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NO. COA11-1477
NORTH CAROLINA COURT OF APPEALS

Filed: 15 May 2012

BOBBY D. ROBINSON,
Plaintiff,

v.

N.C. Industrial Commission
I.C. No. TA-17357

NORTH CAROLINA DEPARTMENT OF
CORRECTION,
Defendant.

Appeal by Plaintiff from Decision and Order entered 14
September 2011 by the North Carolina Industrial Commission.
Heard in the Court of Appeals 21 March 2012.

*The Moore Law Office, PLLC, by George W. Moore, for
Plaintiff-Appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General
Donna B. Wojcik, for Defendant-Appellee.*

BEASLEY, Judge.

Bobby D. Robinson (Plaintiff) appeals from a 14 September
2011 Decision and Order of the North Carolina Industrial
Commission (the Commission) denying his claim under the State
Tort Claims Act, N.C. Gen. Stat. § 143-291, *et seq.* (2011). For
the following reasons, we affirm.

On 27 January 1997, Plaintiff was convicted of first degree murder and placed in the custody of the North Carolina Department of Correction (Defendant). On 18 February 1999, Plaintiff was transferred from Defendant's Marion County facility to Mountain View Correctional Institute in Mitchell County (Mountain View). On 14 February 2002, Plaintiff initiated this action by filing a claim for damages under The Tort Claims Act, alleging that he was injured when he was handcuffed too tightly by Defendant's employee, Sergeant Dula, (Dula) on 19 February 1999 at Mountain View. In response, Defendant filed a Motion to Dismiss dated 22 April 2002.

This case was heard before Deputy Commissioner J. Brad Donovan on 24 September 2010. On 8 February 2011, Deputy Commissioner Donovan filed a Decision and Order finding that Plaintiff was injured by the negligence of Dula and was entitled to a recovery of \$50,000 from Defendant for his injuries. Defendant appealed Deputy Commissioner Donovan's Decision and Order which was reviewed by the Full Commission on 19 July 2011. The Commission reversed Deputy Commissioner Donovan's decision and denied Plaintiff's claim in a Decision and Order filed 14 September 2011. Plaintiff filed notice of appeal from the Commission's decision on 6 October 2011.

I.

The Commission has exclusive jurisdiction to hear claims falling under the Tort Claims Act. N.C. Gen. Stat. § 143-291(a) (2011). "[W]hen considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Simmons v. N.C. Department of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998). It is well-settled that "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony" and thus we "may set aside findings of fact *only* upon the ground they lack evidentiary support." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965) (emphasis added).

Plaintiff challenges several of the Commission's findings of fact, asserting that they were not supported by competent evidence. We address each challenged finding in turn.

Plaintiff challenges Finding of Fact Number 8, that a drawing Plaintiff made to document his injuries was inconsistent

with his testimony regarding his injuries. Plaintiff testified at the 24 September 2010 hearing before Deputy Commissioner Donovan that he had a cut laterally around his wrist, that there were "teeth marks" from the handcuffs all the way around his wrist, and that his wrist was bruised and swollen. However, his drawing indicates that only his left finger and thumb were swollen, with no indication of a cut or "teeth marks" laterally around his wrist. The drawing also does not reflect any bruising or discoloration. We hold there is competent evidence to support the Commission's findings that Plaintiff's drawing was not consistent with his testimony.

Plaintiff also challenges Finding of Fact Number 16, that Dr. Phillip Stover, who testified for Defendant, "spent a great deal of time in the field of plastic surgery." This finding is supported by Dr. Stover's testimony that he (i) "spent a good a lot of time in plastics", (ii) based his opinion on "the experience that [he] gained from working plastics", and (iii) spends "a lot of time taking care of skin, skin complaints, skin injuries" which he sees "all the time in primary care." Plaintiff further challenges the second statement in Finding of Fact Number 16, that Dr. Stover "opined that Plaintiff's claims of wrist injury, due to Sergeant Dula's actions, are not

credible." Plaintiff is really attempting to challenge Dr. Stover's opinion rather than the Commission's finding acknowledging that opinion. Dr. Stover clearly stated while testifying that he did not believe that Plaintiff's medical records support his explanation for his injury. Dr. Stover's testimony is competent evidence to support the Commission's finding.

Plaintiff's next challenges Finding of Fact Number 17, where the Commission found that "[w]hen Plaintiff presented after the handcuffs were removed, none of the symptoms existed." This finding is supported by the testimony of Sandy McClellan, the nurse that examined Plaintiff on 19 February 1999 shortly after the alleged incident. Nurse McClellan testified that when she examined Plaintiff, "there wasn't any signs of anything that was there on his left wrist. No bruising, no laceration, no anything."

