BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GLENDA L. CASEY, Claimant, vs. GORDON RECOVERY CENTERS, Employer, and NORTH AMERICAN SPECIALTY, Insurance Carrier, Defendants.	:	File Nos. 5003209, 5003210 A R B I T R A T I O N D E C I S I O N HEAD NOTE NOS: 1108.50; 1802; 1803

STATEMENT OF THE CASE

Claimant, Glenda L. Casey, has filed a petition in arbitration and seeks workers' compensation benefits from Gordon Recovery Centers (Gordon), employer, and North American Specialty, insurance carrier, defendants, for injuries occurring on or about December 26, 2001 and January 11, 2002.

This matter was heard by deputy workers' compensation commissioner, James F. Christenson, on March 11, 2004 in Sioux City, Iowa. The record in this case consists of claimant's exhibits 1 through 23, defendants' exhibits A through H and the testimony of claimant, her daughter, Lindsey Casey, and Clifford Millard.

ISSUES

The parties submitted the following issues for determination:

In File No. 5003210 (Date of Injury: December 26, 2001):

1. Whether claimant's deep venous thrombosis (DVT) and pulmonary embolisms (PE) arose out of and in the course of employment;

2. The extent of claimant's entitlement to total temporary/healing period benefits;

3. Whether the injury of December 26, 2001 is a cause of permanent disability; and if so,

4. The extent of claimant's entitlement to permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

In File No. 5003209 (Date of Injury: January 11, 2002):

1. Whether claimant's injury to her neck and her DVT and PE's arose out of and in the course of employment;

2. The extent of claimant's entitlement to temporary total/healing period benefits;

3. Whether the injury of January 11, 2002 is a cause of permanent disability; and if so,

4. The extent of entitlement to permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony of the witnesses and considered the evidence in the record, finds that:

Glenda L. Casey was born April 7, 1954, making her 49 years old at the time of hearing. Claimant left high school before graduation but earned a GED. She returned to school and in 1996 graduated as a registered nurse (RN).

Claimant testified that she worked continuously since the age of 14. She testified she has worked in print shops, in a dry cleaner, as a bartender, as a hotel maid and in a number of factories. Since earning her degree, claimant has worked as a RN in a number of nursing homes in the Sioux City area. Claimant began her employment with Gordon in September of 2001. She testified that Gordon was a home for adolescents with addiction or behavioral problems.

Claimant's prior health history is significant in that she has a history of back problems going back to at least 1999. She was a smoker and has been diagnosed as a diabetic and obese.

Claimant testified that while at work on December 26, 2001, she hurt her back when checking in patients returning from Christmas. She testified she bent over to pick up a patient's duffle bag and felt something pop in her back. She testified she dropped the bag, sat down, and felt light-headed. Claimant testified she left work early that evening after passing medication because she was in excruciating pain. She testified she had never had this sort of back pain before.

An injury report, written and signed by claimant, indicates when claimant reported the injury, she told her employer she felt a "twinge" in her back, that she worked the rest of the night, and did not hurt until the next morning. The report also indicates that claimant told her employer: "I have had this before." (Exhibit C)

Claimant testified that prior to her injury, she was told by her employer that Gordon would merge with the Boys and Girls and Family Services (Family Services). This meant that claimant would be terminated. Claimant testified she applied to Family Services for a new job and believed she had a good interview. Claimant testified she was not told she had a new job with Family Services. (Ex. G-2)

On December 31, 2001, claimant treated at St. Luke's Emergency Room with complaints of back pain. Records indicate that claimant told the emergency room staff that she "had similar episodes of this in the past." Claimant was diagnosed as having low back strain and was prescribed Darvocet, Flexeril, and cold compressors. (Ex. 1)

Claimant was referred by her employer to Richard Thompson, D.O., for treatment of her low back pain. Claimant initially treated with Dr. Thompson on January 3, 2002 complaining of pain in the lower back, both buttocks and legs. Dr. Thompson diagnosed claimant as having a lumbar strain. He prescribed physical therapy, ibuprofen, Flexeril, and Ultram. He confined claimant to two days' bed rest followed by a return to work on restricted duty. (Ex. 2-1)

