STATE OF MICHIGAN

COURT OF APPEALS

SHARON MINCOFF,

Plaintiff-Appellant,

v

ROBERT C. ANDERSON,

Defendant-Appellee.

UNPUBLISHED
July 31, 1998

No. 204493
Schoolcraft Circuit Court
LC No. 96-002393 NI

Before: Markman, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

In this action under the no-fault automobile insurance act, MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.*, plaintiff appeals as of right the order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), based on plaintiff's lack of a "serious impairment of body function" under MCL 500.3135(1); MSA 24.13135(1). We affirm.

On January 21, 1994, plaintiff was involved in a low-speed automobile accident with defendant in Manistique, Michigan. Plaintiff was stopped at a stop sign in her pickup truck when defendant's Jeep collided with the back of her truck at an estimated speed of five miles per hour. Plaintiff's truck appeared wholly unaffected, the bumper of defendant's Jeep was only minimally affected and neither party appeared hurt, so both parties agreed to leave the scene without contacting the police. Although plaintiff claimed that within an hour she developed a burning sensation near her neck that stiffened within a day, she did not seek any medical attention for fifty-four days. Plaintiff explained the delay by saying that she did not know that her automobile insurance would cover medical expenses.

Plaintiff asserted that she thereafter began experiencing pain in her neck, shoulder, right arm and chest. From March 1994 until June 1995, plaintiff visited numerous doctors and physical therapists in an effort to treat her injuries and in contemplation of this lawsuit. She first visited Dr. E.H. Klumpp III, a chiropractor, on March 16, 1994. He diagnosed plaintiff with "chiropractic spinal subluxation complexes,[1] cervical radiculitis,[2] whiplash and probable cervical discopathy,[3]" and found some reduction in plaintiff's range of motion, although x-rays revealed "no evidence of recent fractures or dislocations." Plaintiff claimed that Dr. Klumpp ordered her to stop working at her waitressing position

for a couple of weeks in May 1994, but the doctor's records do not state that he ordered her to stop working altogether.

In April 1994, plaintiff visited Robert J. Urban, M.D. By this time, the doctor noted that she had full range of motion of the neck and right arm without pain. Dr. Urban did not prescribe any work cessation for plaintiff, but did refer her to Pratap C. Gupta, M.D., a neurologist. Dr. Gupta noted that plaintiff's neck was supple and that she had full range of motion of her neck with minimal pain. He diagnosed plaintiff with a "mild whiplash injury," and stated that she was "somewhat recovering," although she had exacerbated the injury when she attempted to put up blinds three weeks before the medical visit. Dr. Gupta also gave plaintiff permission to return to work.

From June 7, 1994, through July 6, 1994, plaintiff worked with a physical therapist, A. Hubble, who found only some tightness and tenderness in plaintiff's neck and upper back. Plaintiff stopped seeing this therapist suddenly for unidentified reasons. Plaintiff then began seeing another doctor, Beverly Zelt, M.D., on January 26, 1995. Although plaintiff reported that she was having difficulty working because her pain made carrying trays difficult, the doctor found no substantial restriction of rotation or bending, full range of motion and extension and only "slight tenderness."

On April 7, 1995, plaintiff visited Richard Vermeulen, M.D. He found that plaintiff's range of motion in the neck was decreased "three fingers between chin and sternum," and the range of motion in her right pectoralis major was significantly limited. His diagnosis was "post-traumatic myofascial syndrome."[4] Subsequently, on June 5, 1995, another physical therapist found normal extension, rotation and range of motion. By May 7, 1997, plaintiff's medical evaluation revealed no abnormalities, and Michael E. Holda, M.D. determined that plaintiff could work even in a labor-intensive job without restrictions.

On January 16, 1996, plaintiff filed her complaint against defendant for accident-related noneconomic losses. Plaintiff attempted to recover noneconomic damages by alleging that she suffered a "serious impairment of body function" under the scope of the Michigan no-fault act. Pursuant to the version of the no-fault act that was in effect in January 1996, before the March 1996 amendments that changed the standard of review and added a specific definition of the phrase "serious impairment of body function," the trial court granted defendant's motion for summary disposition. MCL 500.3135(2)(7); MSA 24.13135(2)(7).[5] The trial court found as a matter of law that plaintiff had not suffered a "serious impairment of body function." MCL 500.3135(1); MSA 24.13135(1).

