

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F707735 (07/16/07)**

**PEARLIE M. WILLIS, EMPLOYEE**

**CLAIMANT**

**LIFE STRATEGIES OF AR., LLC., EMPLOYER**

**RESPONDENT**

**HARTFORD INS. CO. OF THE MIDWEST, CARRIER**

**RESPONDENT**

**OPINION FILED SEPTEMBER 23, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on June 26, 2008, at Marion, Crittenden County, Arkansas.

Claimant represented by the HONORABLE J. MATTHEW COE, Attorney at Law, West Memphis, Arkansas.

Respondents represented by the HONORABLE GENE WILLIAMS, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted in the above-style claim to determine the claimant's entitlement to additional workers' compensation benefits. On May 6, 2008, a pre-hearing conference was conducted in this claim from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1. The parties have entered additional stipulations, to include the fact that the claimant's employment was terminated during her compensation period and that suitable employment was available within the

claimant's physical and mental limitations with respondent-employer at all times pertinent. Further, the parties stipulated that the claimant would not be presenting any evidence as to additional temporary total disability or permanent partial disability benefits. The parties stipulated that the claimant's average weekly wage was \$430.88, which yields compensation benefit rates of \$287.00/\$215.00, for temporary total/permanent partial disability; that the respondents paid weekly benefits to the claimant at erroneous compensation benefits rates resulting in an overpayment of \$1,280.70, in indemnity benefit, for which a credit is sought in the event of an award of additional benefits.

The testimony of Pearlie Willis - the claimant, and Scott Waddell, coupled with medical reports and other documents comprise the record in this claim.

### **DISCUSSION**

Pearlie Willis, with a date of birth of April 20, 1961, is a high school graduate with two years of college education. The claimant has additional training in home day care and public housing. Claimant has run a home day care for four years.

The claimant worked a couple of years at Primary Learning Academy counseling families with children. Claimant worked at Hughes High School for approximately six (6) years, during which time she had her own classroom. Claimant left the high school job to take care of her grandmother. Regarding other jobs that she has held, the testimony of the claimant reflects:

Worked at Marty Mart. Worked at the Health Department doing records. Worked at the Hughes High School and instructional teacher in school suspension. Worked with the mental health in the after school program. Also worked at Life Strategies. I also worked at the elementary campus and high school. (T. 12).

The testimony of the claimant reflects that she currently works at Hughes Meadow Apartments as

the on site manager. Claimant testified regarding her job duties in her current employment:

I have a twenty-four unit complex. I take care of their rent, do the inspection of the homes, do the property inspection, make sure that the maintenance is on time when it is scheduled in doing whatever maintenance is in the apartment complex. (T. 12).

The claimant was employed at Hughes Meadows at the same time that she worked for respondents, explaining that both were part time jobs. The testimony of the claimant reflects that she commenced her employment with respondents in 2003 and remained so employed for five years. Regarding her job duties and responsibilities in the employment of respondents, claimant testified:

At Life Strategies I was the activity therapist. I scheduled clients activities around their treatment plan. I also was over transportation. I also was over the food for the clients and . . . (T. 13).

On July 16, 2007, the claimant sustained a work-related injury to her right knee which required surgery. Following the surgery, the claimant went through post surgical physical therapy, and was given a full duty release on January 21, 2008. The claimant received a 2% permanent physical impairment to the lower extremity as a result of the injury and surgery.

The testimony of the claimant reflects that prior to her January 21, 2008, full duty release without restrictions she was released in December 2007 by Dr. Meredith to return to work with the assistance of a stepper. Claimant testified that Mr. Waddell, who was over Human Resources at Life Strategies, did not allow her to return to work with the use of a stepper. The claimant's testimony reflects regarding her conversation with Mr. Waddell with respect to the afore:

We had a meeting and he and the other supervisor, and during the process of the meeting, I forgot what her name was, anyway, she was

saying that Mr. Draper told me that I could come back to work. He said that . . .

Mr. Draper wasn't in there. The other lady was in there and Mr. Waddell was in there, and they said that I had a stool on the van and I told them it wasn't a stool on the van, and the lady said that Mr. Draper said that it was one on all the vans and I told her no, it wasn't one on our van, because I'm with transportation. That they had talked about it but We never received one, and so the lady was in there, she is new, so I don't know her like I know some of the others. And she said that, well, I can just to Wal-Mart and we can just pick a little stool up, and so I asked her what kind of stool was she talking about. She said with the four legs and its flat, and I told her that, okay, if you get the stool, I said I'm over transportation and I'm transporting back and forth, then when I climb up, who is going to be there to get that stool she is talking about. I said the clients can't do it because they are in the seats and I'm the only one on there and she said well, you're right about that, and I told her, you know, I don't need to fall, and she said well, you're right, and then Mr. Waddell said that yeah, she's right, cause you see, he don't want the company to be liable for me if something happens. (T. 15-16).

