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NO. COA13-189
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

WILLIAM LEE WALKER,
Plaintiff

v.

Industrial Commission
No. TA-21910

N.C. DEPARTMENT OF CORRECTION,
Defendant

Appeal by plaintiff from decision and order filed 25
September 2012 by the North Carolina Industrial Commission.
Heard in the Court of Appeals 23 September 2013.

*Attorney General Roy Cooper, by Associate Attorney General
Adrian W. Dellinger, for the State.*

William Lee Walker, pro se, plaintiff-appellant.

ERVIN, Judge.

Plaintiff William Lee Walker appeals from an Industrial
Commission order entered by Commissioner Staci T. Meyer, with
the concurrence of Commissioners Tammy Nance and Linda Cheatham,
denying his claim for damages stemming from the alleged loss of
certain items of his personal property pursuant to the State
Tort Claims Act. On appeal, Plaintiff contends that the
Commission erred by failing to consider certain evidence and

making certain factual determinations in the course of reaching its decision. 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

In its order, the Commission found as a fact that:

2. On October 13, 2009, Plaintiff was a prison inmate incarcerated in the custody and control of Defendant at Warren Correctional Institution.

3. On October 13, 2009, Plaintiff was taken to court for pending charges in Caswell County. Plaintiff left his personal property in the locker assigned to his bunk as directed by a correctional officer. Plaintiff was housed in a dorm that had as many as 34 inmates. Each inmate was assigned a bunk and a locker.

4. The normal procedure when an inmate is sent to court is that all of the inmate's property is packed by the inmate and taken by the inmate with him to the county's lockup. If the inmate is to be gone for only one day, the inmate will leave his property at the unit.

5. When Plaintiff left Warren Correctional Institution on October 13, 2009, Plaintiff and the correctional officers believed that Plaintiff would be returned to the unit within one day. However, Plaintiff remained in the Caswell County jail in lockup for five months.

6. While Plaintiff was in Caswell County another inmate was assigned to

Plaintiff's bunk and the locker that goes with it. When the inmate had the locker opened so he could place his property in it, Plaintiff's property was discovered and was placed in a bag by an officer and taken to Sergeant Avalos' office for storage. There is no evidence that there was an inventory taken of the property that was removed from the locker and placed in the bag before the bag was placed in Sergeant Avalos' office.

7. When Plaintiff returned to the unit he was told that his property was stored in [Sergeant] Avalos' office. When Plaintiff arrived at Sergeant Avalos' office, [Sergeant] Avalos informed Plaintiff that all his property was in the bag that she gave him. Sergeant Avalos and Plaintiff then inventoried what was in the bag at that time.

8. Plaintiff told Sergeant Avalos that all his property was not there and that he was missing a pair of tennis shoes, eye glasses, law books including North Carolina General Statutes, and some legal papers. Plaintiff told Sergeant Avalos that he had three bags of property when he left and she only had part of one bag of his property.

9. Sergeant Avalos asked Plaintiff why he had left his property in his locker and he told her that he was told to do so by an officer, but Plaintiff could not tell her the name of the officer.

10. The Full Commission finds based upon the evidence of record that Plaintiff failed to prove that all of his property that he left in his locker on October 13, 2009 was not returned to him by Sergeant Avalos when Plaintiff returned to the unit.

11. Plaintiff has failed to show that an employee or agent of Defendant breached a duty of care owed to Plaintiff.

Based upon these findings of fact, the Commission concluded that Plaintiff had failed to prove that he had sustained any injury as the result of negligence on the part of a named employee or agent of defendant and determined that Plaintiff's claim should be denied. Plaintiff noted an appeal to this Court from the Commission's order.¹

II. Substantive Legal Analysis

In his brief, Plaintiff contends that the Commission erred by failing to consider all of the evidence, by deciding to credit certain allegedly perjured testimony, and by considering evidence that "cast doubt" on his case. Although the Commission clearly reached a contrary conclusion, Plaintiff argues that the evidence shows that he lost his property as the result of Defendant's negligence and that he is entitled to compensation for that injury under the State Tort Claims Act. We do not find Defendant's arguments persuasive.

