STATE OF MICHIGAN

COURT OF APPEALS

BRUCE BEHNKE,

Plaintiff-Appellant,

v

AUTO OWNERS INSURANCE CO.,

Defendant-Appellee,

and

ESTATE OF KAREN MCLEAN,

Defendant.

UNPUBLISHED
September 16, 2004

No. 248107
Chippewa Circuit Court
LC No. 01-005523-NI

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

GRIFFIN, J. (*dissenting)*.

This case involves a routine and highly ordinary cervical soft tissue strain, commonly known as a whiplash injury. The majority holds that, as a matter of law, plaintiff's alleged whiplash constitutes a *serious* impairment of body function under our Michigan no-fault automobile tort threshold. MCL 500.3135(1). I respectfully disagree and, therefore, dissent.

I. Findings of Fact

Following a non-jury trial, the Honorable Nicholas J. Lambros rendered findings of fact and conclusions of law. The majority appears to review both de novo, although "findings of fact by the trial court may not be set aside [on appeal] unless clearly erroneous." MCR 2.613(3).

The trial judge rendered the following findings of fact, which in my view are not clearly erroneous and are critical in determining whether plaintiff's alleged injury constitutes a serious impairment of body function:

> Plaintiff, Bruce Behnke, was 44 years old at the time of the May 1998 accident and was employed full time as a welder at Olofsson Company earning approximately $10.81 per hour. Plaintiff missed eight weeks of work after the accident and subsequently he left Olofsson Company in June, 2000, for reasons unrelated to the May 1998 accident. In January, 2001, plaintiff was employed by

Burton's Excavating doing snow removal which included shoveling snow from roofs, and earned $10.00 per hour. In May, 2001, plaintiff was employed by Wendrick's Truss Company where he continues to work as a sawyer cutting and stocking lumber used to build trusses. He works 40 hours a week and earns $9.75 per hour.

The accident on May 29, 1998, occurred when plaintiff's vehicle, a half-ton four-wheel drive full size Dodge Ram Pickup was struck from behind by a vehicle driven by Karen McLean, while plaintiff's vehicle was stopped at an intersection. Plaintiff was thrown about awkwardly in the vehicle causing shock to the right side of his neck. He refused medical treatment at the scene. The impact of the collision caused $400.00 worth of damage to plaintiff's bumper. The following day, plaintiff presented himself to the emergency room at War Memorial Hospital complaining of stiffness, soreness, and swelling on the right side of his neck and headaches. He was diagnosed with acute cervical strain, prescribed Motrin and discharged.

Subsequently, plaintiff was experiencing the same symptoms, so he went to his family doctor, Dr. Robert Graham, D.O. on June 2, 1998. Dr. Graham performed a physical examination and ordered an MRI examination. The MRI revealed congenital defects and degenerative changes not associated with the accident.

Plaintiff returned to Dr. Graham for further consultations four more times in 1998, five times in 1999, twice in 2000, and twice in 2001. During plaintiff's last visit in 1998, Dr. Graham returned plaintiff to work without restrictions. Three of plaintiff's visits in 1999 were unrelated to the accident and on the fourth visit, plaintiff complained of neck pain. On the two visits in 2000, plaintiff complained of cervical spasm and pain while engaging in sexual relations. Dr. Graham concluded the symptoms were due to arthritis of the spine.

On July 8, 1998, plaintiff was examined by Dr. J. Eric Zimmerman, M.D., a neurosurgeon, at the request of Dr. Graham. Dr. Zimmerman concluded that plaintiff had facet degenerative changes but did not show any spinal cord or root compression. Plaintiff's neurological exam was normal, his strength and reflexes were normal, and there was nothing to suggest radiculopathy or myelopathy. It was Dr. Zimmerman's opinion that plaintiff suffered myofascial strain. Plaintiff visited Dr. Zimmerman once again on November 21, 2001, complaining of severe myospasm which occurred during sexual relations. Once again, plaintiff's neurological exam was normal. He had degenerative changes to his spine which were not associated with plaintiff's May, 1998 accident. All testing was negative and plaintiff's strength was normal. Dr. Zimmerman again opined myofascial strain and referred plaintiff to a neurologist.