The claimant is 5'2" tall. The van that the claimant drove is a fifteen passenger van.

Claimant testified:

It sits up high and you have to kind of leap a little bit, well, I do, to get in and off the van. (T16).

Regarding her returning to work using the stepper, the claimant's testimony reflects, with respect to Mr. Waddell:

He told me that, he said, well, since you are drawing your workmans' comp, he said just continue to draw you r workmans' comp and we'll get back with you as to what you are going to do and he also told me, he said, you do realize that transportation is under your job description. I told him, yes, I do realize that and I told him I didn't have a problem with my working. I told him that I just need a better stepper than a stool. They wanted to give me a stool and I told them if they give me something else that would work, and he said in the meantime, draw your workmans' comp and just keep in contact ans we will get back to you and you finish up going to the doctor. (T. 16-17).

Claimant maintains that she kept in contact with respondent regarding her medical treatment during her time off from work explaining:

When I left the doctor's office, I went by there and its on Cavanaugh Street, . . .

No. I went by there and I gave them the paper. I gave them to the secretary, and I also, the new lady, the one that was in the office with Mr. Waddell, I talked to her and she just told me to get better and continue to do what I was doing and when I went to therapy I also faxed them the paper, cause that's how we was keeping in contact, since I'm over the conflicts [complex] I have that access of the fax machine, and that's where I can get my messages at. (T. 17).

Claimant maintains that she was also keeping in contact with respondent by telephone.

The claimant identified documents evidencing fax transmissions to respondent-employer regarding the status of her medical treatment. Claimant testified that she kept respondent-employer updated regarding the afore from December 12, 2007, through the end of January 2008. In addition to keeping the respondent updated regarding her treatment claimant testified that she was also asking when they wanted her to return to work.

Claimant testified that she made telephone calls to respondent-employer and talked to the secretary when she was unable to talk to Mr. Waddell. Regarding the secretary, claimant's testimony reflects:

Ms. Barbara. And I let her know what was going on and she said she was going to relay the message to him, to let him know that I had called. (T. 19).

The testimony of the claimant reflects that she sent a fax to Mr. Waddell on January 8, 2008. Regarding the afore, the claimant testified:

On this date, he had asked me to do what I had been doing, keeping in contact and let him know what was going on and on this date I told him

that the doctor couldn't give me a complete evaluation until Dr. Meredith got through with me, which was on the 21<sup>st</sup> , and Dr. Denton scheduled me an appointment on the 22<sup>nd</sup>. (T. 19).

Claimant's testimony reflects that she faxed respondent the information that Dr. Denton was going to send but she had not yet received. Claimant acknowledged that she did not send respondents Dr. Denton's medical records on January 8, 2008. Claimant asserts that she did send respondents the medical record dated January 10, 2008, which she was referring to in the January 8, 2008, transmission but had not received. Claimant explained that it 6:00 p.m. when she got out of Dr. Denton's office.

Claimant asserts that she received the January 10, 2008, medical report from the office of Dr. Denton on January 10, 2008, and that she in turn faxed it respondent on the same date. Claimant testified that she sent faxes to Mr. Waddell on January 21, 2008, and January 23, 2008, in which she was providing updates on the medical treatment and inquiring when she could return to work. Claimant maintains that in addition to sending the January 10, 2008, letter, she was talking to the secretary of respondent via telephone:

I was telling her that I had sent the fax and I still hadn't heard anything from Mr. Waddell, and she told me that she couldn't do anything but just to give him the message and ro me to keep doing what I'm doing. (T. 21-22).

