

CRYSTAL DeLONG
(Appellant)

v.

KEY BANK
(Appellee/Self-Insured)

and

NORWAY SAVINGS BANK
(Appellee)

and

MEMIC
(Insurer)

Conference held: December 13, 2018
Decided: May 6, 2019

PANEL MEMBERS: Administrative Law Judges Pelletier, Hirtle and Stovall
BY: Administrative Law Judge Hirtle

[¶1] Crystal DeLong appeals from a decision of a Workers' Compensation Board administrative law judge (*Knopf, ALJ*) granting in part her Petitions for Award and for Payment of Medical and Related Services. The ALJ awarded her the protection of the Workers' Compensation Act for two injuries to her left shoulder: the first sustained while working for Norway Savings Bank on August 9, 2011;¹ and

¹ Norway Savings Bank filed a motion asking that it be dismissed from any appellate proceedings because no party challenged the ALJ's finding that the effects of Ms. DeLong's injury with Norway Savings Bank had ended. Ruling on that motion was deferred to the substantive decision. We deny the motion to dismiss as moot based on this decision, and do not address whether such substantive motion practice is available to parties at the board's appellate level.

the second while working for Key Bank on July 9, 2013. The ALJ also awarded a closed-end period of incapacity benefits for the 2013 injury, and payment of medical expenses limited to those incurred in July of 2013. Ms. DeLong contends that the ALJ erred in adopting testimony given by a witness from Key Bank, and by adopting a medical opinion of the independent medical examiner given in his deposition that differs from an opinion given in his earlier report. We affirm the decision.

I. BACKGROUND

[¶2] Crystal DeLong experienced a work related left shoulder injury while working for Key Bank on July 9, 2013. When she sought lost wage benefits under the Workers' Compensation Act, Ms. DeLong was referred for an independent medical examination with a physician appointed pursuant to 39-A M.R.S.A. § 312 (Supp. 2018).² The independent medical examiner issued a report opining that Ms. DeLong continued to experience the effects of her injury.

[¶3] When the case proceeded to hearing, Key Bank presented testimony from Ms. DeLong's immediate supervisor that he had interacted with Ms. DeLong each day she worked following her injury until her employment with Key Bank ended (for unrelated reasons). Additionally, the supervisor testified that he observed no

² An ALJ is required to adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record. 39-A M.R.S.A. § 312(7).

issues with Ms. DeLong's ability to perform her job duties due to her shoulder. Ms. DeLong states that her supervisor's testimony is a fabrication and that she provided Key Bank with notes from her doctor detailing work restrictions related to her injury.

[¶4] Following the hearing, the parties took deposition testimony from the independent medical examiner. Counsel for Key Bank provided facts to the independent medical examiner regarding Ms. DeLong's time out of work following the injury, change in job duties, whether Ms. DeLong was assigned work restrictions, and the onset of her shoulder symptoms. The ALJ found that Key Bank's assertions to the independent medical examiner were accurate and documented in the record. During his deposition, the independent medical examiner changed his opinion and concluded that the effects of Ms. DeLong's injury of July 9, 2013, ended shortly after it occurred. The ALJ adopted the independent medical examiner's medical findings as expressed in his deposition testimony.

[¶5] Ms. DeLong filed a Motion for Additional Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Supp. 2018), which the ALJ granted. The ALJ altered the decision but did not change the substantive outcome. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶6] The role of the Appellate Division “is limited to assuring that the [ALJ’s] findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation.” *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted). Because Ms. DeLong requested findings of fact and conclusions of law following the decision, the Appellate Division may “review only the factual findings actually made and the legal standards actually applied by the [ALJ].” *Daley v. Spinnaker Inds., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446.

B. Competent Evidence

[¶7] Ms. DeLong contends that the evidence presented to the ALJ and the independent medical examiner compelled a finding that her ongoing shoulder symptoms and restrictions are attributable to the injury she sustained at Key Bank. We disagree. Although Ms. DeLong presented evidence that supports her position, there is also competent evidence in the record that supports the factual findings reached by the ALJ. The ALJ heard from the witnesses first hand and was therefore in a better position to weigh competing factual evidence. The ALJ, as the factfinder, was well within her authority to choose between conflicting versions of the facts,

and we find no reversible error in the ALJ's decision to adopt testimony from Key Bank's witness in this case. *See Boober v. Great N. Paper Co.*, 398 A.2d 371, 375 (Me. 1979) (stating that where there is conflicting evidence and credibility is at issue, it is for the [ALJ], who "had the opportunity to hear the witnesses and judge their credibility . . . to resolve the evidentiary conflicts in the case." (quoting *Lovejoy v. Beech Hill Dry Wall Co., Inc.*, 361 A.2d 252, 254 (Me. 1976))).

[¶8] Ms. DeLong also contends the ALJ erred when adopting the independent medical examiner's medical findings as expressed in his deposition testimony, rather than the findings stated in his earlier report. When there is ambiguity between an independent medical examiner's report and deposition testimony, "it is incumbent on the [ALJ] to consider the larger context in which those statements are offered to construe the intent of the examining physician." *Oriol v. Portland Hous. Auth.*, Me. W.C.B. No. 14-35, ¶ 12 (App. Div. 2014). The choice between competing expert medical opinions is a matter soundly within the purview of the ALJ who hears the case. *See Traussi v. B & G Foods, Inc.*, Me. W.C.B. No. 15-10, ¶ 17 (App. Div. 2015) ("After considering both the written report and his deposition testimony, [the ALJ] adopted the findings that [the independent medical examiner] expressed in his written report, concluding that his deposition testimony did not fundamentally alter those conclusions.").

[¶9] The ALJ considered the larger context in which the independent medical examiner issued the report and gave the deposition testimony. She found that the factual basis supplied to the examiner at his deposition was more accurate than the factual basis of the examiner's written report. We find no reversible error in the ALJ's choice in this case to adopt the deposition testimony of the independent medical examiner as opposed to the opinion in the written report.³

III. CONCLUSION

[¶10] Because the factual findings are supported by competent evidence and the choice between competent medical causation opinions is reserved to the ALJ, we find no reversible error in the decision.

The entry is:

The administrative law judge's decision is affirmed.

³ Ms. DeLong also contends that Key Bank should be penalized for failing to timely report her injury to the Workers' Compensation Board. However, this issue was not presented to the ALJ at the hearing, and therefore has not been preserved for appellate review. Issues raised for the first time on appeal are waived. *Henderson v. Town of Winslow*, Me. W.C.B. No. 17-46, ¶ 10 (App. Div. 2017) (explaining the importance of raising a legal argument at a time and manner sufficient to give the ALJ and opposing party a fair opportunity to respond and address it).

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 (Supp. 2018).

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.

Appellant:
Crystal DeLong
12 Lucky Lane
Westport Island, ME 04578

Attorney for Appellee Key Bank:
William O. LaCasse, Esq.
Grant J. Henderson, Esq.
NORMAN HANSON & DETROY, LLC
Two Canal Plaza
P.O. Box 4600
Portland, ME 04112

Attorney for Norway Savings Bank:
Matthew Marett, Esq.
MEMIC
P.O. Box 3606
Portland, ME 04112