On January 8, 2002, claimant returned to Dr. Thompson with continued complaints of pain radiating to both legs. Dr. Thompson returned claimant to physical therapy. (Ex. 2-3)

Claimant testified that on or about January 11, 2002, she was put in traction for physical therapy. Claimant testified her body was stretched and extended while in traction. She testified she believed the physical therapist shut the traction unit off too abruptly which caused an injury to her neck. Medical records indicate when claimant returned to Dr. Thompson on January 15, 2002, she complained of pain in her neck, chest, and right arm as a result of the traction. Dr. Thompson returned claimant to physical therapy and to work on restricted duty. (Ex. 2-5)

On January 22, 2002, claimant returned to treat with Dr. Thompson. Records show claimant indicated improvement and she had no pain when at rest. Dr. Thompson diagnosed claimant as having an improved lumbar strain and continued to treat her with physical therapy and restricted duty at work. (Ex. 2-7)

On January 23, 2002, defendant-employer, Gordon, sent claimant a letter regarding her workers' compensation claim and continued employment status with Gordon. The letter indicates that, at that time, claimant had not returned to work on a full-time basis. The letter indicates Gordon was willing to return claimant to work on a part-time basis. The letter also notes claimant could file for extended unpaid leave under the Family Medical Leave Act or that she might be eligible for salary continuation under short-term disability. (Ex. G-3) Claimant testified she did not take advantage of either offer.

Medical records indicate claimant returned to treat with Dr. Thompson on January 28, 2002. Records indicate: "Patient states she is feeling better, still having

some back pain but it is not constant." (Ex. 2-9) Dr. Thompson prescribed physical therapy and liberalized claimant's work restrictions. (Ex. 2-9)

Claimant returned to Dr. Thompson on February 13, 2002. Records note: "Patient relates that she is essentially pain-free at this time. She does have a little bit of stiffness in her lower back in the morning when she first wakes up but this is gone shortly after she gets up; otherwise, she denies any weakness or pain in her legs." (Ex.2-11) Medical records indicate claimant had full range of motion in the lumbar spine without pain. Dr. Thompson released claimant from his care and returned her to work full duty and found claimant to be at maximum medical improvement (MMI). (Ex. 2-11 and 2-12)

Physical therapy notes from St. Luke's Rehabilitation Services dated January 28, 2002, also note that on her final physical therapy visit, claimant rated her low back pain as a zero on a scale of ten, with ten being extreme pain. (Ex. 3-6)

Claimant's testimony differed from these records. Claimant testified she asked Dr. Thompson to have an MRI but that he refused because the "company" would not pay for it. She testified Dr. Thompson told her she should have a 20-pound lifting restriction but she asked him to remove it. She testified she was still in "excruciating" pain in her lower back when she was released from Dr. Thompson's care. Claimant also testified that she called Dr. Thompson's office on three occasions to have follow-up care due to lower back pain but that Dr. Thompson "wouldn't get on the phone." She testified that Dr. Thompson's office allegedly told her Dr. Thompson refused to treat her further because the "insurance company was done with my claim."

Dr. Thompson's records show no indication claimant ever tried to call his office following her release. Clifford Millard, Vice-President for Gordon at the time of claimant's injury, testified he would have allowed further treatment, following February 13, 2002, had claimant requested it.

Dr. Thompson testified in deposition that he found claimant to have reached MMI on February 13, 2002 and released her to return to work with no restrictions at that time. (Ex. E, deposition pages 19 through 20) He testified claimant had no permanency as a result of the December 26, 2001 injury. (Ex. E, deposition page 21) Dr. Thompson testified that he did not offer claimant a 20-pound lifting restriction upon her release. He testified such a restriction made no sense since a prior lifting restriction had been in the 35-49 pound range. (Ex. E, deposition page 25)

Claimant testified that because Dr. Thompson's office refused to treat her, she sought treatment for her back problems at Siouxland County Health Center (Siouxland). Claimant testified that at that time her pain was "horrific." The medical records for claimant's initial visit to Siouxland indicate that:

> Her main complaint is that she wants to try to get on disability because she has a number of concerns, such as hypertension, diabetes, breathing,

> problems, she gets frequent bouts of bronchitis that have her be off of work at least once or twice a month and also now she's having problems with a hammertoe and it's painful for her to walk. Her primary concern recently has been back pain and neck pain, although that has been improving lately. . . . The neck doesn't really bother her right now other than she feels the cracking . . . . It's not as painful as it was, however, earlier before. The neck pain was contributing to her loss of work.

