ROBIN G. LAURSEN
(Appellant)

v.

SAPPHIRE MANAGEMENT
(Appellee)

and

MEMIC
(Insurer)

Argued: December 12, 2018
Decided: October 13, 2020

PANEL MEMBERS: Administrative Law Judges Elwin, Jerome, and Knopf
BY: Administrative Law Judge Jerome

[¶1] Robin Laursen appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) that awarded her the protection of the Act for a left-hand injury on July 11, 2014, but denied her request for lost time benefits in reliance upon the medical findings of an independent medical examiner (IME). *See* 39A M.R.S.A. § 312 (Pamph. 2020). Ms. Laursen maintains that the ALJ's denial of her motion to hold the evidence open for purposes of rescheduling the IME's deposition constitutes reversible legal error. We affirm the decision.

I. BACKGROUND

[¶2] Robin Laursen began working for Sapphire Management as a housekeeper in May of 2014. On July 11, 2014, Ms. Laursen was pushing a laundry

cart when she caught her left thumb between two carts, experiencing sharp pain. Thereafter, Ms. Laursen treated with Sapphire Management's chosen medical providers at Concentra, who diagnosed a strain and recommended light-duty work restrictions. Ms. Laursen continued to work but testified that she continued to experience pain in her left thumb.

[¶3] Ms. Laursen stopped working for the employer in November 2015. She filed a Petition for Award seeking benefits reflecting 100% earning incapacity based upon the ongoing effects of her 2014 thumb injury and an unsuccessful work search. Ms. Laursen underwent an independent medical evaluation pursuant to 39-A M.R.S.A. § 312, performed by Dr. Matthew Donovan. Dr. Donovan issued a report stating that Ms. Laursen suffered a work-related injury to her left hand on July 11, 2014, but that the effects of that injury had ended by August 30, 2014. The report was received by the board on April 20, 2017. The ALJ granted Ms. Laursen's unopposed request to depose Dr. Donovan. The hearing took place in June of 2017, but the record was left open to include Dr. Donovan's deposition.

[¶4] The deposition was scheduled for August of 2017 but was cancelled by Dr. Donovan due to a family matter. The rescheduled deposition was set to occur in September of 2017 but was cancelled by the parties because they were unable to timely provide Dr. Donovan with updated medical records. The deposition was set

for a third time in January 2018 but was cancelled by Dr. Donovan due to a severe snowstorm.

[¶5] Thereafter, the parties reset the deposition for a fourth time to occur on April 12, 2018, and Ms. Laursen requested that the due date for closing papers be extended to April 27, 2018. The ALJ denied that request in an order issued on January 26, 2018, noting that the cumulative delays caused by the rescheduling of Dr. Donovan's deposition were too great. The ALJ extended the date for closing papers to February 2, 2018.

[¶6] Ms. Laursen did not file a closing paper before the ALJ issued the decree on March 9, 2018.[1] The ALJ granted Ms. Laursen's Petition in part, determining, consistent with Dr. Donovan's report, that she established a work-related strain of her left thumb on July 11, 2014, but that the effects of that injury had ended by August 30, 2014.

[¶7] Ms. Laursen filed a Motion for Findings of Fact and Conclusions of Law, in which she argued that the ALJ erred by denying the final request to extend the "ready for decision" date so that Dr. Donovan's deposition could be taken and included in the record. She contended that the failure to allow the deposition violated her right to due process, noting the heightened weight afforded to the IME's

[1] The Record on Appeal contains an unsigned copy of a position letter dated March 11, 2018. The decree was issued on March 9, 2018.

findings.[2] She pointed out that there had been no objection to the rescheduling and argued that in the circumstances, the goal to "move cases along" should not be achieved at the expense of Ms. Laursen's due process rights. Counsel cited no authority other than the Maine and United States Constitutional provisions.

[¶8] The ALJ denied the Motion for Findings, and Ms. Laursen appeals.

III. DISCUSSION

[¶9] Ms. Laursen contends that the ALJ violated the due process clauses of the Maine and United States Constitutions when failing to keep the record open until she could be allowed to depose the IME for purposes of cross examination.

[¶9] For several reasons, we conclude that Ms. Laursen has forfeited consideration of this issue. First, she failed to raise this issue in a timely filed position paper. Second, she raised it only perfunctorily, after the ALJ issued the decision, in a motion for findings. Although the ALJ observed that Ms. Laursen cited no persuasive authority supporting her contention, we note that she cited no authority, other than the constitutional provisions, in her Motion for Findings. The Appellate Division has previously held that a party may forfeit consideration of an issue, including a constitutional issue, when it is raised in a perfunctory manner for the first time in a motion for findings. *See Waters v. S. D. Warren*, Me. W.C.B. No. 14-26,

[2] Pursuant to 39-A M.R.S.A. § 312(7), the ALJ must adopt the IME's medical findings unless there is clear and convincing contrary evidence in the record.