This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. *Stehlik*, *supra* at 85.

Section 3135(1) of the Michigan no-fault act, that was not amended by the March 1996 amendments, permits a person injured in an automobile accident to recover noneconomic damages only in the following circumstances:

> A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. [MCL 500.3135(1); MSA 24.13135(1).]

"The 'serious impairment of body function' threshold was designed to eliminate suits based on clearly minor injuries, and those injuries which did not seriously affect the ability of the body, in whole or in part, to function." *DiFranco v Pickard*, 427 Mich 32, 60; 398 NW2d 896 (1986).[6] Two factors must be evaluated to determine whether a "serious impairment of body function" has occurred such that a plaintiff may sue for noneconomic losses:

> a) What body function, if any, was impaired because of injuries sustained in a motor vehicle accident?
>
> b) Was the impairment of body function serious? [*Id.* at 67.]

The focus is "not on the injuries themselves, but how the injuries affected a particular body function." *Id.* To determine this, "[g]enerally, medical testimony will be needed to establish the existence, extent, and permanency of the impairment." *Id.*

Accordingly, in an effort to analyze this case consistently with *DiFranco*, we must first determine which of plaintiff's body functions have been impaired as a result of her accident. According to her medical records, plaintiff's body functions were affected in that her ability to turn her neck, her ability to reach out with her right arm and her ability to carry things with her right arm were impaired. The next inquiry is whether these impairments were serious. Once an impairment is established, the factors to be evaluated in deciding whether it is serious are "the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors." *Id.* at 39-40.

First, it is instructive that plaintiff did not immediately report any injury or pain after the accident. Indeed, she did not visit a doctor for fifty-four days. In *Johnston v Thorsby*, 163 Mich App 161, 163; 413 NW2d 696 (1987), this Court relied on the plaintiff's two-year delay in seeking help as part of its basis for concluding she had not suffered a serious impairment of body function as a matter of law. Although plaintiff's delay here was not as long, in our judgment it was a rather lengthy delay for an impairment that plaintiff claimed was "serious."

Second, although plaintiff complained of pain, she was not diagnosed with any substantial abnormalities or injuries. Dr. Klumpp diagnosed plaintiff with seemingly the most serious problems, but even this diagnosis is consistent with simple strains and pulls. The relatively minor damage is highlighted by the diagnoses of the later medical personnel, who found nearly normal or normal ranges of motion

and extension of plaintiff's neck and arm and at most, a "mild whiplash injury." Although plaintiff may have suffered some pain and decrease of her range of motion in her arm and neck for a time, her injury is similar to that suffered by the plaintiff in *Kallio v Fisher*, 180 Mich App 516, 518; 448 NW2d 46 (1989), which this Court ruled was not "serious." There, the plaintiff was diagnosed by one physician with "chronic cervical-dorsal strain" from whiplash and pain the left side of his neck. *Id*. Although the focus is on how the injury affected body function, rather than the injury itself, it is instructive when, as here, the injury was significantly less extensive than those that cause much pain, considerably limit movement or activities, or affect important areas of the body such as the brain.

Third, and related closely to the injury suffered, plaintiff did not need significant medical treatment to correct her impairment. See *DiFranco, supra* at 40. Plaintiff apparently visited physical therapists for a short time, and found massage helpful. However, she was never admitted into the hospital and never required surgery, traction, significant medication or even bed rest. Again, this factor points out the relatively less serious nature of the injury in that it could be remedied without invasive or extensive procedures.

Fourth, plaintiff's impairment was not permanent, degenerative or at all lengthy. See *id*. at 40, 88. Plaintiff at worst suffered lingering effects of her whiplash injury up to one year after the accident. However, all vestiges of the injury seem to have disappeared by the time of the court hearing. Although this factor is not dispositive, it is instructive that the injury was not to an important life organ that would be more seriously impacted by a short impairment, and that any impairment to plaintiff's arm and neck lessened before a significant period of time had passed. Indeed, we also take into account that plaintiff reported to Dr. Gupta that she had exacerbated her injury while attempting to install blinds; her whiplash injury may well have fully healed sooner if not for this additional injury.