The claimant testified that she receive the January 14, 2008, termination letter from respondents long after the January 14, 2008, date. The letter was mailed to 111 Maple Street, Hughes, Arkansas, which is the claimant's residence. Claimant explained that she does not receive mail at the 111 Maple Street address, noting that she does not have a mailbox. Claimant testified that she learned of the termination of her employment by respondent when, while at the

store getting supplies for the apartment complex she encountered another employee of respondent. The testimony of the claimant reflects:

Okay. I called Mr. Waddell and I told him that I was still waiting to come back and that's when he informed me that he had sent me a letter and I asked him what kind of letter and he said I sent you a termination letter. And I asked him why would he send me a termination letter. He said, well, I didn't hear from you so I assumed that you didn't want your job. And I told him why wouldn't I want my job, you know. That's where I always worked at. And he said, I don't know why you hadn't got the letter and I said, well, I've been getting all of my other mail. I hadn't got the letter. And then he said that, you are already working and I told him, what do you mean, I'm already working. He said, well, you're working at the complex and I told him, that doesn't have anything to do with my position at Life Strategies. Life Strategies already knew that that was my part time job, that I had that and that I could work around that. And he said well, I still don't see why you didn't get the letter and he didn't want to talk to me any more. (T. 23-24).

Claimant testified that she called the secretary at respondent and asked for a copy of the termination letter:

I asked the secretary, Ms. Barbara. Matter of fact, I called her twice. I asked her to ask Mr. Waddell to send me a copy of the termination letter because I never did get one. And she said okay. It took awhile and I called back again and I said, well, Ms. Barbara, I still haven't got the letter. She said, well, I told him and I said, well, I just wanted to see the letter. And she okay. (T. 24).

The testimony of the claimant reflects that she continued to update respondents of her medical status and inquire about returning to work subsequent to January 14, 2008. Claimant testified that following her unrestricted release on January 21, 2008, she asked to be put back to work at respondent. The claimant was not but back to work. Claimant testified that she was not offered any other types of employment by respondents.

During cross examination, claimant testified that she is in the process of working on

taking the test which would allow her to return to employment at Hughes High School. Claimant acknowledged the Dr. Meredith performed surgery in September 2007, regarding her July 16, 2007, right knee injury. Claimant concedes that Dr. Meredith was the doctor in charge of her treatment for the right knee injury.

The testimony of the claimant reflects that as of the December 10, 2007, date she was not using a cane or braces relative to her right knee injury. On December 10, 2007, the claimant was released by Dr. Meredith to return to work with a return appointment scheduled in six (6) weeks. The record reflects the presence of a December 11, 2007, note regarding the use of a stepper to get in and out of the van. Claimant asserts that Dr. Meredith asked her if she need the assistance of a stepper.

The claimant acknowledged that there are no imprints on the faxed transmission sheet from the apartment complex reflecting the exact time of the fax transmission. Claimant insist that she sent the document from her fax at the apartment complex on the date asserted, January 8, 2008. Claimant added that when she sent the fax on January 8, 2008, she also talked to Mr. Waddell.

During further direct examination, claimant testified that some days when she sent fax transmissions to respondent-employer she made it a habit of telephoning to relay that the fax was coming. Claimant asserts that she did not receive the letter terminating her employment with respondent until the February 6, 2008, fax transmission from same.

Claimant asserts that had she received the January 14,2008, termination letter she would not have sent the fax transmission regarding her medical status and inquiring when she could return to work. Regarding the faxes she sent to respondent-employer, the testimony of the

claimant reflects:

Cause, see, he would always let me know that if he hadn't got my fax he would have called me to let me know that he hadn't received my fax. (T. 39).

Claimant further testified regarding her availability to receive telephone calls from respondent:

Yes sir. That's how we made communication. He would call me, and that's how I knew to be at that meeting. He called me and left a message on my answering machine asking me to call him back. And I called him back. (T. 39).

The claimant testified that her mailing address is P.O. box 81, Hughes, Ark. The claimant acknowledged that her physical address is 111 Maple Street, in Hughes, which is where the termination was mailed. Claimant is uncertain what address she placed on her employment application as the time she commenced her employment with respondents in 2003. The claimant residing at the apartment complex as the time she commenced her employment with respondents.

In describing the operations of Life Strategies - respondent-employer, claimant noted it is a program that based on helping mentally disturbed children:

It maximizes the moment to be on top of whatever the client needs. Whatever area that they need, then we are supposed to complete. (T. 43).

Claimant provided testimony regarding her job duties with respondent in more details:

I was the activities therapist. I worked with the therapist, the doctors, the case managers, and we designed a treatment plan, activity around the client's treatment. Whatever kind of behavior problem that they have, the we will focus on an activity to help them with their treatment. (T. 43).

Regarding the transportation aspect of her job duties the claimant testified:

Yes sir. I picked up all of the clients, because everybody else stayed in Memphis and Marion and other areas and so I was in Hughes

and I knew everybody and it was hard for the clients, for the staff to find the location. (T. 44).

The claimant has no difficulty driving the van and assisting clients on and off of the van prior to her July 16, 2007, injury.

