



November 22, 2021

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RE: HF No. 83, 2020/21 – Marvin Bragg v. Layton Construction Co. and XL Specialty Insurance CO

Greetings:

This letter addresses Layton Construction Co. and XL Specialty's (Employer and Insurer) Motion for Sanctions and for Signed Medical Release. All responses have been taken into consideration.

On May 31, 2021, Kaitlyn Rhamy (Rhamy) of Employer and Insurer's law firm, called Marvin Bragg (Claimant) to confirm his attendance at his deposition on June 4, 2021. Claimant responded that he had a death in the family and would not be able to attend. On June 2, Rhamy called Claimant and proposed June 28, 2021 at 2:30 p.m. Mountain Time (MT) as a new deposition date. Claimant agreed. On June 2, 2021, Employer and Insurer filed a Second Amended Notice of Deposition with the Department of Labor & Regulation (Department) and mailed a copy to Claimant.

On June 23, 2021, Rhamy called Claimant to confirm his attendance on June 28. Claimant confirmed that he would be there. On June 28, 2021, Claimant

called Rhamy inquiring about the time of his deposition. He was told it was at 2:30 p.m. MT. Claimant said he was busy and did not think he could make it by 2:30. He asked if it could be delayed until 4:00 p.m. MT. He was informed that due to the time difference, he still had an hour and a half until the deposition. Claimant agreed to keep the original time with the understanding that he may run late. Then, at approximately 2:05 p.m. MT, 25 minutes before his scheduled deposition, Claimant again called and requested to move the deposition back to 4:00 p.m. Mountain Time. Employer and Insurer's counsel, J.G. Shultz (Shultz), and the court reporter agreed.

At approximately 2:25 p.m. Mountain Time, five minutes before the originally scheduled time, Claimant called and informed Rhamy that he would be able to make the original 2:30 p.m. time. When he arrived at the deposition, Claimant informed Shultz that he had retained an attorney and that he would not agree to have his deposition taken without his attorney present. Claimant was unable to name his attorney. On the record, Claimant was asked to provide a medical release. He declined.

Employer and Insurer move the Department for an Order pursuant to SDCL § 15-6-36, requiring Claimant to reimburse them for travel expenses and costs for attending the failed deposition. They further request the Department require Claimant to sign a medical release. Employer and Insurer assert that Claimant failed to be deposed despite being provided proper notice. They sent a Notice of Deposition and Amended Notice of Deposition to the Department and Claimant. Both Notices were sent by certified mail and Claimant signed for receipt of both.

Claimant argues that sanctions are not appropriate in this matter. He asserts that he has been cooperative but is unfamiliar with the process. Once formal discovery began, he concluded it would be best to hire an attorney. Claimant further argues that as administrative rules are meant to be liberally construed in favor of the claimant, it would be unjust to apply sanctions in this situation. Further, Claimant states that he has signed and submitted the medical release to Employer and Insurer.

The Department's authority governing depositions is provided in SDCL 1-26-19.2 which states,

Each agency and the officers thereof charged with the duty to administer the laws and rules of the agency shall have power to cause the deposition of witnesses residing within or without the state or absent therefrom to be taken or other discovery procedure to be conducted upon notice to the interested person, if any, in like manner that depositions of witnesses are taken or other discovery procedure is to be conducted in civil actions pending in circuit court in any matter concerning contested cases.

Further, SDCL 15-6-37(d) provides, in pertinent part,

If a party or an officer, director, or managing agent of a party or a person designated under subdivision 15-6-30(b)(6) or § 15-6-31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, ... the court in which the action is pending on motion may make such orders in regard to the failure as are just... In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

By refusing to continue with the deposition, Claimant failed to appear under SDCL 15-6-37(d). He received proper notice for the deposition, and it had been rescheduled for his convenience. He was informed by the notices that he was going to be under oath for the deposition. He could have told Employer and Insurer

during any of the many phone calls leading up to and on the day of the deposition that he was hiring an attorney and would not answer questions without representation. Instead, he chose to wait until Shultz had driven from Sioux Falls to Rapid City to inform him that the deposition would not occur. Claimant has asserted that he was unfamiliar with the process and did not understand the official nature of the meeting. However, even when liberally construing SDCL15-6-37(d) in Claimant's favor, it is clear that he was provided proper notice, he did not allow his deposition to be taken, and his lack of understanding of the deposition procedure is not substantial justification for his failure to appear. Thus, sanctions are appropriate.

The Department's authority to apply sanctions is specifically provided by ARSD 47:03:01:05.02 which states, "If any party fails to comply with the provisions of this chapter, the Division of Labor and Management may impose sanctions upon such party pursuant to SDCL 15-6-37(b). However, attorney fees may be imposed only for a violation of a discovery order." Therefore, as this matter does not involve the violation of a discovery order, Employer and Insurer are entitled to the payment of reasonable expenses, but not attorney's fees.

Additionally, Claimant has provided the signed medical release to Employer and Insurer, that issue is now moot.

Employer and Insurer's Motion for Sanctions and for Signed Medical Release is GRANTED. It is hereby ORDERED, Employer and Insurer shall provide the Department with an accounting of their reasonable expenses incurred in the attempt to depose claimant. Upon review by the Department of Employer and Insurer's expense

submission, as provided by SDCL 15-6-37(d) and ARSD 47:03:01:05.02, Claimant shall pay Employer and Insurer's reasonable expenses.

Sincerely,

A handwritten signature in blue ink that reads "Michelle Faw". The signature is written in a cursive, flowing style.

Michelle M. Faw  
Administrative Law Judge

MMF/das