(Ex. 4-1)

At that visit, claimant was diagnosed as having neck pain and low back pain. She was prescribed to continue exercises given to her from prior physical therapy. (Ex. 4-1 through 4-3)

Claimant continued to treat at Siouxland for numerous health problems including her neck and back pain in April and May of 2002. Records indicate that on June 26, 2002, claimant had an x-ray of her lumbar spine for Social Security. The x-ray revealed no acute bony injury and a mild narrowing at the L5-S1 with sclerosis. (Ex. 6)

On July 29, 2002, claimant had an MRI of her spine. The MRI revealed no significant herniated nucleus pulposus but did show a "very small left paracentral protrusion at the L4-5." (Ex. 7-1) An MRI of the cervical spine also showed no herniated nucleus pulposus with some mild changes in the C4-5 and C5-6 regions. (Ex. 7-1 through 7-2, 8, and 9-1)

On August 14, 2002, claimant treated with Thomas Clark, D.O. At that time claimant complained of "severe" low back pain with pain radiating into the left leg. (Ex. 9-1) Dr. Clark diagnosed claimant having a neck strain and possible disc problem at the L4-5 region. He recommended she lose weight and exercise to "sustain any improvement." He also prescribed Neurontin. Dr. Clark requested a surgical referral and referred claimant to physical therapy. (Ex. 9-3)

On September 25, 2002, Dr. Clark again saw claimant. At that time claimant indicated physical therapy had helped her. Records suggest physical therapy was suspended because "her insurance ran out." Dr. Clark also advised weight loss and active exercise. (Ex. 9-4) Claimant testified that the Neurontin Dr. Clark prescribed helped her pain, but only for a few hours. She testified that in the months of April through July 2002 approximately eight to nine of her waking hours were spent stationary.

On September 30, 2002, claimant returned to Siouxland for treatment. Records indicate claimant had an appointment with a Dr. Hunt but did not keep the appointment as she was afraid of surgery. Records indicate claimant continued to have back and leg pain. (Ex. 4-8) On December 11, 2002, claimant again treated at Siouxland. Records indicate claimant sought to get out of jury duty because of back and knee pain. She was advised to stop smoking and begin exercising. She was also given the option of

getting a free membership at the YMCA to exercise. Claimant testified she did not pursue the membership and did not exercise. Records indicate that on November 26, 2002, claimant was not allowed to get out of jury duty and was told that serving on a jury would be "good for her." (Ex. 4-9, Ex. D)

Claimant testified that in January of 2003 she was hospitalized for approximately two weeks for treatment of three PE's and a DVT. On January 2, 2003, claimant was admitted to St. Luke's Regional Medical Center with complaints of shortness of breath. She was diagnosed as having a PE in the left upper, right lower, and left lower lung and a DVT. (Ex. 11-1 through 11-4) Claimant was treated for this condition by Craig Bainbridge, M.D. Dr. Bainbridge is a board-certified pulmonologist. In his deposition, Dr. Bainbridge testified that a PE is a blood clot that causes an obstruction to the blood flow in the pulmonary artery. He testified that a DVT is a clot that originates in the deep veins of the body either in the leg or pelvis. He testified that if the clot becomes detached and moves through the veins into the lungs, it then becomes a PE. (Ex. F, deposition pages 6 through 7) Claimant was treated with Coumadin and was advised to stop smoking. (Ex. 11-5 through 11-7)

Dr. Bainbridge testified that DVT's are caused by a number of factors including a sedentary lifestyle, smoking and obesity. (Ex. F, deposition page 10) He testified he believed the source of claimant's PE's to be in claimant's right popliteal vein. (Ex. F, deposition page 12) He testified that he could not say if smoking, obesity, or a sedentary lifestyle caused the PE but that all factors put claimant at a higher risk for having PE's. (Ex. F, deposition page 15) He testified he could not give a cause for claimant's DVT's. (Ex. F, deposition pages 21, 27, 28, and Ex. 15)