The testimony of the claimant reflects that she has received messages from respondent-employer on her answering machine on her telephone in the office of the apartment complex.

Claimant further explained:

Right. And the thing is, there is no one works in my office [at the apartment complex]. I check all of my answering machines so it wouldn't be anybody else in there to receive my message but me. (T. 45-46).

The claimant has the same telephone number for sending a fax transmission as for receiving and making a telephone call. Finally, the testimony of the claimant reflects, regarding mail received from respondent-employer:

The only mail that I received from Life Strategies was when the secretary would call me and told me that they had my W-2 form. And she said that she needed a P.O. Box, and I told her for her to use the same P.O. Box that they sent my termination letter in. She said that they didn't have one, did I want to come in there and pick my W-2 up, because it had come back. The mail had come back because there was no P.O. Box, so I gave her a P.O. Box and when I gave her the P.O. Box, the returned W-2 form, it came in that box. (T. 42).

Mr. Scott Waddell testified that his job with respondent-employer was that of director of Human Resources. Mr. Waddell elaborated that Life Strategies is an out-patient mental health provider for group, family, children, adult, therapy for mentally ill. Mr. Waddell testified that respondent-employer has ten (10) locations and employ roughly seventy (70) employees.

Mr. Waddell testified that the claimant's employment date by respondent was June 7, 2004.

Regarding the December 2007, meeting with the claimant and other personnel of

respondent-employer, Mr. Waddell testified about the reason for the meeting:

She had called and said that she had seen her doctor on December 10<sup>th</sup>, I believe, saying that she was released to return to work and she bought the medical documents to me at that time.

So she could update us more in person about how she was feeling and what she could do and she was in town, if I recall, and she wanted to drop those by.

She presented to me a doctor's statement saying that she could return to work on full duty and then attached to that was a second sheet with a note that said may return to work with assistance of a stepper. (T. 48-49).

Mr. Waddell testified regarding his discussion with the claimant about keeping in touch regarding her medical status:

Well, its critical to us for an employee in that situation to keep in touch with us. It's a critical job that we have to fill on a day to day basis to transport kids and to work with children, so I was real clear with Ms. Willis at the time, you must keep in touch with us to let us know what is going on, to keep us posted as much as you can about your situation, how you are feeling, you medical appointments and things like that. (T. 49-50).

Mr. Waddell acknowledged that the claimant got in touch with him on January 2, 2008, in that he received a fax from the claimant reflecting that her appointment had been rescheduled for January 8, 2008, with Dr. Meredith. Thereafter Mr. Waddell testified, regarding his efforts to reach the claimant:

On the 8<sup>th</sup>, I left a message on her answering machine, that afternoon on the 8<sup>th</sup>, I knew her appointment was the 8<sup>th</sup> and I called that afternoon to find out how things went. I left a message, did not talk to her. (T. 50).

Mr. Waddell testified regarding his next efforts to contact the claimant:

I tried again on the 9<sup>th</sup> at 3:00, because that is a time period when I return calls and make calls for a day. On the 9<sup>th</sup> at 3:00 I called and

got a busy signal and again on the 10<sup>th</sup> . I was out of the office on the 10<sup>th</sup> but tried to call her on the 10<sup>th</sup> as well. (T. 50).

Mr. Waddell denies that he received a fax from the claimant on either January 8<sup>th</sup> , 9<sup>th</sup> , or 10<sup>th</sup> . Further, Mr. Waddell denies that anyone in his office relayed that a fax had been received from the claimant on Thursday, January 10, 2008.

After having not heard from the claimant as of January 10, 2008, the testimony of Mr. Waddell reflects:

I was in the office on the 11<sup>th</sup>, I was out all day of the 10<sup>th</sup>, I came back on the 11<sup>th</sup> and received a fax on the 11<sup>th</sup> from her, which was dated January 8<sup>th</sup>. And attached to that fax was a note from her doctor of January 10<sup>th</sup>, and her cover sheet. That was received on the 11<sup>th</sup>. (T. 51).

Mr. Waddell maintains that there was a gap in communication from the claimant between January 2, 2008, and January 11, 2008. Mr. Waddell's testimony reflect, regarding his actions:

At that point it was late in the day, I believe that was a Friday, the 11<sup>th</sup>. On Monday morning I came in, drafted the letter that was referred to today, the termination letter, and mailed it out at that point. (T. 51).

Mr. Waddell explained his actions:

Because we have a policy, three days, no call, no show, is basically what its all about, and our policy is if we do not hear from an employee for that period of time we consider them to have voluntarily resigned. ( T. 51-52).

