

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1990-13T1

ROBERT LOEBER,

Petitioner-Respondent,

v.

FAIR LAWN BOARD OF
EDUCATION,

Respondent-Appellant.

Argued October 22, 2014 – Decided December 5, 2014

Before Judges Waugh and Carroll.

On appeal from the New Jersey Department of Labor and Workforce Development, Division of Workers' Compensation, Claim Petition No. 2010-27597.

Randolph Brause argued the cause for appellant (Leitner, Tort, DeFazio, Leitner & Brause, P.C., attorneys; Mr. Brause, on the brief).

Herbert L. McCarter argued the cause for respondent (Wind & McCarter, P.A., attorneys; Mr. McCarter, on the brief).

PER CURIAM

Appellant Fair Lawn Board of Education (Board) appeals the December 10, 2013 order of the Division of Workers' Compensation (Division) in the Department of Labor and Workforce Development.

We affirm as to all issues except the requirement that the Board install an elevator in the home of petitioner Robert Loeber.

I.

We discern the following facts and procedural history from the record on appeal.

As the result of a work-related accident in November 2009, Loeber is partially paralyzed and confined to a wheelchair. In October 2010, he filed a workers' compensation claim against the Board, which was his employer. The Board admitted that there had been a compensable accident and has been providing medical treatment to Loeber.

In October 2011, Loeber sought modifications to his home and vehicle, as well as psychiatric care. The Board agreed to provide psychiatric care, and Loeber no longer needs any modification to his vehicle. This appeal concerns the extent of Loeber's right to have the Board provide home modifications.

The Board initially opposed Loeber's application for home modifications, arguing that Loeber had not supplied medical proof that any were needed. However, the Board subsequently agreed to certain modifications without receiving medical reports. Both sides then retained non-medical experts. The judge of compensation held four days of hearings. During the

hearings, the Board again agreed to certain types of modifications without insisting on medical evidence.

Loeber testified in March and April 2013. He explained his reasons for wanting the whole of his house, not just the first floor, to be as accessible as possible. Loeber sought access to the second floor, which contained his son's bedroom, and the basement, where he wants to perform woodworking.

Loeber's expert, who was admitted as "an expert in home modification for disabled people," testified in June.¹ He supported Loeber's position, including access to all floors of the house. He also advocated expansion of the kitchen, raising the family room floor, and installing a lift platform at the front door. The expert conceded on cross-examination that he did not take cost into account in making his recommendations.

The Board's expert, who was qualified as a licensed occupational therapy assistant, testified in August. Although she agreed with some of the recommendations made by Loeber's expert, she disagreed with others. For example, she recommended that the workshop should be built in the garage and the son's bedroom should be moved to the first floor.

¹ On appeal, the Board is critical of the fact that Loeber's expert submitted a late supplemental report shortly before he testified; however, no objection was made when the expert testified.

In June, after Loeber's expert had testified, the Board's attorney wrote to Loeber's attorney concerning medical testimony.

This serves to further our discussion in court regarding medical testimony.

It has always been my position that the law requires that the petitioner prove that any home modifications are necessary to cure and relieve his condition. It is accurate that I did agree that it was not necessary to produce a doctor to indicate that the petitioner was in a wheelchair.

[Loeber's expert] touched on psychological issues during his testimony. To the extent that you are claiming that any renovations are needed on a psychological basis I want to make it very clear that I am not waiving medical testimony regarding this issue.

The issue of medical testimony was raised again following the testimony of the Board's expert in August. The Board's attorney reiterated that his concern arose from testimony concerning psychological issues by Loeber's expert. He clearly drew a distinction between medical and psychological testimony. The judge stated that she would not be relying on anything other than Loeber's physical disability, adding that she found Loeber's testimony concerning his abilities, "what he can and cannot do," to be credible.

On November 25, 2013, the judge delivered an oral opinion. She found the testimony of Loeber's expert to be more credible

than that of the Board's expert, and reiterated her finding that Loeber had a significant, long-term disability. She determined that Loeber was entitled to receive the modifications sought, with the Board having a lien to recover expenses upon sale of the house. This appeal followed.²

II.

On appeal, the Board argues that the judge of compensation failed to follow the appropriate procedure in deciding Loeber's application. The Board criticizes the judge for not requiring the submission of one or more medical reports supporting the relief requested, as well as her failure to apply the standards for home modification set forth by the Supreme Court in Squeo v. Comfort Control Corp., 99 N.J. 588 (1985).

