

no-fault newslines

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

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Two Recent Unpublished Court of Appeals Decisions Analyze the Definition of Objectively Manifested Injury and Serious Impairment

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Galvin v Cherkasov, Ct of Apps No 247070, issued September 14, 2004.

A Michigan Court of Appeals panel issued an opinion holding that an MRI suggesting a strain to the knee did not establish an objectively manifested impairment, without physical or clinical manifestation of injury on examination.

In *Galvin*, Plaintiff injured his knee in an automobile accident and was seen in the emergency room. He was released to return to work with restrictions. Bruising and abrasions were noted on examination two days later and physical therapy was prescribed. Plaintiff continued to have knee complaints and an MRI of the knee was found to be normal. Therapy of one month was completed and Plaintiff was returned to full activity.

Plaintiff was evaluated by an orthopedic surgeon due to his continuing complaints of knee pain. On evaluation, Plaintiff had full range of motion, no significant laxity and no meniscal pathology. Nearly a year after the accident, Plaintiff underwent a diagnostic videoarthroscopy and the knee was found to be completely normal.

Plaintiff complained of pain and limitations at work, home and play and self-restricted his activities.

The panel began and ended its analysis by stating that, according to MCL 500.3135, Plaintiff had failed to supply medical or factual support of an objectively manifested injury.

Behnke v Auto Owners Insurance Co, Ct of Apps No 248107, issued September 16, 2004.

Two days later, another Michigan Court of Appeals panel reversed a bench trial judgment of no cause of action which held that temporary muscle spasm, tenderness, and temporary limited range of motion did not establish a serious impairment of an important body function. Judge Richard Allen Griffen dissented, finding that while indicative of possible symptoms, temporary muscle spasm, tenderness, and temporary limited range of motion did not constitute an objectively manifested impairment of an important body function.

In *Behnke*, Plaintiff injured his neck in an automobile accident in 1998. He did not seek medical treatment the day of the accident, but went to the emergency room with complaints of neck pain and an intense headache. After x-rays, he was

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Galvin and *Behnke* demonstrate that, even after the Supreme Court's decision in *Kreiner*, different Court of Appeals' panels will continue to interpret the no-fault statute to suit their ideologies. These cases illustrate that future decisions will depend upon the composition of the appellate panels. Additionally, Plaintiff's attorneys will attempt to use the different opinions of the Court of Appeals to defeat summary disposition motions. A bill has been introduced in the Michigan Senate (SB1429) on September 28, 2004, to amend the definition of serious impairment of body function, to make it easier for individuals to meet the serious impairment threshold and recover non-economic damages.

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given a cervical collar and Motrin. This treatment did not help and Plaintiff had to leave work to seek further treatment. After review of the hospital x-rays, his physician indicated that the accident could have caused Plaintiff's asymptomatic conditions to become aggravated and painful.

A MRI of the cervical spine showed Plaintiff's problems were congenital and existed before the accident. Plaintiff's doctor continued him off work pending a neurosurgical consult. The neurosurgeon found no basis for surgery or treatment, and Plaintiff was returned to work without restrictions.

Plaintiff returned to a physician three months later complaining of headaches. His doctor did not know whether the headaches were related to Plaintiff's lifestyle or type of work (welding). Medications were prescribed and light-duty work was recommended.

Plaintiff was involved in a second accident in 1999, which caused his neck to be sore and stiff but the soreness went away. He was laid-off in June 2000 and his headaches worsened. In September 2000, muscle spasms were noted and Plaintiff's range of motion was decreased. The doctor related Plaintiff's problems to the type of injury sustained and the aging process. The doctor opined that surgery was "out of the question," that Plaintiff's condition was permanent, and that he would likely suffer increasing arthritis and neck pain.

Plaintiff saw a neurologist who testified that the significant stenosis and degenerative disc disease was the likely cause of Plaintiff's headaches. The neurologist recommended that Plaintiff change jobs as the welding head gear would exacerbate his head pain.

During the bench trial, Plaintiff testified that welding was a very good job and he enjoyed it and tried to "tough it out". After Plaintiff was laid off as a welder, he continued to work with complaints of headaches. The trial court concluded that Plaintiff's injuries did not constitute a serious impairment of a body function and did not affect his ability to lead a normal life.

Auto Owners had conceded that if Plaintiff's injuries were "objectively manifested" that the important body function requirement was met.

A majority of the Court of Appeals panel held that Plaintiff's limited range of motion and muscle spasms were objective manifestations of injury and opined that aggravation of the congenital defects also fulfilled this requirement. Further, that self-imposed restrictions (not doctors restrictions) were enough to establish a residual impairment.

The Dissent

Judge Richard Allen Griffen concluded that Plaintiff's injury was whiplash and did not find a serious impairment of a body function. Judge Griffen, following *Kreiner*, found Plaintiff generally able to lead his normal life, despite occasional headaches and neck pain. The Judge further concluded that the headaches and neck pain were never objectively manifested (not subject to medical measurement) and therefore not compensable under the No Fault Act.

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We welcome your questions and comments.

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