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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-659

Filed 19 March 2025

N.C. Industrial Commission, I.C. No. TA-28672

ANTHONY TOWNSEND, Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF ADULT CORRECTION
f/k/a NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Defendant.

Appeal by plaintiff from order entered 6 May 2024 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 February 2025.

Anthony Townsend, pro se plaintiff-appellant.

Attorney General Joshua Stein, by Assistant Attorney General Jayla L. Cole, for defendant-appellee.

FLOOD, Judge.

Plaintiff Anthony Townsend appeals from the North Carolina Industrial Commission's (the "Full Commission") order denying Plaintiff's negligence claim. On appeal, Plaintiff argues (A) the Full Commission erred when it did not compel his case manager, Mr. Freddie Harris, to testify at trial where there was a legally binding subpoena, and (B) the Full Commission cannot assess the credibility of Mr. Harris,

in the absence of his sworn testimony. Upon review, we conclude the Full Commission did not err when it did not compel Mr. Harris to testify where the subpoena was never served on him, and the Full Commission could assess the credibility of Mr. Harris based on his written testimony.

I. Factual and Procedural Background

On 26 June 2020, Plaintiff filed a Form T-1 Affidavit with the Full Commission, alleging that he had been assaulted by another inmate at the Sampson Correctional Institution, where Plaintiff was being housed at the time, and alleging the North Carolina Department of Adult Correction (“Defendant”) had been negligent in failing to protect Plaintiff. On 14 September 2020, Defendant filed a motion to dismiss, an answer with an affirmative defense, a motion to strike, and a motion for a protective order. The Full Commission’s Special Deputy Commissioner, Katashia Cooper (“SDC Cooper”), held a pretrial conference and held a motions hearing on 18 May 2021. Two days later, SDC Cooper entered an order denying Defendant’s motion to dismiss, but granting Defendant’s motion for a protective order and motion to strike.

On 25 August 2022, the Full Commission’s Deputy Commissioner Thomas Perlungher held an evidentiary hearing on the matter. Prior to the hearing, Plaintiff had provided the Full Commission with a list of witnesses he intended to produce, which included Mr. Harris. Defendant provided the Full Commission with the last known address for Mr. Harris, and the Full Commission issued a subpoena for Mr. Harris at that address. At the beginning of the hearing, Plaintiff was advised by

Deputy Commissioner Perlungher that the subpoena issued to Mr. Harris was undeliverable, as he no longer resided at the address provided. Plaintiff indicated his intent to proceed with the hearing in Mr. Harris' absence.

At the hearing, Plaintiff "testified consistent with his [Form T-1 Affidavit,]" that on 11 March 2020, Plaintiff went to speak with his case manager, Mr. Harris, regarding Plaintiff's criminal charges.¹ Plaintiff stated that: he "explained to Mr. Harris in complete detail the ongoings of harassment, threats and bodily harm by three different individual inmates or offenders"; "the threats were going on for weeks"; and these incidents "need to be addressed or someone could get hurt." Further, Plaintiff testified that Mr. Harris told him that he would "look into it." Plaintiff then testified as to the 16 March 2020 assault that occurred a few days after this conversation. Plaintiff claimed he was assaulted from behind by one of the offenders he had described to Mr. Harris, and the offender bit Plaintiff on the head, "leaving deep teeth marks[.]" Plaintiff explained that he was taken to the onsite medical facility where he was treated for his injuries. According to Plaintiff, he was given a T-DAP shot "because [of] the bites" and he vomited "for over an hour" following the incident.

During the hearing, Plaintiff admitted six pages of grievances and responses between him and Defendant, including Plaintiff's grievance report to Defendant sent

¹ Plaintiff's criminal charges are not relevant to this appeal.

on 30 March 2020, regarding the assault and explaining Plaintiff's prior expressed concern to Mr. Harris, and Defendant's response from 7 April 2020. Defendant's response stated: it had "reviewed [Plaintiff's] grievance"; Mr. Harris had seen Plaintiff for notary services and to discuss his criminal charges on 13 March 2020, rather than Plaintiff's original report of 11 March 2020; and that Plaintiff "did not discuss the issues concerning [the offender] until March 19, 2020," which was after the assault occurred.

Plaintiff claimed Mr. Harris had incorrectly indicated in his response that Mr. Harris saw Plaintiff on 13 March 2020 instead of 11 March 2020. Plaintiff also testified that Mr. Harris notarized his letter on 11 March 2020, as was shown in Plaintiff's Exhibit 1. On cross-examination, Plaintiff admitted that he spoke to his work supervisor about the offender prior to the attack, but that he never requested protective custody from anyone. Plaintiff conceded that he never spoke to any housing staff members about the offender and the threat of attacks.

After the hearing, Deputy Commissioner Perlungher entered an order on 1 March 2023 denying Plaintiff's negligence claim, finding that "[b]ased upon the preponderance of the evidence in view of the entire record, there is insufficient evidence to find that [D]efendant was on notice that [P]laintiff may be attacked by this offender[.]"