Our standard of review is well-settled. We are bound by the judge's factual findings that are supported by sufficient credible evidence in the record. Sager v. O.A. Peterson Constr. Co., 182 N.J. 156, 163-64 (2004) (citing Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)). We must give due regard to the judge's expertise. Ibid. "[D]eference must be accorded the factual findings and legal determinations made by the Judge of Compensation unless they are manifestly unsupported by or

² We granted the Board a partial stay with respect to the elevator, the expansion of the kitchen, and the lifting of the family room floor.

inconsistent with competent relevant and reasonably credible evidence as to offend the interests of justice." Lindquist v. City of Jersey City Fire Dep't, 175 N.J. 244, 262 (2003) (citations and internal quotation marks omitted). A petitioner bears the burden of establishing the compensability of the claim being made. Id. at 279; Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div. 1994), certif. denied, 140 N.J. 277 (1995).

However, it is well-established that our review of a judge's conclusions of law is de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."). The same standard applies to the legal rulings of a judge of compensation. Sexton v. Cnty. of Cumberland/Cumberland Manor, 404 N.J. Super. 542, 548 (App. Div. 2009).

The Board is correct that N.J.A.C. 12:235-3.2(b) requires an application seeking treatment or reimbursement for treatment to be supported by one or more medical reports concerning the petitioner's diagnosis and the medical need for the treatment at issue. Nevertheless, a fair reading of the record in this case makes it quite clear that the Board waived that requirement as

far as the nature of Loeber's physical disability and his need for modifications to his house to provide him reasonable access and mobility in it.

In the letter written well after the hearing had begun, the Board's attorney stated that "[i]t is accurate that I did agree that it was not necessary to produce a doctor to indicate that the petitioner was in a wheelchair." There is nothing in the record to suggest that there was any dispute that Loeber had been injured in a compensable accident, that he was paralyzed to the extent of requiring a wheelchair, or that his condition was only temporary. The June 2013 letter and the colloquy on the last day of the hearing both focused on psychological diagnoses. Loeber's attorney made it clear that he was not relying on psychological injuries or conditions.

The Board, having conceded the obvious, that some modifications to the home were appropriate because Loeber was confined to a wheelchair, focuses its appeal on four specific issues: (1) installation of an elevator to take Loeber from the main floor to both the basement and the second floor of Loeber's house; (2) lifting the floor of the family room to provide better access to the kitchen; (3) modification of the kitchen to permit Loeber to use it safely; and (4) reimbursement for the installation of a turn platform at the end of a wheelchair ramp

leading to the rear entrance of the house. In her detailed oral decision, the judge of compensation explained her reasons for determining that those modifications, as well as others not challenged on appeal, were required. Although her reasoning is persuasive in many respects, the question before us is whether she went beyond the remedies allowed by the Workers' Compensation Act (Act), N.J.S.A. 34:15-1 to -142, and the factual support in the record before her.

We start with the fact that the Act does not specifically mention home remediation as an available remedy. N.J.S.A. 34:15-15 speaks in terms of payment or reimbursement for "medical, surgical and other treatment." It further provides that,

[w]hen an injured employee may be partially or wholly relieved of the effects of a permanent injury, by use of an artificial limb or other appliance, which phrase shall also include artificial teeth or glass eye, the Division . . . , acting under competent medical advice, is empowered to determine the character and nature of such limb or appliance, and to require the employer or the employer's insurance carrier to furnish the same.

[Ibid.]

In Squeo, supra, 99 N.J. at 596-604, the Supreme Court interpreted that language as permitting the Division to order home modification, but only in limited circumstances.

The Squeo Court was reviewing our affirmance of a compensation judge's order requiring the employer to build a self-contained apartment, to be attached to his parents' home, for a quadriplegic who had developed severe depression and become suicidal after several years in a nursing home. Id. at 591-96. Starting with the language of N.J.S.A. 34:15-15 and the fact that, as a statute remedial in nature, it was entitled to liberal construction, Squeo, supra, 99 N.J. at 596-99, the Court ultimately concluded that

under certain unique circumstances, when there is sufficient and competent medical evidence to establish that the requested "other treatment" or "appliance" is reasonable and necessary to relieve the injured worker of the effect of his injuries, the construction of an apartment addition may be within the ambit of N.J.S.A. 34:15-15. We caution however that it is only the unusual case that may warrant such extraordinary relief.

