



KOPKA PINKUS DOLIN & EADS, LLC

Legal Advisory

UNDERSTANDING MCCORMICK V. CARRIER

AUGUST 2, 2010

Since 2004, when *Kriener v. Fischer* was released, plaintiffs' attorneys have been lobbying both the legislature and the courts to overturn the Michigan Supreme Court's interpretation of "serious impairment of an important body function." Their wait has ended. On July 31, 2010, the new Michigan Supreme Court overturned *Kriener* and made sweeping changes to the serious impairment standard. Due to these changes, very few cases, regardless how minimal the injury or how scant the medical evidence, will be dismissed by the courts as a matter of law.

In overturning *Kriener*, the Supreme Court, retroactively, held that: 1) whether an impairment (not an injury) is objective is not determined by the existence of medical evidence, 2) whether a body function is important is subjective and must be determined on a case-by-case basis, and 3) whether an impairment affects a person's "general ability to lead his normal life" is determined by whether the impairment merely "influenced some of the person's power or skill, i.e., the person's capacity, to lead a normal life." How the standard jury instructions will be altered due to these holdings remains unclear.

1. WHEN SHOULD THE TRIAL COURT ENTERTAIN A MOTION FOR SUMMARY DISPOSITION

The threshold question of whether the person has suffered a serious impairment of body function should be determined by the court as a matter of law as long as 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 regarding the nature and extent of the person's injuries, the trial court should not decide the issue as a matter of law. This is the same standard that was applied by the courts prior to the decision.

2. STATUTORY REQUIREMENTS

The Court in *McCormick* reiterated that the Michigan No Fault act sets forth three prongs that must be satisfied for an injury to be a serious impairment of an important body function. The prongs are: 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 Court noted that the No Fault Act fails to provide any definitions of the terms in the statute. The Supreme Court, however, held that no judicial construction is either required or permitted because the terms were "clear and unambiguous" on their face. Interestingly, the Court goes on to selectively choose dictionaries (sometimes outdated) and particular definitions in the dictionaries to construct its preferred "clear and unambiguous" meanings.



A) OBJECTIVELY MANIFESTED IMPAIRMENT

The Court first notes that the phrase does not contain the word “injury” and that “injury” is different than “impairment.” Therefore, the Court holds, when considering impairment, the focus is not on the injuries themselves but how the injuries affect a particular body function. The Court specifically looks to *pre-Kriener* cases for what it views as correct interpretations of the objective standard. The Court cites to *Cassidy* for the holding that “objective manifested” means affecting the functioning of the body. The Court then cites to *DiFranco* for the holding that the objective standard is satisfied by “introducing evidence establishing that there is a physical basis for their subjective complaints of pain and suffering” and that showing an impairment generally requires medical testimony. The Court rejects *Kriener* to the extent that it suggests that medical evidence is always required.

The Court, therefore, holds that medical documentation is not always required in determining if an impairment is objective.

B) OF AN IMPORTANT BODY FUNCTION

The Court goes on to hold that the second prong, whether a body function is important, is a strictly *subjective* test. An analysis, therefore, must be done on a case-by case-basis.

Specifically, the Court held that the “relevant definition” of the adjective “important” is “[m]arked by or having great value, significance, or consequence. This definition was taken from The American Heritage Dictionary, Second Edition (1982). It should be noted that there have been several editions of the dictionary since the Second Edition. The court selectively chose not to use definitions from these later editions.

The Court goes on to hold that whether a body function has great “value”, “significance” or “consequence” 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.”

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

The Court’s most sweeping changes to the threshold standard are to the third and final prong, “general ability to lead his or her normal life.” The Court specifically overturned *Kriener*’s holding that there must be a change to the “trajectory” of a person’s life. Now, the change need only influence the person’s life.