Plaintiff then challenges Finding of Fact Number 19, that "the vast majority of Plaintiff's alleged injuries cannot be attributed to the alleged acts of Sergeant Dula" because an injury to Plaintiff's radial nerve would not cause pain on the inside of Plaintiff's hand. At several times during Plaintiff's testimony, he pointed to his hand to illustrate where he had

pain, and the transcript of the hearing does not always include a description of where Plaintiff is pointing for the record. Even without this finding, the Commission's conclusions of law are adequately supported. Thus assuming, *arguendo*, that none of these descriptions included an indication of pain to the inside of Plaintiff's hand then there is not competent evidence to support this finding, and so it is not conclusive and must be set aside. *Kyle v. Holston Group*, 188 N.C. App. 686, 690-91, 656 S.E.2d 667, 670 (2008).

Plaintiff next challenges Finding of Fact Number 20, where the Commission acknowledges Dr. Stover's opinion that Plaintiff's injury was more likely than not caused by another incident. Plaintiff argues that Dr. Stover's opinion is based on "fantasy and speculation rather than competent evidence." Dr. Stover opined that it was not likely that Plaintiff's injury resulted from being handcuffed too tightly and this opinion was based on his review of Plaintiff's medical records, his training, and his experience. Thus, the Commission's finding is supported by competent evidence.

Plaintiff also challenges Finding of Fact Number 22, that "[n]either the medical records, nor the credible evidence, support Plaintiff's version of events." This finding is

supported by Dr. Stover's testimony that it would take "a considerable amount of force, to cause this kind of injury or it has to be a lot of trauma repeatedly over a long period of time. . . ." The Commission's decision regarding the credibility of evidence is not for this Court to evaluate on appeal. There was competent evidence in the record for the Commission to make this finding, and thus the finding is binding on appeal, regardless of the evidence that might support a contrary finding.

Next, Plaintiff challenges Finding of Fact Number 23, which states that he was examined by Nurse McClellan after the alleged incident and by a physician several days later, but neither found any evidence of damage consistent with the type of force required to cause the injury to Plaintiff's superficial radial nerve. This finding is supported by the testimony of Nurse McClellan that there was no bruising nor any lacerations on Plaintiff's wrist when she examined him, and Dr. Stover's testimony that "[t]o subject this nerve to the kind of force that would cause this kind of injury, it would also cause significant injury to the overlying soft tissues that should have been present for a considerable length of time after the incident." Plaintiff's argument is without merit.

Plaintiff also challenges Finding of Fact Number 24, in which the Commission acknowledged Dr. Stover's opinion that Plaintiff's symptoms are not from any single event but a result of multiple events. Plaintiff asserts that Dr. Stover's opinions were based on "insufficient evidence and speculation." Again, Plaintiff attempts to challenge Dr. Stover's actual findings, not the Commission's finding where it acknowledged Dr. Stover's opinion. Dr. Stover offered his medical opinion based on his experience and training, and his review of Plaintiff's medical records. Plaintiff's argument that this finding is unsupported by competent evidence is unpersuasive.

Plaintiff also challenges Finding of Fact Number 25, where the Commission found that Dr. Stephen Westly, who performed an independent medical evaluation on Plaintiff over eight years after the alleged incident, did not review any of Plaintiff's records prior to December of 2000. Dr. Westly testified that he reviewed some of Plaintiff's records from February 2000. There does not appear to be any evidence in the record to the contrary. Accordingly, this portion of Finding of Fact Number 25 is not conclusive and will be set aside. *Kyle*, 188 N.C. App. at 690-91, 656 S.E.2d at 670.

Plaintiff further challenges Dr. Westly's statement that it was possible that if Plaintiff struggled with his cuffs it could have caused problems in his radial sensory nerve, which is the Commission's Finding of Fact Number 27. Dr. Westley was asked whether it was possible that this type of injury could have been caused by Plaintiff struggling in his cuffs, and he responded "Yes." Thus, the Commission's finding was supported by competent evidence.

Next, Plaintiff challenges Finding of Fact Number 28, that Dr. Lacy Eugene Thornburg was not aware of Plaintiff's prior gunshot wounds and the resulting surgeries when he examined Plaintiff. However, in his brief to this Court Plaintiff concedes that Dr. Thornburg's testimony supports this finding. This argument is without merit.