An appeal from the Commission to this Court in an action brought pursuant to the State Tort Claims Act "shall be for

¹Ordinarily, we would include a more detailed description of the factual background underlying and the history of the Commission's consideration of Plaintiff's claim in our opinion. However, Plaintiff's failure to include certain relevant documents in the record on appeal which has been presented for our review or to provide a copy of a transcript of the proceedings held before the Commission for our consideration has precluded us from incorporating this additional information in our opinion.

errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293. In reviewing a decision and award under the State Tort Claims Act, we determine: (1) whether the Commission's findings of fact are supported by competent evidence, and (2) whether the Commission's conclusions of law are supported by the findings of fact. *Simmons v. N.C. Dep't. of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998). Simply put, the Commission, rather than a reviewing court, is responsible for determining the credibility of and weight which should be afforded to the evidence. As long as there is some evidence in the record tending to support them, the Commission's findings of fact are conclusive for purposes of appellate review. *Fennell v. N.C. Dep't. of Crime Control and Pub. Safety*, 145 N.C. App. 584, 590-91, 551 S.E.2d 486, 491 (2001), *cert. denied*, 355 N.C. 285, 560 S.E.2d 800 (2002).

The record on appeal does not contain the stenographic transcript of the hearing before the deputy commissioner or a narration of the testimony presented at that proceeding. "The burden is on an appealing party to show, by presenting a full and complete record, that the record is lacking in evidence to

support the Commission's findings of fact." *Dolbow v. Holland Industrial, Inc.*, 64 N.C. App. 695, 696, 308 S.E.2d 335, 336 (1983), *disc. rev. denied*, 310 N.C. 308, 312 S.E.2d 651 (1984). When "[t]he record does not contain the oral testimony . . . the [lower tribunal's] findings of fact are presumed to be supported by competent evidence." *Fellows v. Fellows*, 27 N.C. App. 407, 408, 219 S.E.2d 285, 286 (1975). In the absence of a showing to the contrary, an appellate court reviewing an order entered at the conclusion of a nonjury proceeding assumes that the trial tribunal disregarded incompetent evidence in making its decision. *City of Statesville v. Bowles*, 278 N.C. 497, 502, 180 S.E.2d 111, 114-15 (1971). As a result, given that we have no basis in the record for reaching a contrary determination, we conclude that the Commission's findings of fact are supported by competent evidence.

The next issue that we must address is the extent, if any, to which the Commission's findings of fact support its conclusions of law and related decision to deny Plaintiff's claim. The State Tort Claims Act permits a plaintiff to recover damages from the State if a plaintiff can show that he or she sustained an injury as a proximate result of a negligent act engaged in by a named state employee acting within the course and scope of his or her employment. N.C. Gen. Stat. § 143-

291(a). The Commission's determination of the extent, if any, to which a named state employee acted negligently must be based upon the same principles that apply in negligence-based civil actions between private citizens. *Barney v. Highway Comm.*, 282 N.C. 278, 284, 192 S.E.2d 273, 277 (1972). "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." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988). After carefully reviewing the trial court's findings of fact, we conclude that the Commission did not commit an error of law by determining that Plaintiff did not establish that Defendant's named employee, Sergeant Avalos, breached a duty of care owed to Plaintiff so as to proximately cause him to sustain an injury given that the Commission's findings, by which we are bound, establish that Plaintiff simply did not prove to the Commission's satisfaction that all of his property was not returned to him. As a result, the Commission's order should be, and hereby is, affirmed.²

²The specific arguments advanced in Plaintiff's brief reflect a misunderstanding of the requirements for successfully prosecuting an appeal from the Commission to this Court or a misapprehension of the applicable standard of review. In the absence of a transcript of the evidentiary hearing held before

AFFIRMED.

Judges GEER and DILLON concur.

Report per Rule 30(e).

the deputy commissioner, we are unable to determine if the various statements which Plaintiff contends that the Commission erroneously failed to consider were proffered for the Commission's consideration or introduced into evidence. Similarly, the same deficiency in the record presented for our review precludes us from determining that the Commission erred by considering other information. Finally, Plaintiff's contention that the Commission should have found the facts consistently with his position and refrained from crediting portions of the evidence apparently presented by Defendant overlooks the fact that the Commission, and not this Court, is the final arbiter of the credibility of and weight to be given to the evidence. As a result, we have no authority to disturb the Commission's decision in reliance on the arguments advanced in Plaintiff's brief.