NO. COA12-823
NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2013

THOMAS BOYD, by and Through TYRA POWELL, Guardian *Ad Litem*,
Plaintiff

v. N.C. Industrial Commission
No. TA-21206

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendant

Appeal by plaintiff from Opinion and Award entered 2 February 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 December 2012.

Perry, Perry & Perry, P.A., by Robert T. Perry, for Plaintiff.

Attorney General Roy Cooper, by Assistant Attorney General Olga Vysotskaya, for Defendant.

ERVIN, Judge.

Plaintiff Thomas Boyd, acting through his guardian, Tyra Boyd, appeals from an Industrial Commission order rejecting his request to be awarded damages from Defendant North Carolina Department of Health and Human Services pursuant to the North Carolina Tort Claims Act stemming from injuries that Plaintiff sustained when he was assaulted by another patient while undergoing treatment at Dorothea Dix Hospital. On appeal,

Plaintiff challenges the sufficiency of the evidentiary support for certain of the Commission's findings of fact and the sufficiency of the Commission's findings to support its conclusion that Plaintiff's claim was barred by the doctrine of contributory negligence. After careful consideration of Plaintiff's challenges to the Commission's order in light of the record and the applicable law, we conclude that the Commission's order should be affirmed.

I. Factual Background

A. Substantive Facts

Plaintiff, a male in his late fifties, suffers from a schizoaffective disorder and an unspecified personality disorder. Although Plaintiff's disorders were adequately controlled by medication, he was involuntarily committed to Dorothea Dix on or around 4 March 2006 after ceasing to take his medication. As his condition improved, Plaintiff was moved to a long-term adult unit. Although every patient in the long-term adult unit, including Plaintiff, suffered from psychotic conditions and features which occasionally led to unexpected behavior, all of the patients in the long-term adult unit were placed there because they were nearing discharge.

At approximately 8:00 p.m. on 19 April 2006, Plaintiff received a phone call from his wife on the hallway telephone.

Upon answering the phone, Plaintiff told his wife that he would be able to speak with her only briefly because he was scheduled to take a smoking break at 9:00 p.m. After ending his conversation with his wife at 8:30 p.m., Plaintiff stood in line to receive his cigarettes for the upcoming smoking break.

At around 8:50 p.m., the hallway telephone rang again. Thinking that the call was from his wife, Plaintiff attempted to answer the phone. However, another patient picked it up before Plaintiff could get there. After hearing the patient who had answered the phone ask, "Do you want to speak to the guy with the white hair," Plaintiff indicated that he was the individual in question. Although the patient acknowledged Plaintiff's identity, he did not hand the phone to Plaintiff.

After looking around to see if any hospital technicians were available and failing to locate any such individuals, Plaintiff became very angry with the other patient and exclaimed, "Man you'd better give me that phone or I will kick your tail." Plaintiff then took several steps back; assumed a karate-like stance; and executed a front and side kick in the air. According to Plaintiff, he merely intended to scare the other patient into giving him the phone and did not intend to actually kick the other patient. In fact, Plaintiff was too far away from the patient holding the phone to actually strike him.

However, after Plaintiff performed these karate-like movements, a second patient came up behind him, picked him up, and threw him to the floor.

The record contains no indication that there had been any previous difficulties between either Plaintiff and the patient who answered the telephone or Plaintiff and the patient who slammed him to the ground. Both Plaintiff and the patient who attacked him were on standard level observation, which was the most lenient observation level, so that each of them should have been observed by a staff member only once each hour. At the time that Plaintiff was thrown to the floor, there were between seven and fifteen patients present in the hallway. Although at least two staff members are required to be in attendance at each gathering of at least ten patients, no member of the hospital staff witnessed this incident, which only lasted about three minutes.

