

IN THE COURT OF APPEALS OF IOWA

No. 6-248 / 05-1210

Filed May 24, 2006

**DANKA HOLDINGS and ZURICH
AMERICAN INSURANCE GROUP,**
Petitioners-Appellees,

vs.

JERRY MYERS,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert,
Judge.

Jerry Myers appeals from the district court's reversal and remand of the
workers' compensation commissioner's award. **AFFIRMED.**

Peter Leehey, of Pete Leehey Law Firm, P.C., Cedar Rapids, for
appellant.

Mark W. Thomas and Lisa R. Perdue of Grefe & Sidney, P.L.C., Des
Monies, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

SACKETT, C.J.

Petitioner-appellant, Jerry Myers, was injured in a motor vehicle accident while driving a truck for Danka Holdings. Myers petitioned for workers' compensation benefits. The extent of the head injuries caused by the accident was in dispute. The agency held Myers was permanently and totally disabled due to his work injuries and awarded him benefits. The district court reversed and remanded the agency decision. The district court held the deputy commissioner erroneously applied the law. The court held the deputy improperly weighed the evidence by attaching greater weight to the opinions of Myers's treating physicians, over the physicians retained in anticipation of litigation, as a matter of law. On appeal, Myers's argues the deputy correctly stated the law or, in the alternative, even if the deputy misstated the law, the deputy actually used the correct legal standard. We affirm the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

Myers was employed as driver by Danka Holdings. On August 14, 2000, he was involved in a motor vehicle accident while driving a truck for Danka. The circumstances leading up to the accident are not in dispute in this appeal. An unidentified vehicle cut in front of Myers's while he was driving on Interstate 80. Myers was forced to make an evasive maneuver, which caused him to crash into a semi-trailer parked along the shoulder of the highway.

As a result of the collision, Myers testified that, even though he was belted, he was thrown around in the cab. He hit and bent the steering wheel. His head struck a hard surface and he suffered cuts to both his forehead and the back of his head. In his testimony Myers indicated he may have lost

consciousness for a short period after the collision, as the first thing he remembers after the collision was a woman sitting on his lap in the truck who said she was a nurse and was trying to help him. Myers claims not to remember much detail about how he was treated at the scene or transported to the hospital. At the emergency room Meyers complained of pain in the area of the laceration on his scalp and shoulder pain caused by the seatbelt strap. The report from the emergency room indicates Myers reported "he was 'fuzzy' and thinks he may have had a momentary loss of consciousness" but he "was then alert at the scene and remembers all the details of the accident." The emergency room report further indicates Myers did not claim to suffer from a headache, visual changes, nausea, vomiting, chest pain, shortness of breath, abdominal pain, or pain in his extremities. The tests and examinations conducted at the hospital returned normal results.

Myers sought treatment from Dr. Laurence Krain, a neurologist, a week after the accident, on August 23, 2000. Myers's primary complaint was that in the days after the accident he suffered from headaches, dizziness, and loss of balance. Dr. Krain's assessment was that Myers had a mild closed head injury and whiplash with associated neck pain, headaches, dizziness, blurred vision, and sleeplessness. Dr. Krain prescribed medication, ordered additional testing, recommended physical therapy, and ordered Myers to remain off work. Myers's condition initially appeared to improve in early September 2000, but by the end of September he returned to Dr. Krain with a reoccurrence of the same symptoms. At this time, Dr. Krain noted Myers appeared to suffer in some degree from obsessive compulsive behavior disorder and the disorder may have been

impairing his coping and recovery. Myers continued to suffer from symptoms in the subsequent months and continued to seek treatment from Dr. Krain.

In March 2001, Myers's employer referred him to Dr. Joseph Nora, who specializes in pain management and closed head injuries, for evaluation and treatment. Dr. Nora's initial assessment was that Myers had a traumatic brain injury. Myers was placed in a "full comprehensive rehabilitation program for traumatic brain injury." The goal of the program was to "objectify [Myers's] deficits, set the stage for therapies to be pursued where [Myers] had deficits and give prognostic and planning information with his ability to go back to work or vocational rehabilitation in some other area versus disability settlement." During the first few days of this program, Myers was subjected to extensive neuropsychological examination by Dr. Jane Springer, a neuropsychologist. After three days of testing, due to inconsistency in performances, Dr. Springer concluded the testing was invalid because of "suspected poor effort and possible malingering." Myers testified his performance was adversely affected by the medications he was taking. In his deposition Dr. Nora testified he found no current problems related to the accident. In his discharge of Myers, Dr. Nora stated, "I feel that there is a component or at least probable malingering." Dr. Nora informed Myers he could not offer him any additional treatment and he should continue to seek treatment through psychiatry.

Myers sought treatment from Dr. Krain again in July 2001 for the same symptoms he had been complaining of since the accident. Dr. Krain noted he had received the reports of Dr. Nora that concluded there was probable malingering on the part of Myers. Dr. Krain indicated he could not explain

Myers's multiplicity of symptoms but did observe that medication helped relieve Myers's headaches.