Mr. Waddell testified that after mailing January 14, 2008, termination letter he had no further contact with the claimant until later in the month when he received a telephone call from her.

Mr. Waddell's testimony reflects regarding the afore:

She, I believe called me the last week of January, possibly after those later faxes, and at that point I explained to her that I had mailed the latter on the 14<sup>th</sup>, and we went through that discussion at that point. (T. 52).

Mr. Waddell testified that as of January 14, 2008, he had made arrangements for someone else to cover the claimant's job. Mr. Waddell's testimony reflects that at least four (4) days a week he has to provide the service, adding that the same is the reason for the "three day contact policy".

During cross-examination Mr. Waddell acknowledged that when the claimant relayed that she could not do her job with the stepper she was referring to the stepper that respondent was going to get for her. Mr. Waddell maintains that he has voice mails to capture those telephone calls that come in while he is out of the office.

Mr. Waddell acknowledged that he was out of the office on January 10, 2008, and that if a fax had been sent on that day he would not have physically received it. Mr. Waddell added that had a fax been sent he would have been informed of it. Mr. Waddell confirmed that he has a policy that if someone is not in contact for three days they have voluntarily resigned.

Mr. Waddell agreed that respondent did not offer the claimant any job after her employment was terminated, nor did respondent try in any way to facilitate the claimant's re-entry into the work place. Mr. Waddell added that when an employee resigns, they resign and respondent does not follow up on it. Mr. Waddell acknowledged that the claimant did not come to him and resign her employment, offering:

I wouldn't state that. I would say that we accepted a resignation under our policy. (T. 55).

Mr. Waddell acknowledged that the claimant called him after receiving the February 6, 2008, fax of her termination letter of January 14, 2008, wanting to know why he had fired her. Mr. Waddell denied that the claimant asked for her job back, but rather was asking for an explanation as to what happened. Mr. Waddell concedes that during his conversation with the

claimant he relayed to her that he had sent a letter of termination to her, however he denies that he refused to talk to the claimant. Mr. Waddell acknowledged that he did not talk to the claimant after the afore conversation.

Mr. Waddell acknowledged that the need for some to drive the van was not the explanation given in the January 14, 2008, termination of employment letter, but rather the failure of contact from January 8, 2008 to January 11, 2008. (T. 56). Mr. Waddell maintains that the fax was received from the claimant on January 11, 2008. Under further questioning regarding when he received the claimant's fax transmission Mr. Waddell testified:

No. I stated the fax machine is right outside my office and when a fax comes n somebody is designated to distribute the faxes. I personally don't watch the fax machine, but I know it was given to me on Friday when it came in. (T. 57).

Mr. Waddell was not in the office on Thursday, January 10, 2008, and as such would not have been present to receive a fax.

The testimony of Mr. Waddell reflects that the policy of respondent regarding three-day no contact was not applicable to the claimant during the time she was off work due to her July 16, 2007, compensable injury:

That's not correct. She was off on leave during workers' comp periods. We moved the status, after she was released on December 10, at that point it became an issue. (T. 58).

The three no-contact policy of respondent is not applied when someone is on temporary total disability or out off work. (T. 58). Mr. Waddell asserts that the claimant did not keep him adequately updated regarding her medical treatment even during the period preceding the January 8, 2008 through January 11, 2008, time frame. Mr. Waddell acknowledged receiving faxes from the claimant as well as "a couple of phone conversations" during the afore period. (T. 59).

Mr. Waddell agreed that in the normal course of business of Human Resources as termination letter is usually included in the personnel file. Mr. Waddell maintains that even though the claimant's termination letter was in her workers' compensation file, the termination was not workers' comp related. The testimony of Mr. Waddell reflects that he did not receive an "undeliverable" termination letter back with respect to the January 14, 2008, termination letter which was mailed to the claimant's address at 111 Maple Street, Hughes.

The testimony in the record reflects that the only confirmation of the claimant having received the January 14, 2008, termination letter was when she received a fax of it on February 6, 2008. With respect to the receipt of faxes regarding the claimant's medical status, Mr. Waddell testified:

I received them on January 2<sup>nd</sup>. I disagree that I received one on the 8<sup>th</sup>, I received one on the 11<sup>th</sup>. (T. 62).

Mr. Waddell asserts that he did not receive the fax dated January 8, 2008, until January 11, 2008, which had attached to it two (2) statements from the doctor dated January 10, 2008. Mr. Waddell does not assert that he did not receive the faxes, only that he did not receive those of January 8, and January 10, until January 11, 2008.

