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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-394

No. COA21-606

Filed 7 June 2022

Industrial Commission No. 13-706850

DIANE J. KIRBY, Employee, Plaintiff,

v.

MISSION HOSPITAL, INC., Employer, SELF-INSURED, Defendant.

Appeal by Plaintiff from opinion and award entered 20 May 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 April 2022.

Ganly & Ramer, by Thomas F. Ramer, for Plaintiff-Appellant.

Brewer Defense Group, by Joy H. Brewer, for Defendant-Appellee.

COLLINS, Judge.

¶ 1 In 2013, the Industrial Commission approved a Form 26A, Employer's Admission of Employee's Right to Permanent Partial Disability, providing Plaintiff Diane J. Kirby compensation for a left knee injury she suffered while working for Defendant Mission Hospital, Inc. Plaintiff appeals from an opinion and award denying her request to set aside the Form 26A, her claim for additional compensation due to change of condition, and her request for authorization for additional medical treatment. Plaintiff argues that Commission's finding that she reached maximum

medical improvement ("MMI") for her injury on 29 April 2013 was unsupported by competent evidence, the Commission erred by declining to set aside the Form 26A, and portions of the Commission's findings regarding her orthopedist's testimony were unsupported. We affirm the Commission's opinion and award.

I. Background

¶ 2 On 20 September 2012, while working for Defendant as a registered nurse, Plaintiff tripped in a patient room and suffered an admittedly compensable injury to her left knee. Plaintiff was initially treated at Mission Staff Health, where "she was diagnosed with knee pain and provided with work restrictions." Mission Staff Health referred Plaintiff to an orthopedist and Plaintiff saw Dr. Tally Eddings on 26 September 2012. Dr. Eddings "diagnosed Plaintiff with left knee pain, mechanical-type symptoms, from a twisting-type injury," ordered an MRI, and continued Plaintiff's work restrictions. The MRI "showed a tear of the anterior horn medial meniscus associated with a para meniscal cyst, medial compartment osteoarthritis, and moderate effusion." On 13 November 2012, Dr. Eddings continued Plaintiff's work restrictions and recommended an arthroscopic evaluation.

¶ 3 After Plaintiff requested a second opinion, Defendant authorized an evaluation with Dr. Jesse West. Dr. West saw Plaintiff on 3 December 2012 and diagnosed her with a "medial meniscal tear," recommended arthroscopic surgery, and continued her work restrictions. Dr. West performed arthroscopic surgery on Plaintiff on

18 December 2012 and Plaintiff attended physical therapy. With Dr. West's authorization, Plaintiff began light-duty work on 14 January 2013.

¶ 4 On 18 January 2013, Plaintiff reported to Dr. West that "she had been experiencing difficulty since falling the night after her arthroscopic surgery." Dr. West diagnosed Plaintiff with a medial collateral ligament strain and ordered her to wear a hinged knee brace during her recovery from the strain, continue physical therapy, and be restricted to sedentary work.

¶ 5 On 8 February 2013, Dr. West noted "that Plaintiff was ambulating well without pain or complaints." Dr. West recorded "minimal swelling" but noted that "Plaintiff reported medial tenderness out of proportion with [his] expectations." Dr. West "continued physical therapy and allowed Plaintiff to return to light duty work."

¶ 6 On 11 March 2013, Dr. West "noted that Plaintiff's anterior knee pain and her medial tear had resolved, but that Plaintiff was reporting pain at the medial epicondyle of her femur" and "no improvement in her symptoms." Dr. West ordered an MRI, which "showed a normal transverse meniscal ligament and no meniscal tears, but grade four medial femoral condyle chondromalacia." Dr. West performed a steroid injection and continued Plaintiff's work restrictions.