Plaintiff challenges Finding of Fact Number 30, that Drs. Thornburg and Westly agree that something happened to Plaintiff's wrist but they could not say what or when. Plaintiff admits that this finding is "technically accurate" but argues that it takes Dr. Thornburg's testimony out of context and is therefore misleading. Plaintiff's argument is without merit, as he concedes that the statement is accurate and thus it is supported by competent evidence.

Plaintiff also argues that Finding of Fact Number 31, that Dr. Stover testified that Plaintiff does not need pain medications, is not supported by competent evidence. Dr. Stover testified that the records from Central Pharmacy showed that Plaintiff has not received any pain medication since January 2010, and that if Plaintiff had complained of pain his staff would have prescribed some sort of analgesic, so Dr. Stover concluded that Plaintiff did not complain of pain and therefore did not need any pain medication. Thus, the Commission's finding is supported by competent evidence.

Plaintiff continues by challenging Finding of Fact Number 34, where the Commission explicitly gave Dr. Stover's opinions greater weight than those of Drs. Westly and Thornburg. The Commission's findings as to the credibility of witnesses cannot be disturbed on appeal. Plaintiff's argument is overruled.

II.

Plaintiff also challenges Findings of Fact Numbers 15, 35, and 36, which he asserts are actually conclusions of law.

The Commission found, in Finding of Fact Number 35, that Plaintiff's testimony was not credible and was contrary to the medical evidence. As noted above, the Commission's findings with regard to the credibility of witnesses are binding on this

Court. Thus, if the Commission found Plaintiff's testimony to lack credibility, we cannot overturn that finding on appeal. Further, we have already discussed the medical evidence, namely the testimonies of Dr. Stover and Nurse McClellan, which were contrary to Plaintiff's testimony. These testimonies constitute competent evidence to support the Commission's finding. Although Plaintiff argues that this is actually a conclusion of law, that argument is without merit.

However, we find that Findings Number 15 and 36 are in fact properly categorized as conclusions of law rather than findings of fact. Thus, we review these conclusions *de novo*. See *Stevenson v. Noel Williams Masonry, Inc.*, 148 N.C. App. 90, 95, 557 S.E.2d 554, 558 (2001). To recover under the Tort Claims Act in this case, Plaintiff must show that the injuries he sustained "were the proximate result of a negligent act of a state employee acting within the course and scope of his employment." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988). "Under the Act, negligence is determined by the same rules as those applicable to private parties." *Id.* "To establish actionable negligence, plaintiff must show that: (1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the

circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury." *Id.*

Plaintiff challenges Finding of Fact Number 15, which states that Dula was not negligent and he exercised due care in carrying out his duties as a correctional officer. Plaintiff also challenges Finding of Fact Number 36, where the Commission concluded that there was no evidence that Dula breached a duty owed to Plaintiff or that any alleged breach was the cause of Plaintiff's injury. In its Finding of Fact Number 9, the Commission stated that Plaintiff's grievance was investigated by an Inmate Grievance Examiner, who concluded that the handcuffs were applied "correctly," were not too tight, and were double-locked; that the knot on Plaintiff's wrist appeared to be an old wound; and that Plaintiff exhibited no injury, laceration, bruise, or contusion when he was examined after the alleged incident. This finding was unchallenged by Plaintiff, and so is binding on appeal. *Davis v. Hospice & Palliative Care of Winston-Salem*, 202 N.C. App. 660, 670, 692 S.E.2d 631, 638 (2010). This finding supports the conclusion in Finding of Fact Number 15 entirely, as well as the conclusion of law in Finding of Fact Number 36 that there was no evidence that Dula breached a duty to Plaintiff, because the Grievance Examiner's report

shows that Dula handcuffed Plaintiff correctly and thus did not fail to exercise due care.

The remainder of the conclusion, that no alleged breach by Dula was the cause of Plaintiff's injury, is supported by the testimony of Dr. Stover that any force that would have caused Plaintiff's injury would have left noticeable injury to Plaintiff's wrist, and the testimony of Nurse McClellan and the Grievance Examiner's report that Plaintiff's wrist evidenced no signs of injury when examined after the accident.

III.

In conclusion, Plaintiff argues that the Commission's findings of fact do not support its conclusions of law and decision because the "competent evidence" supports Plaintiff's claim that Dula breached his duty not to use unreasonable force and that breach was the proximate cause of Plaintiff's injuries. As stated in Section III, *infra*, the Commission's findings of fact that are upheld by this Court support its conclusion that Dula did not breach a duty to Plaintiff and that any alleged breach did not proximately cause Plaintiff's injury. Accordingly, this argument is unavailing.

Affirmed.

Judges BRYANT and HUNTER, Robert Jr. concur.

Report per Rule 30(e).