Mr. Waddell acknowledged receiving a fax from the claimant date January 21, 2008, which reflected a medical appointment the next day and specifically stating compliance with his request to be kept updated and that he would notify the claimant when she could return to work. Mr. Waddell testified that he thought he talked with the claimant on the day he received the January 21, 2008, fax or the day after, and that it was at the point he discussed what had happened, the termination of the claimant's employment. Mr. Waddell testified that he did not

call the claimant.

Mr. Waddell acknowledged receiving the January 23, 2008, fax from the claimant in which she relayed that she had a 1:00 p.m. doctor's appointment, that she did not get out until 6:30 p.m., that the doctor's office did not fix her paper, that the doctor had written two (2) prescriptions, and again reminding Mr. Waddell that he was suppose to get back with her regarding returning to work. With respect to any action on his part in terms of contacting the claimant after receipt of the fax, Mr. Waddell testified:

I believe I called her, she called me after the first or second, it would have been after the second one I assume, so yes, we talked. (T. 64).

Mr. Waddell has been employed by respondent for one year as HR Director, having started in June 2007. Prior to his employment by respondent Mr. Waddell worked for seven (7) years as HR Director for Counseling Services of Eastern Arkansas. While Mr. Waddell testified that the three-day no contact policy is a written policy of respondent as copy of same was not present at the hearing. Mr. Waddell testified that since his employment by respondent the three-day policy has been relayed to new employees during orientation.

The testimony of Mr. Waddell reflects that following the claimant's July 16, 2007, injury through December 10, 2007, her job duties as a van driver were reallocated to other personnel:

We reallocated. In fact we moved activity therapist from different locations and ultimately had to add a second one to that facility. (T. 68).

Mr. Waddell's testimony reflects, regarding the outcome of the December 17, 2007, meeting with the claimant and other personnel:

Okay. We, she was going back to her family doctor up to that point, so we agreed that we would let that run its course, we could continue to, she would have her job but she was to keep me informed over the next

few weeks, from her family doctor, how things were going. And then she had to keep in touch, you know, regularly, to let me know the status. (T. 68).

Regarding the claimant's continued receipt of temporary total disability benefits following the meeting Mr. Waddell testified:

I will say this. I notified our insurance carrier that her physician had released her on the 10<sup>th</sup>. I faxed those documents to the insurance carrier. I have no idea how or if she was paid after that? (T. 68-69).

The documents faxed to the insurance carrier included the medical report as well as the one regarding the claimant's need to use a stepper. Mr. Waddell testified that while he was aware that the claimant was maintaining that she could not do the function of her job, he directed that she follow up with her doctor and that her job would be preserved, he had no knowledge or impute regarding the claimant's continued receipt of workers' compensation indemnity benefits at the conclusion of the December 2007, meeting.

Mr. Waddell testified that during the three (3) days that he did not hear from the claimant the same reallocation of resources, with respect to the performance of the claimant's job duties, were going on. Regarding the point in time that the claimant's employment position was filled permanently by a new employee, Mr. Waddell's testimony reflects:

It would have been the week following. It would have been the week of the 14<sup>th</sup> because we were desperate for filling that job. It's a critical job. I do not have the exact date. (T. 69-70).

Mr. Waddell testified that he was "quite certain" that the claimant's employment position was filled the week of January 14, 2008, "shortly after the termination week". (T. 70). The testimony of Mr. Waddell reflects that there is no recourse to termination letter forwarded to the claimant.

Mr. Waddell testified that since his employment by respondent in June 2007, the

employment of other employees of respondent has been terminated pursuant to the three-day no contact policy. The testimony of Mr. Waddell reflects that the claimant is the only employee whose employment was terminated pursuant to the three-day policy who had suffered a work-related injury and was out from work relative to the injury when her employment was terminated.

The testimony of Mr. Waddell reflects that the employment of the claimant was terminated because there was a policy [three-day-no-contact] in place and he had to adhere to the policy. Mr. Waddell did not furnish a copy of the afore policy to claimant's attorney pursuant to discovery, [Interrogatory No. 10]. Mr. Waddell acknowledged that the "policy" was not cited in his January 14, 2008, letter of termination of employment to the claimant. Further Mr. Waddell acknowledged that he was aware of the claimant's scheduled doctors appointments pursuant to faxes he received. Mr. Waddell concedes that the claimant's employment with respondent was terminated before she was released from the doctor.