On January 17, 2003, claimant was given a letter by Kristi Walz, M.D., indicating that because of claimant's right lower leg DVT, three PE's, back pain and diabetes, claimant is unable to work. (Ex. 12)

On March 24, 2003, claimant was treated by Dr. Clark. Dr. Clark reiterated that claimant's back problems might be caused by an L5 nerve root involvement. Dr. Clark advised claimant to exercise and lose weight and resume physical therapy. (Ex. 9-4) On October 30, 2003, Dr. Walz wrote claimant's counsel. In that letter, Dr. Walz indicated claimant continued to have shortness of breath due to the PE, chronic lower back pain, leg pain due to DVT's and diabetes only moderately controlled. (Ex. 16)

On November 5, 2003, claimant underwent an independent medical examination (IME) by Douglas Martin, M.D. Dr. Martin diagnosed claimant as having a lumbosacral strain, residual lumbosacral myofascial pain as a result of the strain, DVT, supraventricular tachycardia response to PE, shortness of breath, morbid obesity, diabetes and depression. (Ex. 17-5) He noted that claimant had non physiological descriptions of extremity pain and found claimant to test positive on three of the five Waddell's tests. (Ex. 17-5) Dr. Martin recommended claimant aggressively lose weight and continue home exercise for the lumbosacral spine. (Ex. 17-5) Dr. Martin opined that claimant's PE's were multifactorial and did not have a "causal correlation to the

work-related injury." (Ex. 17-6) In a subsequent letter to claimant's counsel, Dr. Martin opined that claimant's sedentary lifestyle led to an increased risk factor for PE's. (Ex. 18) Dr. Martin found claimant to have a seven percent whole person permanent partial impairment and found claimant to have reached MMI. (Ex. 17-6) He limited her to a 35-pound lifting restriction and with limited bending, twisting, and squatting. He also noted that claimant did not complain of any neck pain during his exam and believed claimant's neck pain had resolved. (Ex. 17-6 through 17-7)

On December 4, 2003, Dr. Walz wrote claimant's counsel indicating she believed claimant's sedentary lifestyle, due to the back injury, was a significant contributing factor to claimant's PE's. (Ex. 19)

Claimant testified she frequently has to sit down while doing household chores due to pain in her legs and back. She testified because of leg and back pain, she relies on her daughter to take her grocery shopping. She testified she is in constant pain from morning until night and she has difficulty with shortness of breath due to the PE's. She testified she can only stand 10-15 minutes and walk only 300 to 400 feet at one time. She testified that unless she has a doctor's appointment or needs to pick up her daughter, she is usually in bed or in a recliner. Claimant testified that she currently takes Vicodin and Neurontin for pain and that she also takes Coumadin for her PE's and DVT. Claimant testified that between February 2002 and January 2003, no physician placed her on any work restrictions. She testified that all of her treating physicians recommended she exercise but that she does not because she does not believe she physically can. Claimant testified that she had been offered a job with Planned Parenthood which she could have done. She testified she turned down the job when she found she would have to help with abortions.

Claimant's daughter, Lindsey Casey, testified that prior to her mother's December 26, 2001 injury, she was always active around the house. She testified that her mother's activities have decreased in part, due to her leg pain and shortness in breath.

Defendants failed to file a first report of injury regarding the January 11, 2002 injury.

CONCLUSIONS OF LAW

The first issue to be determined is if claimant's neck injury, and DVT and PE's arose out of and in the course of employment.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. of App. P. 6.14(6).

The claimant has the burden of proving by of preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Ciha v. Quaker Oats Co., 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial

Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

An employer is liable for disability caused by treatment, when the treatment claimant receives for a work injury aggravates or increases disability. Heumphres v. State, 334 N.W.2d 757, 760 (Iowa 1983); Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960); Hoover v. Iowa Department of Agriculture, II Industrial Commissioner Decisions., 565 (App. October 8, 1985).