Plaintiff was examined by a neurologist, Dr. Susan Anderson, M.D. on two occasions in 2002. She ordered an MRI which revealed degenerative disc disease and central canal stenosis. Dr. Anderson opined that plaintiff's headaches

were caused by these conditions and prescribed Indomethacin which, for the most part, resolved plaintiff's pain at that time.

In this case, *although plaintiff suffers from headaches and neck pain, the medical evidence is inconclusive as to the cause*. However, no further treatment is necessary from a neurological standpoint.

As a result of the accident plaintiff was never hospitalized nor underwent surgery. He was off work for eight weeks, but has since worked full time both as a welder and a sawyer. He went to physical therapy on one occasion and did not return. No doctor has placed plaintiff on medical or work restrictions. Further, the headaches and neck pain do not limit range of motion other than such motion normally associated with headaches and occasional neck pain. Currently, plaintiff takes non-prescription medication for his headaches.

* * *

The evidence established that plaintiff has continuing intermittent neck pain and headaches. However, his ability to work has not been medically restricted, even though the pain sometimes causes him to take additional breaks. Plaintiff has no physician-imposed restrictions on his daily activities and plaintiff is still able to work, drive, socialize, travel, take care of himself and otherwise engage in the normal activities of life. Plaintiff testified that when the headaches and neck pain occur, he is less active and limits his usual activities. At that point, he self-medicates with over the counter pain medications. Plaintiff also testified that while engaging in sexual relations with his wife, he occasionally experiences severe spasms. But, plaintiff also testified he has a very good intimate relationship with his wife despite these recurring spasms. *Although these minor lifestyle changes are undoubtedly frustrating, they do not affect plaintiff's ability to lead his normal life*.[1] [Emphasis added.]

II. No-Fault Tort Threshold

Michigan's no-fault automobile tort threshold, MCL 500.3135(1), provides:

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.

In *Cassidy v McGovern*, 415 Mich 483, 503; 330 NW2d 22 (1982), the Supreme Court stated:

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[1] This finding is a mixed finding of fact and conclusion of law.

> In determining the seriousness of the injury required for a "serious impairment of body function," this threshold should be considered in conjunction with the other threshold requirements for a tort action for noneconomic loss, namely, death and permanent serious disfigurement. MCL 500.3135; MSA 24.13135. *The Legislature clearly did not intend to erect two significant obstacles to a tort action for noneconomic loss and one quite insignificant obstacle*. [Emphasis added.]

In regard to the tort threshold and the intent of the Legislature, we have stated: "One of the obvious goals of a scheme of no-fault automobile reparations is to keep minor personal injury cases out of court." *McKendrick v Petrucci*, 71 Mich App 200, 211; 247 NW2d 349 (1976). Furthermore, in 1995, the Michigan Legislature amended § 3135 of the no-fault act in a number of important respects. *Kern v Blethen-Coluni*, 240 Mich App 333; 612 NW2d 838 (2000). Critical to the present appeal is the term "serious impairment of body function" that is now specifically defined as follows:

> As used in this section, "serious impairment of body function" means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life. [MCL 500.3135(7).]

Recently, in *Kreiner v Fischer*, ____ Mich ____; ____ NW2d ____ (Docket Nos. 124120, 124757, issued July 23, 2004), slip op, p 12 n 8, our Supreme Court noted: ". . . [T]he most uncomplicated reading of the 1995 amendment [to § 3135 of the no-fault act (1995 PA 222)] is that the Legislature largely rejected *DiFranco* [*v Pickard*, 427 Mich 32; 398 NW2d 896 (1986)] in favor of *Cassidy*." [Citations omitted.]

Under the new statutory definition of "serious impairment of body function," three criteria must be met for an injury to exceed the threshold: (1) an *objectively* manifested impairment of (2) an *important* body function that (3) affects the person's *general ability* to lead his or her normal life. The first and second criterion precisely follow the *Cassidy v McGovern* standard. However, the final criterion is a modification of the former *Cassidy* purely objective test, which focused on "the person's general ability to live *a normal life*." *Cassidy, supra* at 505 (emphasis added). The modified test is now both objective and subjective in that it tests whether the person's "general ability" to live *his normal life* has been affected by the objectively manifested impairment of an important body function. *Kreiner, supra*.

