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NO. COA13-476
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

WILLIAM LEE WALKER

v.

N.C. Industrial Commission
No. TA-22024

N.C. DEPARTMENT OF CORRECTION

Appeal by plaintiff from order filed 18 December 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 October 2013.

William Lee Walker, pro se, plaintiff-appellant.

Attorney General Roy Cooper, by Associate Attorney General Adrian W. Dellinger, for defendant-appellee.

CALABRIA, Judge.

William Lee Walker ("plaintiff") appeals from an order of the North Carolina Industrial Commission ("the Commission"), denying his claim pursuant to the Tort Claims Act. We affirm.

On 15 June 2010, plaintiff, an inmate incarcerated at the North Carolina Department of Correction ("defendant" or "DOC"), filed a claim for damage or loss of personal property against the DOC under the Tort Claims Act. Plaintiff alleged that after

plaintiff was sequestered for an infraction, a DOC officer searched his personal property and damaged plaintiff's King James Bible ("the Bible"). Plaintiff claimed that he had been damaged in the amount of \$1,000.00 by the negligent conduct of a DOC employee.

The DOC filed, *inter alia*, a motion to dismiss, which the Commission denied. After determining that plaintiff failed to prove that DOC was negligent as a result of an employee's actions, Deputy Commissioner George T. Glenn II ("Deputy Commissioner") denied plaintiff's claim. Plaintiff appealed to the Commission.

According to the Commission's order, plaintiff had "not shown good ground to reconsider the evidence, receive further evidence, or rehear the parties or their representatives." The Commission affirmed the order, with minor modifications. Plaintiff appeals.

Plaintiff argues that the Commission erroneously denied his claim by not considering all of the competent evidence, by failing to review the record regarding the Deputy Commissioner's conflict of interest, and by failing to review an interlocutory order. We disagree.

An appeal from the Commission to this Court "shall be for 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 (2011). In reviewing a decision and award under the 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. Dept. of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998). The Commission determines the credibility and weight to be given evidence, and as long as there is some evidence in the record to support them, the findings of fact made by the Commission are conclusive on appeal. *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). "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).

In the instant case, the Commission's specific findings of fact are as follows:

2. On June 15, 2010, plaintiff was a prison inmate incarcerated in the custody and control of defendant at Warren Correctional Institution.

3. Plaintiff alleges that, on June 15, 2010, Officer Charles D. Cooper wrote plaintiff up for having cigarettes in his possession and took him to segregation. Plaintiff further alleges that, while he was in segregation, Officer Cooper searched the property in his locker, which plaintiff alleges included a King James Bible, and that, when he received his property back, the front and back covers of the Bible had been torn and pages were falling out of it.

4. Officer Cooper testified at the hearing before the Deputy Commissioner that he had searched plaintiff's cell on two or three occasions, and that plaintiff was present during the search on each occasion. Officer Cooper did not recall seeing a King James Bible in plaintiff's locker.

5. Officer Cooper further testified that he has never found it necessary to rip any Bible in the course of conducting a search and that he never destroyed or damaged any of plaintiff's property.

The Commission concluded that plaintiff failed to prove negligence on the part of a named employee or agent of defendant, and denied plaintiff's claim.¹

¹ We note that plaintiff has not provided a complete copy of the Commission's order in the record on appeal, but that the partial

The record on appeal filed by plaintiff only includes a portion of plaintiff's and Officer Cooper's testimony. The record and testimony support the Commission's findings of facts two and three. As we do not have access to Officer Cooper's testimony, we must presume that findings of fact four and five are also correct. See *Fellows v. Fellows*, 27 N.C. App. 407, 408, 219 S.E.2d 285, 286 (1975) (noting that 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."). Therefore, the Commission's findings of fact are supported by competent evidence.²

The next issue is whether the Commission's findings of fact support their conclusions of law. The Tort Claims Act permits recovery if the plaintiff can show that he sustained an injury as a proximate result of a negligent act of a named state employee acting within the course and scope of his employment. N.C. Gen. Stat. § 143-291(a) (2011). The determination of whether a named employee is negligent is based upon whether,

copy quoted herein makes it clear that the Commission denied his claim.

² The Commission also included a sixth finding of fact, but as that finding is more akin to a conclusion of law, it will be treated as such. See *Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007) (a finding of fact is "more properly classified a conclusion of law" when the "determination requir[es] the exercise of judgment ...").

"under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina." *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." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988).

In the instant case, the Commission's findings establish that plaintiff failed to prove that Officer Cooper negligently damaged the Bible. Furthermore, as the Commission concluded, "by alleging that Officer Cooper tore the front and back covers off of his Bible, plaintiff has alleged intentional acts that are not properly within the Industrial Commission's jurisdiction under the Tort Claims Act." Therefore, plaintiff has not shown that defendant's named employee, Officer Cooper, breached a duty of care owed to plaintiff.

Plaintiff also argues that the Commission erred by not reviewing the record to determine whether the Deputy Commissioner had a conflict of interest. Plaintiff claims that the Deputy Commissioner should have recused himself from the case because he had heard three prior cases brought by

plaintiff, and ruled the same way in each case. As an initial matter, the record does not reflect that plaintiff ever requested that the Deputy Commissioner recuse himself from the hearing. Thus, plaintiff has failed to preserve this issue for appellate review. N.C.R. App. P. 10(a)(1) (2013). Assuming, *arguendo*, that plaintiff preserved this issue, he has failed to present any evidence of "personal bias, prejudice or interest on the part of the [Deputy Commissioner.]" Therefore, plaintiff has failed to meet his burden of showing "that grounds for disqualification actually exist[ed]." *Lange v. Lange*, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003).

Plaintiff further argues that the Commission did not review the record "as to the continuance base[d] on the Sheriff not serving the subpoenas on the [plaintiff's] witnesses." The transcript makes it clear that defense counsel made an attempt to track down plaintiff's witnesses, but was unable to locate Officer G. Powell as "there [was] no Officer G. Powell at Warren Correction" The record is devoid of any evidence that plaintiff requested a continuance. Therefore, plaintiff failed to preserve this issue for appellate review. N.C.R. App. P. 10(a)(1) (2013).

Finally, plaintiff argues that the Commission failed to review the interlocutory order denying DOC's motion to dismiss. Despite plaintiff's contentions, there is no evidence that the Commission failed to review the interlocutory order denying the DOC's motion to dismiss. According to the State, plaintiff apparently believes the Commission's order found DOC liable for negligence. However, the Commission's order merely denied the DOC's motion to dismiss. Defendant's arguments are without merit. Therefore, we affirm the Commission's order.

Affirmed.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).