Myers sought another opinion on his condition in October 2001 from Dr. Marc Hines, another neurologist. Dr. Hines's assessment was that Myers "suffered a closed head injury with post-concussion symptomology with post-traumatic labyrinthine concussion episodic syncope. . . ." Dr Hines's noted,

It appears likely that this patient has a mixed problem with both the difficulties post-traumatically with headaches, dizziness, cervical dysfunction from cervical strain, and multiple trigger point dysfunction complicated by post-traumatic labyrinthine concussion, most likely as an explanation for his dizziness. The findings in this regard, are completely typical and, unfortunately, a number of patients do have these types of difficulties post-traumatically.

Dr. Hines indicated neuropsychological tests, like those conducted by Dr. Springer, are difficult to interpret. Myers's situation was further complicated, in Dr. Hines's opinion, by Myers's development of post-traumatic migraines which "can further develop the difficulties with chronic pain which can continue the process of ongoing sleep deprivation, serotonin depletion, subsequent depression, and further complicate the overall interpretation of the situation." Dr. Hines handled Myers's treatment in the subsequent months, but accomplished only minimal improvement. Dr. Hines concluded Myers had permanent impairment due to the motor vehicle accident and would require significant work restrictions.

Myers's petition for workers' compensation benefits was heard by the agency on April 6, 2004. The deputy commissioner issued a decision on April 22, 2004, finding Myers was permanently and totally disabled due to the motor vehicle accident. Numerous expert opinions as to Myers's condition were offered

into evidence at the hearing. The deputy rejected the views of Dr. Nora and Dr. Springer that Myers was not giving full effort and malingering. The deputy indicated he gave substantial weight to the opinions of Dr. Krain and Dr. Hines, Myers's treating physicians, and to the social security disability evaluators, who found Myers to be disabled. Ultimately, the deputy ordered Danka to pay Myers permanent total disability benefits at the rate of \$251.55 per week. Danka appealed to the commissioner who affirmed the deputy's decision.

Danka petitioned for judicial review arguing, in part, the deputy improperly gave greater weight to the testimony of Myers's treating physicians as a matter of law. The district court concluded the deputy's statement that the opinions of the treating physicians "should be given more weight than the others," improperly indicated such physicians' opinions should be given more weight, "as a matter of law solely based upon their status." Therefore, the district court reversed the agency decision and remanded to the agency. Myers appeals.

II. SCOPE OF REVIEW.

At issue in the present case is the agency's interpretation of the law regarding the weight to be given to the expert opinion of treating physicians in a workers' compensation case. We review such questions for errors at law. See Iowa R. App. P. 6.4; see also *IBP, Inc. v. Harpole*, 631 N.W.2d 410, 414 (Iowa 2001). "[T]he question on review is whether the agency's interpretation was erroneous, and we may substitute our interpretation for the agency's." *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006).

III. ANALYSIS.

The rule regarding the weight to be given to a treating physician's opinion in workers' compensation cases is that the fact-finder may not give a treating physician's opinion more weight than a physician who examines the patient in anticipation of litigation as a matter of law. *Gilleland v. Armstrong Rubber Co.*, 524 N.W.2d 404, 408 (Iowa 1994); *Rockwell Graphic Systems, Inc. v. Prince*, 366 N.W.2d 187, 192 (Iowa 1985). However, as a matter of *fact*, the fact-finder can take numerous factors into account in determining the value of a particular physician's opinion. *Rockwell*, 366 N.W.2d at 192. The fact-finder may consider the physician's employment in connection with litigation; the compensation arrangement; whether the examination was close in time to the injury; the extent and nature of the examination; the physician's education, experience, training, and practice; and all other factors which bear upon the weight and value of the physician's testimony. *Id.*

We must now consider whether the deputy commissioner correctly interpreted this rule in the present case. At issue is the following excerpt from the deputy's written ruling:

It is probably an understatement to state that the evidence is conflicting concerning [Myers's] asserted mental problems and their connection to the August 2000 accident. Even objective testing must be subjectively interpreted which is largely why we have a divergence in medical opinion in this case. Consequently, the best approach is to evaluate, not so much the objectivity of the testing tools utilized by various [evaluators], but the objectivity of the evaluators themselves.

Over my many years with this agency, I have tended to give more weight to the views of health care providers who became involved in the case for the purpose of treatment rather than those who were involved, in whole or in part, for litigation purposes. I believe this approach is correct, but not necessarily determinative. *This means that the views of the treating physicians, Drs. Krain and Hines, should be given more weight than the others.* Also, the Social Security evaluators should be given considerable weight in

that they were retained by a relatively neutral authority as far as this workers' compensation claim is concerned.

(Emphasis added.)

The statement of the deputy that “the views of the treating physicians, Drs. Krain and Hines, should be given more weight than the others” is problematic. The statement is indicative that the deputy gave greater weight to the opinions of the treating physicians as a matter of law. The deputy’s conclusion with regards to weight to be given to the opinions of treating physician’s was not connected with a factual analysis, as is approved of in *Rockwell*, 366 N.W.2d at 192. Therefore, we must conclude that the deputy committed legal error. Even though the remainder of the deputy’s decision appears sound and there is considerable evidence in the record to support the ultimate conclusion reached by the deputy, we cannot approve an agency’s decision that rests upon flawed legal foundation. *Office of Consumer Advocate v. Iowa State Commerce Comm’n*, 432 N.W.2d 148, 156 (Iowa 1988). We affirm the district court’s ruling reversing and remanding this case to the agency.

AFFIRMED.