The Court again looks to dictionaries for obtaining the “clear and unambiguous” meaning of the terms of the statute. “Affect” is defined in the Second Edition of American Heritage as “to have an influence on; bring about a change in.” An “ability” is defined as “[t]he quality of being able to do something,” “Able” is defined as “having sufficient power, skill, or resources to accomplish an object.” The Court then cites an internet version of Merriam-Webster Online Dictionary (<http://Merriam-webster.com>) for additional definitions. Specifically, the Court notes that the adjective “general” means: 1. Relating to, concerned with, or applicable to the whole or



every member of a class or category. 2. Affecting or characteristic of the majority of those involved; prevalent; a general discontent. 3. Being usually the case; true or applicable in most instances but not all. 4.a. Not limited in scope, area or application; as a general rule. 4.b. Not limited to one class of things; general studies. 5. Involving only the main features of something rather than details or particulars. 6. Highest or superior in rank.

The Court discounts the last definition because it felt that the highest ability to affect a person's life would be death and, therefore, this definition was inappropriate. The Court also disregards the first definition because it requires that the impairment would involve the "whole." The court does not explain why it is disregarding this definition. The Court then focuses on the remaining definitions and somehow makes the leap that these definitions illustrate that to "affect" the person's "general ability" to lead his or her normal life is that it merely "influences some of the person's power or skill, i.e., the person's capacity, to lead a normal life."

3. RETROACTIVE AFFECT

The holding in *McCormick* is retroactive for all cases still pending before the Michigan courts. If, however, a plaintiff's case was dismissed or otherwise resolved and the Plaintiff did not timely file an appeal, the plaintiff will not be able to reopen the litigation.

A decision of the supreme court overruling a former decision is generally retrospective in operation, and makes the law at the time of the overruled decision as it is declared to be in the last decision, *Martin v. White Pine Copper Co.*, 378 Mich. 37, 142 N.W.2d 681 (1966) but the court may in a proper case refuse to give retroactive effect to an overruling decision. *Stevens v. McNamara*, 365 Mich. 445, 113 N.W.2d 772 (1962); *Browning v. Paddock*, 364 Mich. 293, 111 N.W.2d 45 (1961) Prospective operation may be given to a decision that overrules a prior holding if the construction last given would impair the obligations of contracts entered into or injuriously affect vested rights acquired in reliance on the earlier decision, *Metzen v. Department of Revenue*, 310 Mich. 622, 17 N.W.2d 860 (1945) and where a constitutional provision or statute has been given a construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with that construction, the contracts may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision. *Gentzler v. Smith*, 320 Mich. 394, 31 N.W.2d 668 (1948).

Since there must be an end to litigation, the fact that a subsequent decision by the Supreme Court changes the interpretation of a law does not entitle the losing party in a previous case to reopen the controversy. *Johnson v. Fischer*, 330 Mich. 491, 47 N.W.2d 706 (1951).

In this case, the Court did not choose to limit the holding to prospective cases. Consequently, the decision is retroactive.

4. POTENTIAL NEW JURY INSTRUCTIONS

It is unclear whether the Michigan Supreme Court will approve new standard jury instructions based on *McCormick*. The current standard jury instructions merely set forth the definition of serious impairment in the statute.



Legal Advisory

Following *Kriener*, the Supreme Court rejected a proposal to change the standard instructions so as to reflect the court's interpretation of serious impairment. Most defense attorneys, therefore, drafted special jury instructions which were sporadically and inconsistently approved by trial court judges.

Given that the Supreme Court indicates in the *McCormick* opinion that it is not interpreting the statute but rather reading same by its clear and unambiguous meaning, there should be no basis for a change of the instructions. If, in fact, the new standard is clear and unambiguous, jurors should need no further instructions for them to understand the current standard instructions. However, due to the political nature of the holding, it is likely that the Supreme Court will approve additional instructions setting forth its selective definitions of the statute's terms. ♦

For more information on the details of this advisory contact
Cheryl Ronk, John Eads, or Mark Dolin in our Farmington Hills, MI office at 248.324.2620

KOPKA, PINKUS, DOLIN & EADS is a multi state civil litigation defense firm that approaches litigation from the client's perspective. Among a diverse group of clients, including many of the nation's largest insurance companies, are a wide range of businesses, manufacturers, service and distribution companies, health care institutions and professionals. The firm's attorneys have extensive trial experience in numerous federal and state courts nationwide as well as appellate experience which includes the United States Supreme Court, federal appellate circuit courts, state Supreme Courts and various state appellate courts.

For more information, please visit www.kopkcalaw.com.