The medical in the record reflects that the claimant was seen by her family physician, Dr. Roy Denton on July 23, 2007, and received treatment under the care of same through August 7, 2007, relative to her compensable right knee injury, at which time she was referred by same to Dr. Samuel Meredith, a orthopedic surgeon. (CX. #1, p. 1-3). On September 21, 2007, the claimant was admitted to Crittenden Memorial Hospital with a diagnosis of right knee meniscal tear, and underwent surgery under the care of Dr. Meredith relative to same. (CX. #1, p. 13-23).

The medical records reflect that on December 10, 2007, the claimant was returned to work by Dr. Meredith. The December 10, 2007, clinic note reflects that the claimant was to return to Dr. Meredith in six (6) weeks for rating and release based on the partial meniscectomy. (CX. #1, p. 26). A December 11, 2007, chart note of Dr. Meredith relative to the claimant

reflects that the claimant would need to have a stepper for assistance no the van. (CX. #1, p. 28). The claimant was rated by Dr. Meredith with a 2% impairment to the lower extremity on January 21, 2008, and also found to have reached maximum medical improvement. (CX. #1, p. 29-30). The claimant was seen by Dr. Denton on January 22, 2008, relative to her compensable right knee injury. Dr. Denton noted restrictions on the claimant's activities to include no prolonged walking, and use of stepper. Dr. Denton released the claimant to return to work "as per Dr. Meredith". (CX. #1, p. 31).

The record reflects the presence of fax cover sheets from Hughes Medows, which identifying the claimant as manager, with her address of 111 Maple Street, and telephone & fax number. The December 12, 2007, dated fax cover recite a communication of the claimant with Mr. Waddell regarding the claimant's medical status. (CX. #2). A fax cover sheet dated January 2, 2008, from the claimant to Mr. Waddell recites a rescheduling of January 2, 2008, appointment to January 8, 2008; a January 8, 2008, fax cover sheet reflects that the claimant could not receive a complete evaluation by Dr. Denton until after the January 21, 2008 appointment with Dr. Meredith, and that the Denton appointment was scheduled for January 22, 2008.(CX. #2). The evidence reflects the presence of two (2) document, inclusive of the cover page, from Dr. Denton's office regarding the claimant. The cover sheet is dated January 10, 2008, and the clinic note recites the claimant's next scheduled appointment of January 22, 2008.

The evidence reflects that the January 14, 2008, employment termination letter of the claimant from respondents was faxed to the claimant on February 6, 2008. The January 14, 2008, termination letter reflects, in pertinent part:

I am following up with you regarding the status of your employment

with Life Strategies of Arkansas.

On January 2, 2008, I received a fax from you stating your appointment had been rescheduled for January 8. Despite efforts to reach you, I did not hear from you after the appointment until January 11, when my office received another fax from you.

Due to the lack of contact from you following your January 8 appointment, we consider you to have voluntarily resigned your position.

Please give me a call with any questions. (CX. #2).

The record reflects the presence of fax correspondence from the claimant to respondent subsequent to January 14, 2008, to include one of January 21, 2008, and January 23, 2008, reflecting the claimant's medical status and inquiry regarding returning to work. (CX. #2).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriated statutory provisions and applicable case law, I make the following:

### **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On July 16, 2007, the relationship of employee-employer-carrier existed among the parties, when the claimant sustained an injury to her right knee within the course and scope of her employment.
3. On July 16, 2007, the claimant earned an average weekly wage of \$430.88, which yield compensation benefit rates of \$287.00/\$215.00, for temporary total/permanent partial disability.

4. The claimant reached the end of her healing period on or about January 21, 2008, with a 2% permanent physical impairment to the right lower extremity as a result of the July 16, 2007, compensable injury.

5. The claimant has proven by a preponderance of the credible evidence that she is entitled to benefits pursuant Ark. Code Ann. §11-9-505 (a), in that the respondents had suitable employment available within her physical and mental limitations and that the failure of the respondents to return the claimant to work was without reasonable cause.

6. The respondents shall pay all reasonably necessary medical, nursing, and other apparatus expenses in connection with the treatment of the claimant's July 16, 2007, compensable right knee injury.

7. Respondents have controverted the claimant's entitlement to workers' compensation benefits pursuant to Ark. Code Ann. §11-9-505 (a).