III. General Ability to Lead His Normal Life

Regarding the third prong, the *Kreiner* Court offered the following guidance:

> Determining whether the impairment affects a plaintiff's "general ability" to lead his normal life requires considering whether the plaintiff is "generally able" to lead his normal life. *If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment.* [*Kreiner, supra*, slip op, p 24; emphasis added.]

In the present case, the trial judge found that plaintiff was "generally able" to lead his normal life, despite occasional headaches and neck pain. In particular, the court made the following findings of fact:

> As a result of the accident plaintiff was never hospitalized nor underwent surgery. He was off work for eight weeks, but has since worked full time both as a welder and a sawyer. He went to physical therapy on one occasion and did not return. No doctor has placed plaintiff on medical or work restrictions. Further, the headaches and neck pain do not limit range of motion other than such motion normally associated with headaches and occasional neck pain. Currently, plaintiff takes non-prescription medication for his headaches.
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> The evidence established that plaintiff has continuing intermittent neck pain and headaches. However, his ability to work has not been medically restricted, even though the pain sometimes causes him to take additional breaks. Plaintiff has no physician-imposed restrictions on his daily activities and plaintiff is still able to work, drive, socialize, travel, take care of himself and otherwise engage in the normal activities of life. Plaintiff testified that when the headaches and neck pain occur, he is less active and limits his usual activities. At that point, he self-medicates with over the counter pain medications. Plaintiff also testified that while engaging in sexual relations with his wife, he occasionally experiences severe spasms. But, plaintiff also testified he has a very good intimate relationship with his wife despite these recurring spasms. *Although these minor lifestyle changes are undoubtedly frustrating, they do not affect plaintiff's ability to lead his normal life*. [Emphasis added.]

Based on the evidence presented, these findings of fact are not clearly erroneous. MCR 2.613(C). Further, after applying *Kreiner* to these facts, I would hold that the lower court did not err in concluding that plaintiff is generally able to lead his normal life.[2]

IV. Proximate Cause

Also, regarding plaintiff's failure to sustain his burden of proving proximate cause, the trial court found: ". . . [a]lthough plaintiff suffers from headaches and neck pain, the medical evidence is inconclusive as to the cause." Again, because this finding of fact by the trier of fact was not clearly erroneous, it must be affirmed. MCR 2.613(C). Proximate causation is normally an issue for the trier of fact. *Derbeck v Ward*, 178 Mich App 38, 44; 443 NW2d 812 (1989). Here, after seeing and hearing the witnesses, the trial judge ruled that plaintiff failed to sustain

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[2] "Absent an outcome-determinative genuine factual dispute, the issue of threshold injury is now a question of law for the court. MCL 500.3135." *Kern, supra* at 341. Here, the trial court's finding of fact is reviewed for clear error, MCR 2.613(C), while its ultimate legal conclusion is reviewed de novo. *Id.* at 344 n 3.

his burden of persuasion as to proximate cause. Such a finding of fact should not be lightly discarded, particularly when plaintiff's alleged injuries are based on subjective complaints.

V. Objectively Manifested Impairment

Finally, because the first and second prongs of the statutory definition reiterate the *Cassidy* standards, *Cassidy* and its progeny are instructive in deciding whether an injury is objectively manifested and whether it impairs an important body function. *Kern, supra* at 340. In the present case, plaintiff seeks recovery of noneconomic damages for his alleged headaches and neck pain. In my view, the alleged injuries are not objectively manifested and, therefore, not compensable under § 3135 of the no-fault act.

As noted by the trial court judge, on July 8, 1998 (approximately five weeks post-accident), plaintiff was examined by a neurologist, Dr. J. Eric Zimmerman, M.D. Significantly, "plaintiff's neurological exam was normal, his strength and reflexes were normal, and there was nothing to suggest radiculopathy or myelopathy." At no time since the accident has any objective evidence been produced in support of plaintiff's subjective complaints of headaches.