¶ 7 Plaintiff met with Defendant's representatives at the beginning of April 2013 to "discuss Plaintiff's inconsistent attendance at physical therapy as well as inconsistencies between Plaintiff's reported physical status and surveillance video of

her activities." Defendant's notes reflected that Plaintiff reported "staying off her knee" and "it hurt 'worse than it ever has' after her recent steroid injection," but surveillance videos showed Plaintiff "standing, walking, bending, shopping, operating a motor vehicle, and visiting multiple retail locations," though "with a noticeable limp."

¶ 8 Dr. West next saw Plaintiff on 29 April 2013. At that time, he "noted that there had been no significant changes in her symptoms." A physical exam of Plaintiff's left knee "showed no swelling, normal strength and reflexes, no abnormal knee tests, and close to normal range of motion." Dr. West concluded that Plaintiff's left knee strains had healed. Plaintiff reported "medial joint line tenderness and pain in her knee, rated a six out of ten" and Dr. West "indicated that Plaintiff was still suffering from grade four medial femoral condyle chondromalacia." Dr. West observed "that Plaintiff's reports of pain were unaffected by conservative measures." Dr. West wrote that,

> [a]t this point, I recommend a second opinion by Dr. Barnett if she wishes. Assuming no benefit is derived from Dr. Barnett's involvement, I would declare her MMI today and rate her for her arthroscopic scars (2%), ongoing painful limp (5%), and her cartilage injury (5%) for a 12% total [permanent partial impairment] for the left leg.

Plaintiff returned to her pre-injury position with Defendant on 1 May 2013 after Dr. West released Plaintiff to work with no restrictions. Additionally, Dr. West prepared

a Form 25R, Evaluation for Permanent Impairment, stating that Plaintiff had reached MMI for her left leg and rating her at a 12% permanent partial impairment.

¶ 9 "[S]hortly after Dr. West's release of Plaintiff" Plaintiff requested that Defendant authorize an appointment with Dr. Barnett. Defendant's "claims professional responded that Plaintiff could make the appointment herself," but Defendant "would need to seek clarification from Dr. West before authorizing such an appointment" because "Dr. West had released Plaintiff at MMI with no restrictions." On 2 May 2013, Defendant's claims professional wrote Dr. West requesting clarification of his 29 April 2013 notes.

¶ 10 Dr. West responded that Plaintiff "ha[d] reached MMI from [his] standpoint." Dr. West indicated that "Plaintiff's cartilage loss was discovered during her left knee arthroscopy and was not resolved by conservative treatment." Dr. West explained that "Plaintiff asked what additional treatment could be provided for her cartilage loss, to which he had responded that she could seek 'some form of knee replacement (likely partial knee replacement).'" However, Dr. West "does not perform knee replacements, so he indicated that Dr. Barnett could provide a second opinion 'where he would likely either agree that she is MMI or offer some type of knee replacement.'"

¶ 11 Plaintiff again requested that Defendant authorize an appointment with Dr. Barnett, but Defendant declined to do so because "Dr. West had indicated that he had no additional treatment to offer for Plaintiff's compensable injury and that she had

already received a second opinion when she had requested to see a provider other than Dr. Eddings." Defendant "offer[ed] a second opinion on the rating" but Plaintiff refused.

¶ 12 On 3 July 2013, Defendant provided Plaintiff with the Form 26A providing that Defendant would pay her compensation for a 12% permanent partial disability to the left leg under N.C. Gen. Stat. § 97-31. The Form 26A indicated "that Plaintiff has returned to full time work with no restrictions." Plaintiff executed the Form 26A and returned it to Defendant. Defendant "executed the Form 26A and attempted to send the Form 26A, Plaintiff's medical records, and a check to the Industrial Commission for approval," but "Defendant's claims representative inadvertently switched the package with the materials for the Industrial Commission with the package for Plaintiff, which also included Plaintiff's medical records."