### **CONCLUSIONS**

The parties acknowledged that the claimant sustained a compensable injury to her right knee on July 16, 2007, which required medical treatment and resulted in a period of temporary total disability and an assessment of permanent physical impairment of 2% to the right lower extremity. Further, the parties have stipulated that the employment of the claimant was terminated by respondent while the claimant remained within her healing period relative to the compensable injury and that suitable employment was available within the claimant's physical and mental limitations with the employer at all pertinent times. The sole issue before the Commission at this juncture is whether the termination of the claimant's employment by respondent was unreasonable so as to entitle her to workers' compensation benefits pursuant to

Ark. Code Ann. §11-9-505 (a).

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

The evidence preponderates that the claimant sustained a compensable injury to her right knee on July 16, 2007, which ultimately required surgery. Claimant received medical treatment under the care of Dr. Roy Denton and Dr. Samuel Meredith relative to her compensable right knee injury. Both of the afore physicians were recognized as authorized treating physician relative the claimant's compensable injury.

The claimant commenced her employment with respondent on or about June 6, 2006. Among the duties discharged by the claimant was that of operating a fifteen passenger van transporting clients of respondent-employer. The credible evidence reflects that on or about December 10, 2007, the claimant was release to return to work, however she required the assistance of a stepper to enter and exit the van. Since the equipment required by the claimant was not available and the claimant was continuing to receive medical treatment relative to her injury, respondent-employer informed the claimant that her job would be preserved while she continued her medical treatment and the receipt of temporary total disability benefits. The claimant was directed to keep respondent-employer update regarding her medical treatment. Further, respondent employer informed the claimant that she would be notified when she could return to work.

The evidence in the record preponderates that the claimant complied with the requests/directives of respondent-employer regarding the status of her medical treatment.

Further, the claimant consistently inquired of the respondent when she could return to work. The credible evidence in the record reflects that the claimant notified respondent of her doctor appointments and medical status. The information was faxed to respondent-employer and the claimant confirmed the fax transmission via telephone calls to respondent-employer.

In a letter dated January 14, 2008, and not received by the claimant until a faxed transmission of same was had on February 6, 2008, respondent terminated the claimant's employment purportedly for failing to contact same following the January 8, 2008, scheduled doctor's appointment until January 11, 2008. The evidence in the record reflects the presence of documentation evidencing a fax transmission to respondent-employer dated January 8, 2008, as well as a January 10, 2008, correspondence from the office of Dr. Denton regarding the claimant. The Human Resource Director, Mr. Waddell, was not in his office on January 10, 2008.

It is noteworthy that the January 14, 2008, termination of employment letter authored by respondent-employer does not recite the implementation of the "three-day-no-contact" policy as the basis for the termination of the claimant's employment. While Mr. Waddell asserts the existence of a written "three-day-no-contact" policy, the same was not produced at the hearing nor had a copy of same been provide to the claimant's attorney through formal discovery. I do not find the testimony of Mr. Waddell to be credible regarding the existence of the afore policy, nor do I find his explanation of the termination of the claimant's employment to be credible.

Ark. Code Ann. §11-9-505 (a) (1), provides:

Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, ain in addition to other benefits, shall be liable to pay to the employee the

difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

In the instant claim, the refusal of the respondent to return the claimant to employment following her compensable injury was unreasonable. Respondent was aware of the claimant's medical status on January 11, 2008, as well as the fact that the claimant was awaiting directions from respondent-employer to return to work, accepting the fact that the HR Director was not in his office on January 10, 2008, and that the earliest that he would have physically handled the document was January 11, 2008. Respondent-employer was aware of the claimant's scheduled January 8, 2008, doctor's appointment and had physical possession of documents dated January 10, 2008, evidencing the contact by the claimant with Dr. Denton's office. Nevertheless, respondent-employer arbitrarily terminated the claimant's employment, with the same being unreasonable.

The stipulations reflect that at all times pertinent respondent had employment within the claimant's physical and mental limitations. Respondents' refusal to return the claimant to such employment is unreasonable. *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996). The claimant is entitled to her average weekly wages of \$430.00, during the period of the refusal for a period not to exceed one (1) year. Respondents have controverted the claimant's entitlement to the afore benefits.

#### **AWARD**

Respondents are herein ordered and directed to pay to the claimant her average weekly wage of \$430.00, pursuant to Ark. Code Ann. §11-9-505 (a), for a period not to exceed one (1) year for their unreasonable refusal to return the claimant to suitable available employment.

Respondents may claim credit for the overpayment of \$1,280.70, in indemnity benefits against the afore benefits. Said sums accrued shall be paid in lump without discount.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity benefits herein awarded, pursuant to Ark. Code Ann. §11-9-715.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

**IT IS SO ORDERED.**

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**Andrew L. Blood, ADMINISTRATIVE LAW JUDGE**