¶¶ 17-18 (App. Div. 2014) (citing *Mehlhorn v. Derby*¸ 2006 ME 110, ¶ 11, 905 A.2d 290 (stating "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived" and "[a]n issue that is barely mentioned in a brief is in the same category as an issue not mentioned at all." (quotation marks omitted)).

[¶10] In *Waters*, the employee suggested for the first time in a motion for findings that failure to include psychological permanent impairment for purposes of determining whether the durational cap on benefits applied raised equal protection issues. Me. W.C.B. No. 14-26, ¶¶ 16-17. That issue was further developed on appeal, but the Appellate Division affirmed the ALJ's determination that the issue had been waived, noting that "the belated assertion of the argument did not give opposing counsel fair notice of the issue; nor did it provide the hearing officer with an opportunity to assess whether any factual predicate was necessary to decide the issue or whether she had the authority to rule a provision of the Act unconstitutional." *Id.* at ¶ 18 (citing *Morey v. Stratton*, 2000 ME 147, ¶¶ 8-10, 756 A.2d 496 (emphasizing "the importance of bringing the specific challenge to the attention of the trial court at a time when the court may consider and react to the challenge")).

[¶11] We conclude that Ms. Laursen's failure to timely raise the constitutional argument and failure to develop that argument at the hearing level raises the same issues noted in *Waters*. We therefore conclude that she has waived

consideration of that issue on appeal. *See also Matthews v. Shaw's Supermarkets*, Me. W.C.B. No. 15-25, ¶ 37 (App. Div. 2015) (determining that failure timely to assert statute of limitations defense resulted in waiver of that issue on appeal); *Henderson v. Town of Winslow*, Me. W.C.B. No. 17-46, ¶ 9 (App. Div. 2017) (raising equal protection issue in perfunctory manner before the ALJ resulted in waiver).

[¶12] Even if we were to reach the due process issue, we would discern no reversible error. As the ALJ noted, there is no Maine statutory or regulatory provision giving rise to an unfettered right to depose the IME.[3] Thus, we would review the ALJ's decision regarding the conduct of proceedings to determine whether, in light of all the circumstances, the ALJ acted beyond the scope of his allowable discretion. *See Kuvaja v. Bethel Savings Bank*, 495 A.2d 804, 806 (Me. 1985) (applying abuse of discretion standard of review for administrative body's ruling on a motion to dismiss); *Matthews*, Me. W.C.B. No. 15-25, ¶ 20 (applying

[3] The ALJ thoroughly and properly addressed the issue, reasoning as follows:

> [T]he Maine Administrative Procedure[s] Act, which guides administrative agency action, permits an agency to restrict the general requirement that parties must be able to cross examine all witnesses. 5 M.R.S.A. § 9056(2). The Board Rules governing practice and procedure before this administrative agency appear to have adopted the statutory invitation extended by 5 M.R.S.A. § 9056(2) and limited a party's opportunity to take deposition testimony from an independent medical examiner appointed pursuant to 39-A M.R.S.A. § 312. W.C.B. Rules ch. 4 § 3(6).

(Footnotes omitted). The ALJ also pointed out that there is a split among jurisdictions as to whether cross examination of medical experts is an absolute right or whether, as in Maine, it may be limited by the exercise of an ALJ's sound discretion, citing Professor Larson's treatise. *See* 12 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 127.11 [3][b] (Matthew Bender, Rev. Ed. 2020).

abuse of discretion standard to ALJ's decision to conduct hearings in a certain manner).

[¶13] The Administrative Procedures Act authorizes limiting cross examination to prevent unreasonable delay in the proceedings. 5 M.R.S.A. § 9056(2) (2013).[4] The Workers' Compensation Act does not address the issue of whether a party must be provided an opportunity to depose an independent medical examiner. Board Rules give the ALJ the discretion to grant or deny a request to depose an IME, stating that "A party may set a deposition of the independent medical examiner only upon agreement of the parties or with permission of the Administrative Law Judge." Me. W.C.B. Rule, ch. 4 § 3(6). Accordingly, it was within the bounds of the ALJ's authorized discretion to close the evidence before the IME's deposition could be rescheduled for the fourth time, in order to avoid unreasonable delay.

The entry is:

The Administrative Law Judge's decision is affirmed.

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[4] Title 5 M.R.S.A. § 9065(2) provides:

> **2. Rights.** Unless limited by stipulation under section 9053, subsection 4, or by agency order pursuant to section 9054, subsections 2 or 4, or *unless otherwise limited by the agency to prevent repetition or unreasonable delay in proceed*ings, every party shall have the right to present evidence and arguments on all issues, and at any hearing to call and examine witnesses and to make oral cross-examination of any person present and testifying.

(Emphasis added).

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Pamph. 2020).

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

Attorney for Appellant:
Kevin M. Noonan, Esq
McTEAGUE HIGBEE
P.O. Box 5000
Topsham, ME 04086

Attorney for Appellee:
John W. Chapman, Esq.
KELLY & CHAPMAN
P.O. Box 168
Portland, ME 04112

1