Although Plaintiff was examined in the immediate aftermath of this incident, treating medical personnel believed that Plaintiff had suffered a contusion. Upon being taken to the Raleigh campus of WakeMed, however, the physicians responsible for Plaintiff's care determined that he had sustained a fractured hip and needed to undergo surgery. Subsequently,

Plaintiff underwent open reduction internal fixation surgery to repair his hip fracture on 20 April 2006.

B. Procedural Facts

On 17 April 2009, Plaintiff filed a claim with the Commission seeking to recover damages from Defendant pursuant to the provisions of the Tort Claims Act. On 22 July 2010, Defendant filed an answer denying the material allegations of Plaintiff's claim and asserting the affirmative defenses of contributory negligence and intervening and superseding negligence and criminal acts. Plaintiff's claim came on for hearing before Deputy Commissioner Stephen T. Gheen on 7 January 2011. On 19 July 2011, Deputy Commissioner Gheen entered an order denying Plaintiff's claim on contributory negligence grounds. Plaintiff noted an appeal to the Commission from Deputy Commissioner Gheen's order. On 2 February 2012, the Commission entered an order affirming Deputy Commissioner Gheen's order with minor modifications. Plaintiff noted an appeal to this Court from the Commission's order.

II. Legal Analysis

A. Standard of Review

Our review of an order entered by the Commission pursuant to the Tort Claims Act "'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.'" *Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 589, 551 S.E.2d 486, 490 (2001) (quoting *Simmons v. N.C. Dept. of Transp.*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998)), *disc. review denied*, 355 N.C. 285, 560 S.E.2d 800 (2002). "Findings of fact by the Commission, if supported by competent evidence, are conclusive on appeal even though there is evidence which would support a contrary finding." *McGee v. N.C. Dep't of Revenue*, 135 N.C. App. 319, 324, 520 S.E.2d 84, 87 (1999) (citing *Bullman v. N.C. State Highway Comm.*, 18 N.C. App. 94, 98, 195 S.E.2d 803, 806 (1973)). Any Commission findings of fact that are not challenged by the appealing party as lacking sufficient evidentiary support are conclusive for purposes of appellate review. *Wooten v. Newcon Transp., Inc.*, 178 N.C. App. 698, 701, 632 S.E.2d 525, 528 (2006), *disc. review denied*, 361 N.C. 704, 655 S.E.2d 405 (2007). On the other hand, this Court reviews the Commission's conclusions of law using a *de novo* standard of review. *McLaughlin v. Staffing Solutions*, 206 N.C. App. 137, 143, 696 S.E.2d 839, 844 (2010).

B. Evidentiary Support for Challenged Commission Findings

1. Plaintiff as an Amateur Karate Expert

In his first challenge to the Commission's decision, Plaintiff argues that the evidentiary record does not support Finding of Fact No. 11, in which the Commission found, among other things, that "Plaintiff classifies himself as an amateur karate expert." At the hearing held before Deputy Commissioner Gheen, however, Plaintiff testified that, although "I hate to say it. I'm a[n] amateur karate expert." Although Plaintiff argues that the Commission should not have made the challenged finding of fact in light of Plaintiff's claim to have been joking at the time that he kicked at the patient who refused to surrender the phone, the evidence upon which Plaintiff relies has no bearing upon the extent, if any, to which the challenged finding of fact is supported by the record. As a result, since the challenged finding of fact has more than sufficient evidentiary support, Plaintiff's first challenge to the Commission's order necessarily fails.