[Id. at 604.]

The Court then concluded that Squeo's situation was "an unusual case calling for unusual relief," noting that there was "competent medical testimony" in the record "to hold that the construction of the apartment addition was reasonable and necessary treatment to relieve Squeo of his severe mental depression." Id. at 604-06.

The Court "stress[ed] that[,] in determining what is reasonable and necessary, the touchstone is not the injured worker's desires or what he thinks to be most beneficial. Rather, it is what is shown by sufficient competent evidence to be reasonable and necessary to cure and relieve him." Id. at 606. With respect to Squeo, the apartment was necessary as a remedy for his psychological problem, rather than his physical disability. Ibid.

The Court also cautioned that price was a consideration. "While there are no monetary limitations on the cost of treatment set forth in the statute, the cost must be reasonable." Ibid. However, in considering the cost for the apartment, the Court did note that, while the short-term cost was higher than some alternatives, it was likely to be less expensive in the long term. Id. at 606-07.

Our review of the order on appeal is complicated by the fact that, although the judge had stated at the end of the hearing that she would not consider psychological issues, she nevertheless concluded early in her oral decision that Loeber's "long-term mental health will be enhanced by having the ability to live in a barrier free home with his wife and preadolescent son." While probably true, the judge's conclusion is not based on any psychological evidence because none was offered. In

addition, although the judge made some general statements about cost, there was no analysis of the relative cost of the proposals made by each side. Admittedly, the latter was also due to the fact that the parties' proposals were not specific with respect to cost.

Having reviewed the record in light of the applicable law, we nevertheless conclude that the judge's overall conclusions are supported by the record and applicable law with respect to all contested issues except the elevator. The judge's findings concerning the elevation of the family room floor, modifications to the kitchen, and the platform lift are adequately related to the nature of Loeber's disability to warrant affirmance. The award of the elevator, although understandable, appears related primarily to the judge's concerns about what is desirable in terms of Loeber's mental health.

The judge visited the Loeber house twice, and relied on her own observations and experiences in finding that the raising of the family room floor was necessary. She found the existing ramp from the family room to the kitchen to be dangerous, having herself fallen off of it, and cumbersome. We defer to her first-hand observations on that issue. We similarly defer to her finding that kitchen modifications are needed so that Loeber can comfortably and safely use the stove, cooktop, sink, and

other parts of the kitchen. They are reasonable and necessary to enable Loeber to participate in sharing household duties and caring for himself when other family members are away from home. Our review of the record also convinces us that reimbursement for the turn platform was appropriate. It resolved Loeber's accessibility issue with the wheelchair ramp.

Before the changes are made to the family room floor and the kitchen, however, the Board must submit a plan for the renovations to Loeber, who shall have a reasonable time to respond with alternatives. If the parties cannot reach an agreement, the issue must be submitted to the judge of compensation for resolution. The judge will have to make her decision in light of the admonitions in Squeo, supra, 99 N.J. at 606, that the modifications be "what is reasonable and necessary" and the cost "reasonable."

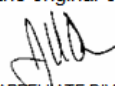
We are not convinced that the judge's decision with respect to the elevator comported with the strictures of Squeo, and infer from her oral opinion that the decision was primarily informed by her concerns about Loeber's "long-term mental health," as understandable as those concerns may be. As we have already discussed, there was no expert testimony concerning Loeber's psychological needs and the judge had specifically stated that she would not consider them.

While the elevator would appear to be beneficial, there is nothing in the record to demonstrate that it is "necessary" and its cost "reasonable" as those terms are used in Squeo. Ibid. The compensation judge was required to reach a decision consistent with Squeo, which "cautioned" that it is "only the unusual case that may warrant . . . extraordinary relief." Id. at 604. Based on the current state of the law, as set forth in Squeo, and the present record, we cannot agree that Loeber demonstrated that the elevator was "necessary."

In summary, we reverse the order on appeal with respect to the requirement that the Board install an elevator in Loeber's house. We otherwise affirm the order, subject to the requirement that the parties resolve the specifics of the remodeling prior to commencing the work.³

Affirmed in part, reversed in part.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

³ Because we have now resolved all issues on appeal, we dissolve the stay previously entered by the court.