¶ 13 Hugh Harris, then the director of the Claims Section of the Commission, approved the Form 26A on 27 August 2013. Upon receiving the approved Form 26A, Defendant issued a check to Plaintiff for her left leg rating; filed a Form 28B, Report of Employer or Carrier/Administrator of Compensation and Medical Compensation Paid and Notice of Right to Additional Medical Compensation ("Form 28B"); and provided the Form 28B to Plaintiff. Like the Form 26A, the Form 28B stated that Plaintiff had returned to work. Plaintiff continued working in her pre-injury position until she suffered a separate injury to her right foot on 14 October 2013.

¶ 14 On 24 August 2015, Plaintiff filed a Petition to Reopen alleging that she was "having increasing disability such as would qualify as [a] change of condition under" N.C. Gen. Stat. § 97-47. The Petition to Reopen stated that Plaintiff sought to "receive her entitlement to additional medical care, additional temporary total disability, additional permanent partial disability, and/or permanent total disability as determined by her physicians."

¶ 15 Defendant denied the claims in Plaintiff's Petition to Reopen. "Plaintiff did not seek any additional medical treatment from Defendant" or "report any complaints in her left knee to any medical provider" until 12 April 2016. On that date, Plaintiff "reported to her primary care provider that she was experiencing left knee pain, which had begun three years earlier, but was worsening at the time of the appointment." Plaintiff's primary care provider referred her to Dr. Charles DePaolo, an orthopedic surgeon who subsequently performed arthroscopic surgery on Plaintiff.

¶ 16 Plaintiff filed a Form 33, Request that Claim be Assigned for Hearing, on 21 June 2017 ("Initial Form 33"). Plaintiff's Initial Form 33 sought additional medical compensation and requested the Commission "set aside the Form 26A . . . based on misrepresentation and/or the Commission's failure to properly evaluate and approve the Form 26A" as required by N.C. Gen. Stat. § 97-17. Defendant contended that Plaintiff had failed to establish a change of condition, was not entitled to any additional benefits for her 2012 left knee injury, and had not shown a basis to set

aside the Form 26A. Plaintiff removed her Initial Form 33 from the hearing calendar because she had another claim against Defendant pending an opinion and award. On 16 July 2018, Plaintiff filed a new Form 33 seeking the same relief as her Initial Form 33. Following a hearing, the Deputy Commissioner entered an opinion and award denying Plaintiff's requested relief and Plaintiff appealed to the Full Commission.

¶ 17 The Commission entered an opinion and award affirming the Deputy Commissioner. The Commission made the following pertinent findings of fact:

> 29. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff reached MMI for her left knee injury on April 29, 201[3]. The Full Commission notes that Dr. West's notes repeatedly stated that Plaintiff had reached MMI and that Dr. West prepared and signed a Form 25R attesting to the fact that Plaintiff had reached MMI. Although Dr. West offered Plaintiff the option to seek a second opinion, Dr. West's notes indicate that he felt she was not in immediate need of a knee replacement. Additionally, Dr. West testified at his deposition that based upon his review of the surveillance videos, he would not have recommended a knee replacement surgery at the time of her April 29, 2013 release and that Plaintiff's recovery had plateaued at Plaintiff's prior visit with Dr. West in March 2013. The Full Commission also notes that Plaintiff's presentation to Dr. DePaolo in April 2016 was consistent with her condition when she was released by Dr. West on April 29, 2013.
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> 30. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that the Form 26A signed by Plaintiff . . . was not obtained due

to a misrepresentation by Defendant. In reaching this finding, the Full Commission finds that Plaintiff's testimony is not credible that she did not receive Dr. West's responses to Defendant's inquiries in May 2013 or a copy of her medical records during the Form 26A process. Defendant produced documentation that Dr. West's notes were e-mailed to Plaintiff after their receipt. Additionally, in August 2013, Plaintiff received the Form 26A approval package intended for the Industrial Commission, which would have included a copy of Plaintiff's medical records. As Plaintiff had access to Dr. West's responses to Defendant's May 2013 inquiries regarding his April 29, 2013 note, Defendant was not in a position to misrepresent Dr. West's explanation to Plaintiff. Additionally, the Full Commission finds that Defendant's representation that it was required to pay Plaintiff for her permanent impairment rating after she returned to her pre-injury position with no restrictions and that Defendant had already provided her with a second opinion when it allowed her to obtain care with Dr. West were not misrepresentations.