Lastly, any impairment to plaintiff's neck and arm did not seem to affect her life in any manner. None of the doctors that plaintiff visited ever restricted her lifestyle. They told her that she could return to work and that no restrictions on her physical activities were needed. Plaintiff's last evaluation even showed that she could work in a labor-intensive job without restrictions. There was apparently little that plaintiff's "impaired body function" actually limited.

On the basis of these factors, we conclude that plaintiff falls significantly short of meeting the "serious impairment of body function" threshold. Plaintiff's initial impairment was not substantial, required little, if any, treatment, and was not long-term. The injuries only minimally affected the function of plaintiff's neck and arm and no reasonable argument can be made that plaintiff suffered a "serious impairment of a body function." Therefore, the trial court properly granted defendant's motion for summary disposition.

Plaintiff also challenges the trial court's order granting defendant's motion in limine to exclude evidence of excess economic losses. Although it is not completely clear on what basis the trial court excluded this information, it appears that it was either because the information would have caused undue confusion or wasted time under MRE 403 or because the trial court concluded that there was no genuine issue of material fact so that summary disposition pursuant to MCR 2.116(C)(10) was appropriate. We will not disturb a trial court's decision to exclude evidence absent an abuse of

discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). We review a grant or denial of summary disposition de novo. *Stehlik, supra* at 85.

The pre-amendment version of section 3135(2)(c) of the no-fault law provided that a plaintiff injured in an automobile accident could seek damages for "allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections." MCL 500.3135(2)(c); MSA 24.13135(2)(c). A claim for damages under this section does not depend on whether the plaintiff suffered a threshold injury such as "serious impairment of body function." *Cochran v Myers*, 146 Mich App 729, 731-732; 381 NW2d 800 (1985). Plaintiff's only claim under section 3135(2)(c) would be for excess work loss benefits.[7] Work loss is described in the statute as "[w]ork loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." MCL 500.3107(b); MSA 24.13107(b). Plaintiff may sue defendant only for work loss amounts which *exceed* this three-year limitation in light of the pre-amendment MCL 500.3135(2)(c); MSA 24.13135(2)(c).

Plaintiff's accident occurred on January 21, 1994, so the three-year limit was reached on January 21, 1997, and any claim for excess work loss must be based on impairments existing after this date. However, plaintiff failed to present any evidence indicating that she is entitled to work loss benefits for the period after January 21, 1997. Her own doctors advised her that she could return to her job as a waitress (her former occupation). Further, she is not entitled to work loss benefits simply because she cannot work in her former occupation. Rather, plaintiff has a duty to mitigate any damages by seeking alternative work. *Bak v Citizens Ins Co*, 199 Mich App 730, 739; 503 NW2d 94 (1993). Plaintiff did not make more than a token attempt to find alternative work, yet she freely admits that she is able to handle jobs other than waitressing. Although reasonableness of mitigation is a question of fact, *id.*, plaintiff has presented so little evidence of an attempt to mitigate that a jury determination of the reasonableness of her mitigation is unnecessary. Therefore, the trial court's ruling to exclude evidence of excess economic loss was correct, whether it is viewed as an exclusion under MRE 403 or as a grant of partial summary disposition under MCR 2.116(C)(10).

For these reasons, we affirm the trial court's disposition of this case.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] "Subluxation" is an incomplete dislocation. *Stedmans Medical Dictionary* (21st ed) (1970).

[2] "Radiculitis" is inflammation of a portion of a spinal nerve root. *Stedmans Medical Dictionary* (21st ed) (1970).

[3] "Discopathy" is a disease of a disk. *Stedmans Medical Dictionary* (21st ed) (1970).

[4] "Myo" is a prefix meaning "muscle," and "fascia" is the "sheet of fibrous tissue which envelops the body beneath the skin, and also encloses the muscles and groups of muscles, and separates their several layers or groups." *Stedmans Medical Dictionary* (21st ed) (1970).

[5] This opinion is based on the version of the no-fault act that was in effect in January 1996.

[6] *DiFranco* is not consistent with the pertinent 1996 amendments to the no-fault act. However, *DiFranco* is applicable to the case at hand, as is the pre-amendment law, because the case was filed prior to the effective date of the amendment.

[7] Plaintiff's insurance company paid all of her accident-related medical expenses, no death occurred such that survivor's loss benefits are in issue and plaintiff has made no claim for any other type of expenses.