On 3 April 2023, Plaintiff filed a notice of appeal, evincing his intent to appeal to the Full Commission. On 6 May 2024, the Full Commission filed a decision and

order denying Plaintiff's negligence claim (the "Full Commission's Order"). In the Full Commission's Order, the Full Commission found "that Plaintiff has not shown that Defendant's employees knew, or in the exercise of reasonable care should have known, that Plaintiff would be the victim of an assault on March 16, 2020." On 28 May 2024, Plaintiff filed a notice of appeal from the Full Commission's Order.

II. Jurisdiction

This Court has jurisdiction to review Plaintiff's appeal pursuant to N.C.G.S. §§ 7A-29 and 143-293 (2023).

III. Standard of Review

"[T]he findings of fact of the [Full] Commission shall be conclusive if there is any competent evidence to support them." N.C.G.S. § 143-293. Our review of the Full Commission's Order "is limited to two questions of law: (1) whether there was any competent evidence before the [Full] Commission to support its findings of fact; and (2) whether the findings of fact of the [Full] Commission justify its legal conclusion and decision." *Taylor v. N.C. Dep't of Corr.*, 88 N.C. App. 446, 448 (1988) (citation omitted). "Unchallenged findings of fact are binding on appeal." *Jones v. N.C. Dep't of Pub. Safety*, 293 N.C. App. 611, 615 (2024) (citation omitted). "Conclusions of law are reviewed de novo." *Id.* at 615 (citation omitted). "Under a de novo review, the reviewing court considers the matter anew and freely substitutes its own judgment for the [Full Commission.]" *eDealer Servs., LLC v. N.C. Dep't of Transp.*, 293 N.C. App. 27, 33 (2024) (citation omitted) (cleaned up).

IV. Analysis

On appeal, Plaintiff argues (A) the Full Commission erred when it did not compel Mr. Harris to testify at trial where there was a legally binding subpoena, and (B) the Full Commission cannot assess the credibility of Mr. Harris in the absence of his sworn testimony. We address each argument, in turn.

A. Compelling Mr. Harris

Plaintiff first argues on appeal that the Full Commission should have compelled Mr. Harris to testify at the hearing on 25 August 2022, where there was a legally binding subpoena. We disagree.

Under our General Statutes, “[s]ubject to the protections of Rule 45(c), the obligation to appear as a witness is perfected when the subpoena is served on the witness.” *Greene v. Hoekstra*, 189 N.C. App. 179, 181 (2008) (referencing N.C.R. Civ. P. Rule 45(e)(1)). A subpoena may be served “by delivering a copy thereof to that person or by registered or certified mail, return receipt requested[,]” or, if the subpoena is “for the attendance of a witness only[,]” it “may also be made by telephone communication with the person named therein only by a sheriff, the sheriff’s designee who is not less than 18 years of age and is not a party, or a coroner.” N.C.R. Civ. P. Rule 45(b)(1). “When witnesses are not under subpoena . . . their absence places no obligation upon the trial judge to subpoena them.” *State v. Wells*, 290 N.C. 485, 491 (1976).

Here, Mr. Harris was never served with the subpoena, as the subpoena was

undeliverable since he no longer resided at the address provided. Because Mr. Harris was therefore not under subpoena, the Full Commission had no obligation to compel Mr. Harris to testify, since he was absent. *See Wells*, 290 N.C. at 491; *see also* N.C.R. Civ. P. Rule 45(b)(1). Accordingly, Plaintiff's argument is without merit, and we find no error on part of the Full Commission.

B. Credibility of Mr. Harris

Plaintiff next argues the Full Commission cannot assess the credibility of Mr. Harris in the absence of his sworn testimony. We disagree.

“The [Full] Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.” *Adams v. AVX Corp.*, 349 N.C. 676, 680 (1998) (citation omitted). “In reviewing the findings found by a deputy commissioner[,] . . . the [Full] Commission may review, modify, adopt, or reject the findings of fact found by the hearing commissioner.” *Watkins v. City of Wilmington*, 290 N.C. 276, 280 (1976). “It is the [Full] Commission that ultimately determines credibility, whether from a cold record or from live testimony.” *Adams*, 349 N.C. at 681. “The [Full] Commission may assign more weight and credibility to certain testimony than other. Moreover, if the evidence before the [Full] Commission is capable of supporting two contrary findings, the determination of the [Full] Commission is conclusive on appeal.” *Johnson v. Herbie's Place*, 157 N.C. App. 168, 175 (2003) (citation omitted).

Here, the Full Commission appropriately determined Mr. Harris' credibility

Opinion of the Court

from “a cold record.” *See Adams*, 349 N.C. at 681. Although Mr. Harris’ written testimony was inconsistent with Plaintiff’s sworn testimony, and thus a contrary finding could have been made by the Full Commission, the Full Commission had the discretion to “assign more weight and credibility to certain testimony than other[.]” as it did here. *See Johnson*, 157 N.C. App. at 175. Accordingly, the Full Commission was able to determine the credibility of Mr. Harris’ written testimony, and Plaintiff’s argument is overruled. *See Adams*, 349 N.C. at 681. We therefore affirm the Full Commission’s Order.

V. Conclusion

Upon review, we conclude the Full Commission did not err when it did not compel Mr. Harris to testify where the subpoena was never served on him, and the Full Commission could assess the credibility of Mr. Harris based on his written testimony.

AFFIRMED.

Judges STROUD and GRIFFIN concur.

Report per Rule 30(e).