. He had not sought any medical treatment for his ankle since a year after the accident when he was approved to return to work without restriction. He testified that his life was “painful, but normal”, although it was “limited” and he continued to experience ankle pain.

The trial court granted summary disposition to the defendant finding no serious impairment. The Court of Appeals affirmed in a 2-1 decision. The Supreme Court reversed, holding that there was a serious impairment as a matter of law.

TEST OF LIABILITY

1. A QUESTION OF LAW OR FACT UNDER MCL 500.3135(2).

According to the statute, the threshold question whether a person suffered a serious impairment of body function should be determined by the court as a matter of law as long there is no factual dispute regarding the “nature and extent of the person’s injuries” that is material to determine whether the threshold standards are met. However, the court noted in a footnote that the Legislature may have unconstitutionally invaded the Court’s exclusive authority by imposing the requirement that the dispute is “material”. The court stated that this was not an issue in the current case but may be reached in a future case. The court further stated that a disputed fact does not need to be outcome determinative in order to be material, but it should be “significant or essential to the issue or matter at hand”.

2. A “SERIOUS IMPAIRMENT OF BODY FUNCTION”.

The court held that each of these prongs’ meaning is clear from the plain and unambiguous statutory language of MCL 500.3135(7) and judicial construction is neither required nor permitted, but that a “dictionary may aid the Court in giving the words and phrases... their common meaning...”

A. AN OBJECTIVELY MANIFESTED IMPAIRMENT

The court stated that the dictionary definitions suggest that the common meaning of “objectively manifested” is “an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function. In other words, an “objectively manifested” impairment is commonly understood as one observable or perceivable from actual symptoms or conditions.”

The court further stated that the issue is whether the *impairment* is objectively manifested, not the *injury* or its symptoms. The court held that the focus must not be on the injuries themselves, but on how the injuries affect a particular body function. The court noted that the serious impairment threshold is not met by pain and suffering alone but also required injuries that affect the functioning of the body. The court further noted that the plaintiff must introduce evidence establishing that there is a physical basis for the subjective complaints of pain and suffering and that showing an impairment *generally* requires medical testimony. The court specifically rejected any requirement from *Kreiner* that there always must be medical documentation, only that medical testimony would *generally* be required.

The court’s summary of this issue states that there must be “an objectively manifested impairment (observable or perceivable from actual symptoms or conditions).”

B. OF AN IMPORTANT BODY FUNCTION

The court held that the relevant definition of “important” is whether a body function has great “value”, “significance”, or “consequence” which will vary depending on the person. Therefore, “this prong is an inherently subjective inquiry that must be decided on a case-by-case basis, because what may seem to be a trivial body function for most people may be subjectively important to some, depending on the relationship of that function to the person’s life.”

The court specifically disapproved of any construction that this is an objective test.

C. THAT AFFECTS THAT PERSON’S GENERAL ABILITY TO LEAD HIS OR HER NORMAL LIFE

The court held that the definitions of “general” illustrate “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.” This requires a subjective, person and fact, specific inquiry that must be cited on a case-by-case basis, requiring a comparison of the person’s life before and after the incident.

The court noted there are several important points to note:

(1) The “statute merely requires that a person’s general ability to lead his or her normal life has been *affected*, not destroyed.” The court should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether, although a person is able to lead his or her pre-incident normal life, the person’s general ability to do so was nonetheless affected.

(2) The word “general” modifies “ability” not “affect” or “normal life”. Thus, the plain language of 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. “*There is no quantitative minimum as to the percentage of a person’s normal manner of living that must be affected.*”

(3) “The statute does not create an express temporal requirement as to how long an impairment must last in order to have an effect on “the person’s general ability to lead his or her normal life.” The court specifically rejected any argument from *Kreiner* that the court should focus on how much the impairment affects a person’s life instead of how much it affects the person’s *ability* to live his or her life. Further, there should be no implied sense of permanence. The court specifically rejected the *Kreiner* analysis of the (a) nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment and (e) the prognosis for potential recovery.

The court's summary of this factor states that the test is the affect on the person's general ability to lead his or her normal life (influences *some* of the plaintiff's capacity to live in his or her normal manner of living).

APPLICATION TO THE MCCORMICK CASE

The court held that the serious impairment analysis is inherently fact-and-circumstance-specific and must be conducted on a case-by-case basis. The analysis does not lend itself to any bright-line rule or imposition of a list of factors.

As applied in *McCormick*, the parties did not dispute that McCormick suffered a broken ankle, was completely restricted from weight bearing on his ankle for a month, and underwent two surgeries in a ten month period and multiple months of physical therapy.

There was a dispute as to whether there was a physical basis for his continuing subjective complaints of pain and suffering.

However, the court held that this was not significant or essential to determine whether the serious impairment threshold was met, because the plaintiff did not allege that the residual impairment, to the extent it exists, continues to affect his generally ability to lead his pre-incident normal life.

The court further determined that before the incident McCormick's normal life consisted of working 60 hours a week as a medium truck loader and frequently fishing in the spring and summer and a weekend golfer. After the incident he was unable to work for at least 14 months and did not return for 19 months and never returned to his original job. He was able to fish at pre-incident level by about 14 months after the accident.

The court determined:

A. AN OBJECTIVELY MANIFESTED IMPAIRMENT

McCormick has shown an objectively manifested impairment of body function. There is no dispute that he suffered a broken ankle and actual symptoms or conditions that someone else would perceive as impairing body functions, with his walking, crouching, climbing and lifting weight.

B. OF AN IMPORTANT BODY FUNCTION

McCormick has shown that the impaired body functions were important to him since he established that he was unable to walk and perform other functions which were of a consequence to his ability to work.

C. THAT AFFECTED THE PERSON'S GENERAL ABILITY TO LEAD HIS OR HER NORMAL LIFE

McCormick has shown 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 which consisted of working 60 hours a week and his hobbies of fishing and golfing. At least *some* of his capacity to live in this manner was affected. Specifically, for a month after the incident he could not bear weight on his left ankle. He underwent two surgeries over a period of ten months and multiple months of physical therapy. His capacity to work, an essential part of his pre-incident normal life, was affected. He was unable to perform functions necessary for his job for at least 14 months and did not return to work for 19 months.

The court concluded that all three prongs were met as a matter of law that plaintiff suffered a serious impairment.

SUMMARY

As can be seen, *McCormick* should have a substantial affect on third party auto cases regarding the threshold.

The *Kreiner* factors are now out.

The emphasis is on a subjective case-by-case analysis.

The most important issue is in regard to the removal of any temporal element and that there must be an affect on the plaintiff's entire life. There only has to be an influence on *some* of the plaintiff's capacity to live in his or her normal, pre-incident manner of living.