2. Plaintiff's Karate Maneuver Caused the Attack

Secondly, Plaintiff challenges the sufficiency of the evidentiary support for Finding of Fact No. 12, in which the Commission stated that the second patient attacked Plaintiff "[a]s a result of plaintiff's karate maneuvers." According to Plaintiff, the record simply did not contain sufficient evidence to support a determination that the second patient approached

Plaintiff as a result of his karate maneuvers. In support of this contention, Plaintiff argues that the second patient was not involved in the argument over the other patient's refusal to surrender the phone, that "[a] rational person would not approach a presumed attacker and throw the person to the ground," and that Dorothea Dix personnel failed to be present at the time of the attack in violation of "its own procedures . . . to protect patients from harm." We are unable to ascertain the relevance of the first and third of these arguments to the validity of Plaintiff's challenge to the sufficiency of the evidentiary support for Finding of Fact No. 12 and believe that acceptance of Plaintiff's second argument would require us to reweigh the evidence in violation of the applicable standard of review. As this court has previously held, the Commission has the sole responsibility of drawing reasonable factual inferences from the evidence, *Simmons v. Columbus Cnty. Bd. of Educ.*, 171 N.C. App. 725, 729, 615 S.E.2d 69, 73 (2005), with a reviewing "court's duty go[ing] no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). After carefully reviewing the record, we conclude that the Commission had ample basis for concluding that Plaintiff's movements in response to the first patient's refusal

to surrender the telephone led directly to the second patient's decision to assault him. As a result, Plaintiff's challenge to the sufficiency of the evidentiary support for Finding of Fact No. 12 lacks merit.

C. Contributory Negligence

Finally, Plaintiff contends that the Commission erred by concluding that his claim was barred by the doctrine of contributory negligence. According to Plaintiff, his "shadow kick" did not warrant the attack by the second patient given the fact that Plaintiff did not intend to make contact with the first patient. We do not find Plaintiff's argument persuasive.

According to well-established North Carolina law, a plaintiff is precluded from obtaining a recovery stemming from another party's negligence if the plaintiff fails "to exercise due care for his own safety in respect of the occurrence about which he complains, and if his failure to exercise due care for his own safety is one of the proximate contributing causes of his injury." *Holderfield v. Rummage Bros. Trucking Co.*, 232 N.C. 623, 625, 61 S.E.2d 904, 906 (1950). "In order to sustain an award under the Tort Claims Act, a claimant must show not only injury resulting from a designated employee's negligence, but must also prove that [he] was not guilty of contributory negligence." *Thornton v. F.J. Cherry Hosp.*, 183 N.C. App. 177,

187, 644 S.E.2d 369, 376 (2007) (*citing Floyd v. N.C. State Highway Comm'n.*, 241 N.C. 461, 465, 85 S.E.2d 703, 706 (1955)), *aff'd*, 362 N.C. 173, 655 S.E.2d 350 (2008). Thus, in the event that the Commission properly concluded that Plaintiff's injuries proximately resulted from his own negligence, Plaintiff is barred from recovering anything from Defendant.

In seeking to persuade us to reverse the Commission's order, Plaintiff argues that the Commission erroneously found him to have been contributorily negligent because he "had no reason to anticipate" that any other patient would attack him based upon his actions in response to the first patient's refusal to surrender the telephone. In essence, Plaintiff appears to argue that he was not contributorily negligent because the second patient's intervention was not foreseeable. However, the fact that the adverse consequences stemming from a party's contributory negligence must have been foreseeable in order for that party's contributory negligence to bar a damage recovery "does not mean that the [party] must have foreseen the injury in the exact form in which it occurred, but that, in the exercise of reasonable care, the [party] might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected." *Williams v. Boulerice*, 268 N.C. 62, 68, 149 S.E.2d

590, 594 (1966). We have no difficulty concluding that Plaintiff should have foreseen that some physical injury would likely have resulted from his decision to make threats and simulate martial arts movements during his argument with the patient who refused to surrender the telephone. For example, even if the second patient had not intervened in apparent defense of the first, one could easily foresee a scenario under which the patient who refused to surrender the telephone would have acted in his own defense. As a result, the Commission did not err by concluding that the evidentiary record, as delineated in its findings of fact, established that Plaintiff's claim was barred by the doctrine of contributory negligence.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Plaintiff's challenges to the Commission's order have merit. As a result, the Commission's order should be, and hereby is, affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).