In *Williams v Payne*, 131 Mich App 403, 409-410; 346 NW2d 564 (1984), we held that for an injury to be objectively manifested, it must be subject to medical measurement:

> Additionally, Mrs. Williams' soft tissue injuries were not subject to medical measurement. Thus, they are not "objectively manifested" in a scientific or medical context. The symptoms of her injuries, however, have found objective manifestation: pain makes certain activities difficult. The *Cassidy* opinion did not expressly designate which standard of manifestation to employ, objective medical measurements of injury or a patient's complaints of pain substantiated only by the patient's limited activities. We conclude that Mrs. Williams' injuries are not "objectively manifested" within the meaning of *Cassidy*. Medically unsubstantiated pain will always be present in a tort action for pain and suffering. The Legislature could not intend so low a threshold for avoiding the no-fault act's proscription against tort actions. General pain and suffering is not sufficient to meet the threshold. *Cassidy v McGovern*, 415 Mich 505.
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> Additionally, the *Cassidy* decision spoke of "objectively manifested *injuries*," not symptoms.

Here, plaintiff's alleged headaches are not subject to medical measurement and, therefore, are not a compensable "objectively manifested impairment." *Id*. In addition, plaintiff's neck pain is also not an objectively manifested impairment because the alleged injury is not medically documented.

During the *Cassidy* era, the *Williams v Payne* line of authority held that temporary tightening of a muscle through a muscle spasm, tenderness, and temporary limited flexion were manifestations of potential *symptoms*, not objective manifestations of *injury*. The cases that followed *Williams v Payne* include *Flemings v Jenkins*, 138 Mich App 788, 790; 360 NW2d 298

(1984) ("The medical findings of muscle spasm, tenderness and limited flexion do not rise to the level of objective manifestations of injuries which generally support a finding of 'serious impairment of body function.'"); *Morris v Levine*, 146 Mich App 150, 154; 379 NW2d 402 (1985) (". . . even if plaintiff's injuries were sufficiently serious, the medical findings of tenderness, spasms, and limited range of motion do not rise to the level of objective manifestations of injuries which generally support a finding of serious impairment of body function."), and *Clark v Auto Club Ins Ass'n*, 150 Mich App 546, 553; 389 NW2d 718 (1986) ("Plaintiff's injuries consisted of soreness, stiffness, tenderness in the muscles, and pain in his back and leg. Flexibility in the spine area was only 50% at one time, however, plaintiff was able to perform leg raising and other flexibility tests. We have previously held that muscle spasms, tenderness and limited flexibility do not rise to the level of a 'serious' impairment of a body function.").

A second line of authority[3] also developed under *Cassidy* that disagreed with the *Williams v Payne* interpretation of *Cassidy* and held that its medical measurement standard proved to be "an almost insurmountable obstacle to the recovery of noneconomic damages in soft tissue cases." See *Garris v Vanderlaan* (Ravitz, J. dissenting), 146 Mich App 619, 627-628; 381 NW2d 412 (1985). These lower threshold decisions included *Shaw v Martin*, 155 Mich App 89; 399 NW2d 450 (1986); *Harris v Lemicex*, 152 Mich App 149; 393 NW2d 559 (1986); *Franz v Woods*, 145 Mich App 169; 377 NW2d 373 (1995); and *Salim v Shepler*, 142 Mich App 145; 369 NW2d 282 (1995). This second line of authority held that muscle spasms (muscle contractions) and limited range of motion resulting from a passive range of motion test were objective manifestations of a serious impairment of body function.

Four years after rendering *Cassidy v McGovern*, the Supreme Court, in *DiFranco v Pickard, supra*, overruled *Cassidy* and also overruled the *Williams v Payne* "medical measurement" standard. In discarding the requirement that injuries be objectively manifested, the *DiFranco* Court explained:

> *In Williams v Payne, 131 Mich App 403, 409-410; 346 NW2d 564 (1984), the Court of Appeals distinguished objectively manifested injuries from objectively manifested symptoms.* After concluding that plaintiff wife's soft tissue injuries to her thumb had not seriously impaired any important body function, . . .
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> *Defendants urge us to adopt the Williams Court's interpretation of Cassidy*. They believe that an injury which cannot be directly demonstrated through the use of accepted medical tests or procedures, but must be diagnosed on the basis of the plaintiff's subjective complaints, a physician's clinical