31. Additionally, the Full Commission finds that the Form 26A that Plaintiff signed, along with the Form 28B served on her following the August 27, 2013 Form 26A approval both clearly indicated that Plaintiff had the right to apply to the Industrial Commission to seek medical authorization for additional treatment. Therefore, to the extent that Plaintiff contends that Defendant made a misrepresentation by not informing her that she could apply to the Industrial Commission to try to compel a second opinion, the Full Commission finds that Plaintiff had constructive, if not actual knowledge, to the contrary.

32. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that the Industrial Commission performed a full investigation when it approved the . . . Form 26A as fair and just. . . . [T]he Form 26A that Plaintiff signed included language

informing her of her right to apply to the Industrial Commission for authorization for additional medical treatment, and when such application would be untimely. As such, the Full Commission finds that the Claims Section was not required to affirmatively reach out to Plaintiff to determine whether she was aware of her rights to make an application to the Industrial Commission for authorization of additional medical treatment. Additionally, the Full Commission finds that based on the Form 26A submitted, the Form 25R, and Plaintiff's relevant medical records, the Claims Section was able to perform a full investigation determining that the Form 26A was fair and just as the documents reviewed established that Plaintiff had been released to return to work with no restrictions, had returned to work at her pre-injury wages, had been released at MMI by her treating physician, that Plaintiff would not be entitled to greater benefits under N.C. Gen. Stat. §§ 97-29 or 97-30, and that the Form 26A had been properly completed.

33. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff did not make an application to modify due to a change of condition from the . . . Form 26A within two years of the last payment under the Form 26A, which would be September 16, 2015. Although Plaintiff filed a *Petition to Reopen* on August 24, 2015, the document provided no basis to establish that Plaintiff had experienced a change of condition, as it only included boilerplate language that she was seeking additional benefits. The *Petition to Reopen* was not accompanied by a motion or request for a hearing seeking any action from the Industrial Commission under any provision of the Workers' Compensation Act. The Industrial Commission advised Plaintiff the *Petition to Reopen* was received, placed in the Commission's file, and any further action on the motion could be taken by Plaintiff filing a Form 33. Plaintiff took no steps to seek a ruling from the Industrial Commission on whether she had sustained a compensable change of condition until over a

year and a half after the *Petition to Reopen*, when she filed a Form 33. Additionally, the Full Commission finds that the *Petition to Reopen* was not supported by the facts of the case at the time it was filed, as on August 24, 2015, not only had Plaintiff not sought any treatment for her left knee in over two years, she had not even complained to any medical provider about her left knee. It was not until April 12, 2016, over seven months later, that Plaintiff reported an issue with her left knee to any medical provider.

34. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that, even assuming that Plaintiff had timely applied to modify the . . . Form 26A due to a change of condition, Plaintiff failed to meet her burden to establish a substantial physical change or any change in her capacity to earn wages due to her left knee. The Full Commission finds that the physical condition of Plaintiff's left knee at the time she presented to Dr. DePaolo in April 2016 was roughly analogous to her condition at the time she was released by Dr. West. Plaintiff was still experiencing chondromalacia in her left knee, with the same level of reported pain. However, in addition to no noticeable physical changes, Plaintiff presented no evidence that she experienced any substantial change in her ability to earn wages due to a change of conditions in her left knee, as she has provided no evidence that any medical provider has provided restrictions related to her left knee, that she has made any job search, that it would be futile for her to seek employment, or that she is working at a lower wage.

35. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff did not apply to the Industrial Commission for additional medical treatment within two years of the last compensation provided in this claim, which occurred on September 16, 2015. The Full Commission finds that not only did Plaintiff not file a Form 18M or motion with the Industrial Commission within two years of receipt of her

> last compensation in this matter, Plaintiff did not even report to a medical provider that she was experiencing any issues with her left knee until roughly thirty-one months after she last received benefits. Additionally, the Full Commission notes that even after Plaintiff filed her *Petition to Reopen*, Plaintiff took no action to file a medical motion, or any other motion to seek that Defendant provide additional medical treatment until she filed a Form 33 in August 2017.

¶ 18 The Commission declined to set aside the Form 26A because it concluded that "Plaintiff has failed to meet her burden to establish that the Form 26A was the product of fraud, misrepresentation, undue influence, or mutual mistake," "failed to present any other evidence to support her claim that the Form 26A . . . should be set aside," and "failed to rebut the presumption that the Form 26A . . . was approved after a full investigation and determination that it was fair and just." The Commission denied Plaintiff's request for compensation for a change of condition because it concluded that Plaintiff was "barred from asserting that she has experienced a compensable change in condition pursuant to the limitations period set in N.C. Gen. Stat. § 97-47," and in the alternative, Plaintiff had "not established that she sustained a change in condition related to her left knee." The Commission concluded that Plaintiff's claim for authorization for additional medical treatment for her left knee was barred by her failure to seek additional medical compensation within two years of Defendant's last payment of medical compensation as required by N.C. Gen. Stat. § 97-25.1. Plaintiff appealed to this Court.

II. Discussion

¶ 19 Plaintiff challenges several of the Commission's findings of fact and its conclusion that the Form 26A should not be set aside. "Appellate review of an opinion and award from the Industrial Commission is generally limited to determining: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Hassell v. Onslow Cnty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (quotation marks and citation omitted). Where a party challenges a finding of fact made by the Commission, "[t]his court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (quotation marks and citation omitted). "[T]he Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there [is] evidence that would support findings to the contrary." *Hassell*, 362 N.C. at 305, 661 S.E.2d at 714. The Commission's findings "may be set aside on appeal only when there is a complete lack of competent evidence to support them." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980) (citation omitted). Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal. *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009). We review the Commission's conclusions of law de novo. *Nay v. Cornerstone Staffing*

Solutions, 380 N.C. 66, 2022-NCSC-8, ¶ 17.

A. Date of Maximum Medical Improvement

¶ 20 Plaintiff argues that the Commission's finding that she reached MMI for her left knee injury on 29 April 2013 is not supported by competent evidence. Plaintiff contends that, because this finding is unsupported, the Commission's conclusion that "Plaintiff entered into a valid Form 26A with Defendant to provide payment for the impairment rating" must be reversed.

¶ 21 "Under the Workers' Compensation Act, an injured employee who suffers some degree of loss or permanent injury to a body part, as enumerated in [N.C. Gen. Stat.] § 97-31, is entitled to collect permanent disability compensation for a 'statutorily-prescribed period of time . . . which begins when the healing period ends and runs for the specific number of weeks set forth in the statute.'" *Harrison v. Gemma Power Sys., LLC*, 369 N.C. 572, 581, 799 S.E.2d 855, 862 (2017) (quoting *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 11, 562 S.E.2d 434, 442 (2002)). "[T]he healing period [under section 97-31] ends at the point when the injury has stabilized, referred to as the point of 'maximum medical improvement[.]'" *Knight*, 149 N.C. App. at 12, 562 S.E.2d at 442. "At that point, a treating or evaluating physician typically assigns to the injured employee a 'permanent partial impairment rating,' which corresponds to the degree of permanent impairment to the body part." *Harrison*, 369 N.C. at 581, 799 S.E.2d at 862 (citation omitted). Whether a workers' compensation claimant has

reached MMI for an injury is a question of fact. *Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 116, 598 S.E.2d 185, 188 (2004).