Regarding claimant's neck injury, claimant testified she injured her neck on or about January 11, 2002 while receiving physical therapy. Medical records corroborate claimant complained to her treating physician of a neck injury from physical therapy. (Ex. 2-5, Ex. E, deposition page 14) There is no evidence in the record to suggest claimant's neck injury was preexisting or caused by anything else other than the physical therapy. Claimant has proved she suffered a neck injury that arose out of and in the course of her employment.

Claimant also contends that her DVT and PE's are work-related conditions, due to her sedentary lifestyle caused by her back injury. There are three opinions regarding the causal connection between claimant's DVT and PE and low back injury.

Dr. Walz opines that claimant's "sedentary lifestyle due to the back injury was a significant contributing factor to her pulmonary embolism." (Ex. 19, Ex. 23, deposition page 8) Dr. Walz is licensed in the area of family practice.

Dr. Bainbridge is a board certified pulmonologist. Dr. Bainbridge has opined that claimant's obesity, smoking and sedentary lifestyle are "factors" that led to claimant's DVT and PE's. Dr. Bainbridge could not give a cause for claimant's DVT or PE's. (Ex. F, deposition page 21) Dr. Bainbridge testified that he would not say that claimant's sedentary lifestyle due to her back injury was a significant contributing factor to her PE's. (Ex. F, deposition page 27) He opined that he could not say what caused claimant's PE's. Dr. Martin also opined that claimant's PE "does not have a causal correlation to the work-related injury." (Ex. 17-6) Dr. Martin specializes in disability evaluation and occupational medicine.

Due to Dr. Bainbridge's and Dr. Martin's experience and training, I find their opinions regarding causation more convincing than that of Dr. Walz. For these reasons,

claimant has failed to prove that her DVT or PE's arose out of and in the course of employment.

The next issue to be determined is the extent of claimant's entitlement to healing period benefits for her neck and back injuries.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Neither maintenance medical care nor an employee's continued complaints of pain or other symptoms prolong the healing period. Healing period may be indicated with a physician indicates a condition remains unchanged and gives an impairment rating. Phillips v. Iowa Methodist Medical Center, File No. 765826 (App. July 30, 1990)

Medical records from Dr. Thompson indicate that claimant was taken off of work on January 3, 2002. Medical records indicate that on January 8, 2002 claimant was returned to work with restrictions by Dr. Thompson on "Monday" or January 14, 2002.

Claimant seeks healing period benefits from December 21, 2003 through April 17, 2003. Claimant testified that she was unable to return to work because her back pain was excruciating. She testified that between February 2002 and January 2003 no doctor gave her any work restrictions. There is no evidence that any doctor took claimant off of work after January 14, 2002. For these reasons, claimant is due healing period benefits from December 26, 2001 up to January 14, 2002.

The next issue to be determined is if claimant sustained any permanent disability due to her neck and back injuries.

The claimant has the burden of proving by of preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Ciha v. Quaker Oats Co., 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when

performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

Dr. Martin opines that claimant has a seven percent permanent partial impairment to the body as a whole as a result of her back injury of December 26, 2001. (Ex. 17-6) He also opines that claimant's injury to her neck has resolved and that she requires no additional treatment for the cervical spine. In deposition, Dr. Thompson opines that there is a low probability that claimant has any permanency or restrictions as a result of the December 26, 2001 injury. From the record, it does not appear that Dr. Thompson did any testing regarding permanent impairment for claimant. Dr. Martin's testing of claimant appears more detailed and he utilized the AMA Guides to the Evaluation of Permanent Impairment. Because Dr. Martin's testing of claimant's impairment is more in depth than that of Dr. Thompson, his opinions regarding claimant's permanent disability are more convincing. Claimant has proved that the back injury of December 26, 2001 caused a permanent disability. She has failed to prove that the neck injury of January 11, 2002 caused any permanent disability.