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[3] During this era, the Court of Appeals did not have a conflict resolution rule, and, therefore, decisions that conflicted were allowed. Beginning November 1, 1990, published decisions of the Court of Appeals became precedentially binding on subsequent panels of the Court, first by operation of AO 1990-6, and now through MCR 7.215(J).

impressions, or the symptoms resulting from the injury, is not objectively manifested. Their reasoning is as follows:

A physical examination yields subjective complaints and objective findings. Subjective complaints are those perceived only by the patient which cannot be otherwise measured, e.g., pain, nausea, and blurred vision. Objective findings are those which the physician can see for himself, e.g., swelling and inflammation. Some procedures involve a combination of subjective complaints and objective findings, e.g., range-of-motion tests, where the doctor manipulates the patient's body until the patient complains of pain or is unable to move further. Doctors use subjective complaints and objective findings to form clinical impressions and diagnoses. To verify these clinical impressions, the doctor usually orders tests, such as x-rays, arthrograms, CAT-scans, blood tests, and the like.

Defendants argue that the injury itself (e.g., broken bones, torn cartilage, etc.) must either be directly perceivable (i.e., the doctor must be able to see, hear, or touch the injury), or the nature and extent of the injury must be demonstrated through a medically accepted test. Symptoms or effects caused by the injury (e.g., spasms, swelling, and pain) are supposedly insufficient to satisfy Cassidy 's requirement of objectively manifested injuries.

Thus, broken bones seen on x-rays clearly satisfy defendants' interpretation of *Cassidy. However, injuries to soft tissues generally cannot be seen or felt. Seeing or feeling the symptoms of torn or stretched muscles or ligaments (e.g., spasms) is not enough.* Nor are plaintiff's subjective complaints of pain or limited motion. Therefore, defendants believe that, in most cases, soft tissue injuries cannot be the basis of a finding that the plaintiff suffered a serious impairment of body function because these injuries are not objectively manifested.

The Court of Appeals has not always accepted this rigid distinction between injuries and symptoms. As a result, panels have disagreed on whether certain manifestations of soft tissue injuries, such as muscle spasms,[53] swelling,[54] tenderness,[55] and loss of lordosis,[56] satisfy *Cassidy*. Panels have also disagreed as to whether the conclusions drawn from range-of-motion tests are an objective manifestation of an injury. Some panels have summarily disregarded the results of these tests, especially if the plaintiff's x-rays were normal and no neurological problems were discovered.[57] Other panels have distinguished between "active" and "passive" range-of-motion tests. Under this approach, the results of an active test (i.e., a test where the plaintiff moves her body until she feels pain) are not considered an objective manifestation of an injury because the plaintiff can control the test results.[58] However, the limitation of movement observed in passive tests is considered an objective manifestation of an injury.[59]

The Williams' interpretation of Cassidy's "objectively manifested injury" language has proved to be an almost insurmountable obstacle to recovery of noneconomic damages in soft tissue injury cases. Judge Ravitz, dissenting in

Garris v Vanderlaan, 146 Mich App 619, 627-628; 381 NW2d 412 (1985), roundly criticized the *Williams* Court's reasoning:

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We agree that Williams misinterpreted Cassidy. The *Cassidy* Court was concerned that plaintiffs could recover noneconomic damages merely by testifying that they had suffered extreme pain following a motor vehicle accident. Recognizing that the Legislature only permitted recovery for injuries which seriously impair body functions, the Court required plaintiffs to establish that they had suffered such an injury. In other words, plaintiffs must introduce evidence establishing that there is a physical basis for their subjective complaints of pain and suffering. Neither *Cassidy* nor § 3135(1) limits recovery of noneconomic damages to plaintiffs whose injuries can be seen or felt. [*DiFranco, supra* at 70-75; emphasis added.]

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[53] Muscle spasms were found to be objective manifestations of soft tissue injuries in *Bennett*, n 34 *supra*, *Harris*, n 41 *supra*, pp 153-154, and *Franz*, n 39 *supra*, p 176; but not in *Clark*, n 47 *supra*, p 553, *Morris*, n 40 *supra*, p 154, and *Flemings v Jenkins*, 138 Mich App 788, 790; 360 NW2d 298 (1984).

[54] Swelling was found to be an objective manifestation of injury in *Pullen*, n 32 *supra*, p 365.

[55] Tenderness was deemed an objective manifestation of injury in *Bennett*, n 34 *supra;* but not *Clark*, n 47 *supra*, *Morris*, n 40 *supra*, *Franz*, n 39 *supra*, p 177, and *Flemings*, n 53 *supra*.

[56] Although loss of lordosis (i.e., the natural curvature of the spine) can be seen on x-rays, *Guerrero*, n 40 *supra*, p 750, held that the cause of the loss (i.e., torn or stretched muscles and ligaments) was not objectively manifested. In other words, loss of lordosis is only an objectively manifested symptom of a soft tissue injury. *Sherrell*, n 46 *supra*, p 711, reached a contrary conclusion.

[57] See *Morris*, n 40 *supra*, p 154; *Flemings*, n 53 *supra; Williams v Payne*, 131 Mich App 411.

[58] See *Franz*, n 39 *supra*, p 175; *Salim*, n 44 *supra*, p 149.

[59] See *Galli*, n 48 *supra*, p 318; *Argenta*, n 48 *supra*, pp 488-489.

The Legislature, by enacting 1995 PA 222, overruled *DiFranco v Pickard* and restored the requirement that a threshold injury be "an objectively manifested impairment." MCL 500.3135(7). One of the issues in the present case is whether the *Williams v Payne* "medical

measurement" standard has also been reinstated by the revival of the objectively manifested impairment test. In *Kreiner, supra*, slip op, p 27, our Supreme Court stated that, under the 1995 amendment, injuries must be "medically documented" to exceed the tort threshold:

> If a court finds that an important body function has in fact been impaired, it must then determine if the impairment is objectively manifested. *Subjective complaints that are not medically documented are insufficient.* [Emphasis added.]

In evaluating whether plaintiff Kreiner's injuries were objectively manifested, the Supreme Court noted that the plaintiff's nerve irritation was medically confirmed and documented by an electromyography (EMG). *Kreiner*, slip op, p 17. Based upon the positive EMG, the Supreme Court concluded: "First, we find that Kreiner's medically documented injuries to his lower back, right hip, and right leg constitute an impairment of an important body function that was objectively manifested." *Kreiner*, slip op, p 33.

I view the Supreme Court's requirement of a "medically documented" injury to indicate that the Court has concluded that the Legislature has overruled *DiFranco v Pickard* and reinstated the medical measurement standard of *Williams v Payne*. As previously indicated, this line of authority holds that temporary muscle spasms, tenderness, and limited range of motion are manifestations of possible symptoms, not an objective manifestation of an injury. In my view, the following argument rejected by the Supreme Court in *DiFranco* has now been accepted by the Legislature:

> If the objective manifestation requirement of the statutory threshold is to have any meaning at all, the courts must require that injured claimants present the sort of hard scientific data which physicians seek to support their clinical impressions and enable them to make a definitive diagnosis. Objective manifestation of an injury cannot be demonstrated by either the subjective complaints of the claimant, the clinical impressions of the physician or unaccepted, subjective medical testing. The injury itself – and not merely its symptoms or effects – must be either directly perceivable by the senses of the observer, without resort to inference or diagnosis, or the nature and extent of the injury must be demonstrable by the use of a scientifically-established, medically-accepted test or procedure. [Defendant-Appellee Brief and Appendix on Appeal, *Kucera v Norton*, Michigan Supreme Court Docket No. 75299, decided December 23, 1986.]

Based on 1995 PA 222 and its construction in *Kreiner*, I would hold that plaintiff's temporary muscle spasm, tenderness, and temporary limited range of motion, while indicative of possible symptoms, do not constitute an objectively manifested impairment of an important body function. MCL 500.3135(7).

I would affirm.

/s/ Richard Allen Griffin