The final issue to be resolved is the extent of claimant's permanent disability resulting from the December 26, 2001 injury.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W.2d 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

A claimant's failure to follow through with recommended treatment may be considered as a lack of motivation on the part of an injured worker. Pickering v. Squealer Feeds, 91-92 IAWC, 323 (App. December 24, 1991)

Claimant was 49 years old at the time of hearing. She has a degree as a RN. She has a 35-pound lifting restriction. Claimant testified this lifting restriction would limit her from working in a job that required the moving of patients. Claimant testified that she was able to find a better paying job with another employer but decided not to take that job because of personal reasons. Claimant has been found by Dr. Martin to have a seven percent permanent partial impairment to the body as a whole. She has had no surgery.

All of claimant's physicians opine that claimant needs to lose weight and exercise. Claimant testified that she has tried to lose weight but was in too much pain to exercise. Claimant's failure to comply with physicians' recommendations to exercise negatively impact evidence regarding her motivation.

The undersigned is empathetic to claimant's situation. However, discrepancies between claimant's testimony and documents submitted at hearing are troubling.

Claimant testified that when Dr. Thompson returned her to full-time duty, she was in "excruciating" pain. Medical records from Dr. Thompson indicate that when claimant was released she indicated "she is essentially pain-free at this time." (Ex. 2-11) Records from the physical therapist made earlier also indicate claimant rated her pain as a zero on a scale of ten, with ten being the worst pain. (Ex. 3-6)

Claimant testified at the time of her injury her pain was so excruciating that she had to leave work early. She also testified that she had never had pain like this before. An employee injury report, filled out and signed by claimant, indicates claimant told her employer at the time of injury, she felt a "twinge," worked the rest of the night and "didn't really hurt til next A.M. . . ." The report also indicates that claimant told her employer "I have had this before." (Ex. C)

Claimant testified Dr. Thompson offered to give her a 20-pound lifting restriction. Dr. Thompson emphatically denied this in his deposition. (Ex. E, deposition page 25)

Claimant testified that after being released by Dr. Thompson, she was in "excruciating" pain because of her back problems and went to Siouxland to get pain pills. Medical records from Siouxland indicate that claimant's primary reason for seeking treatment was to get on disability. The records do show that claimant still had back pain, however, her pain was said to be "improving." (Ex. 4-1)

Claimant testified she went to Siouxland to get a release from jury duty because of her "excruciating" back pain and was given a release. Medical records from Siouxland indicate claimant attempted to get a release from jury duty but was not given one and was told that to participate would be "good for her." (Ex. D)

For these reasons, and the others detailed in this decision, the undersigned finds medical records made a part of this record, more credible regarding claimant's complaints of pain.

When all relevant factors are considered, claimant has a 15 percent loss of earning capacity and industrial disability as a result of the December 26, 2001 injury. Claimant is entitled to 75 weeks of permanent partial disability.

ORDER

THEREFORE, IT IS ORDERED:

That in regard to File No. 5003210 (Date of Injury December 26, 2001):

That defendants pay claimant healing period benefits from December 26, 2001 through January 13, 2002 at the rate of three hundred twenty-three and 34/100 dollars ($323.34) per week.

That defendants pay seventy-five (75) weeks of permanent partial disability at the rate of three hundred twenty-three and 34/100 dollars ($323.34) commencing on January 14, 2002.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That in regard to File No. 5003209 (Date of Injury January 11, 2002):

That claimant shall take nothing.

That defendants are assessed a civil penalty of one hundred dollars ($100.00) for failure to file a first report of injury regarding the injury of January 11, 2002, payment to be made to the Second Injury Fund of Iowa through the Treasurer of the State of Iowa.

That in regard to both files:

That defendants shall pay the costs of this matter including the costs of transcription.

That defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this _____3rd_____ day of May, 2004.

_____
JAMES F. CHRISTENSON.
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

Copies to:

Mr. Edward J. Keane
Attorney at Law
PO Box 1379
Sioux City, IA 51102-1379

Mr. Timothy A. Clausen
Attorney at Law
PO Box 327
Sioux City, IA 51102-0327

Second Injury Fund of Iowa
Tort Claims Division
Hoover State Office Bldg.
Des Moines, IA 50319-0109

Treasurer, State of Iowa
Hoover State Office Building
Des Moines, IA 50319-0109

JFC/pjs