¶ 22 In this case, the Commission made the following unchallenged findings of fact: On 29 April 2013, Dr. West "noted that there had been no significant changes in [Plaintiff's] symptoms" and "Plaintiff's reports of pain were unaffected by conservative measures." That day, Dr. West signed a Form 25R, Evaluation for Permanent Impairment, stating that Plaintiff was at MMI for her left leg injury. Dr. West released Plaintiff to work without restrictions and Plaintiff returned to her pre-injury position. Plaintiff remained in that position until she sustained a separate injury to her right foot in October 2013. These unchallenged findings of fact support the Commission's finding that Plaintiff reached MMI on 29 April 2013.

¶ 23 Plaintiff argues that "the recommendation for further medical evaluation for possible surgery is evidence the claimant has not reached MMI." Plaintiff contends that Dr. West's notes demonstrate that his assessment Plaintiff had reached MMI "was contingent upon further evaluations by Dr. Barnett" and "before Dr. West's declaration of MMI could mature, the Dr. Barnett evaluation would have to occur, which in this case it did not." Plaintiff emphasizes the portion of Dr. West's 29 April 2013 notes stating that,

> [a]t this point, I recommend a second opinion by Dr. Barnett if [Plaintiff] wishes. Assuming no benefit is derived from Dr. Barnett's involvement, I would declare

> her MMI today and rate her for her arthroscopic scars (2%), ongoing painful limp (5%), and her cartilage injury (5%) for a 12% total PPI rating for the left leg.

In support of this argument, Plaintiff cites *Aderholt v. A.M. Castle Co.*, 137 N.C. App. 718, 529 S.E.2d 474 (2000) and *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 656 S.E.2d 608 (2008). However, both *Aderholt* and *Johnson* are distinguishable.

¶ 24 In *Aderholt*, the defendants challenged the Commission's finding that the plaintiff had reached MMI for his spinal injury at the date of his last evaluation with one of his doctors. 137 N.C. App. at 721, 529 S.E.2d at 477. At this evaluation, the doctor "strongly encouraged plaintiff to see a neurosurgeon" for surgery to avoid the likelihood that problems stemming from his compensable injuries would worsen. *Id.* at 720, 529 S.E.2d at 476. The plaintiff refused, however, because he did not want to undergo any further surgery. *Id.* This Court held that the plaintiff's "refusal to undergo further surgeries as recommended" supported the Commission's finding that he had reached MMI for his injuries. *Id.* at 722, 529 S.E.2d at 478.

¶ 25 In *Johnson*, the defendant challenged the Commission's finding that the plaintiff had not reached MMI for carpal tunnel syndrome. 188 N.C. App. at 397, 656 S.E.2d at 618. After conducting studies, the plaintiff's doctor "did not feel [p]laintiff should continue to work until after surgery" and wrote plaintiff out of work. *Id.* The plaintiff underwent surgery, but only on his left hand; "was only able to go to [physical] therapy a couple of times before his health insurance ran out"; and was

never released back to work by a doctor. *Id.* The doctor testified that he would need to conduct another exam to determine whether the plaintiff would continue to have problems with his right hand and whether surgery was necessary. *Id.* The doctor further opined that the plaintiff "would need further medical treatment for his hands" if he had not received any treatment since the doctor's last exam. *Id.* at 397-98, 656 S.E.2d at 618. This Court held that the evidence "tend[ing] to show that [p]laintiff's medical treatment for his carpal tunnel syndrome may not be complete, that [p]laintiff requires further medical evaluation at a minimum, and that [p]laintiff's condition has not stabilized" supported the Commission's finding that the plaintiff had not reached MMI. *Id.* at 398, 656 S.E.2d at 618-19.

¶ 26 Here, there is no evidence that Plaintiff had been recommended surgery for her left knee as of 29 April 2013. Though Dr. West mentioned a potential evaluation by Dr. Barnett in his 29 April 2013 notes, he subsequently clarified his belief that Plaintiff "has reached MMI from my standpoint." Dr. West also released Plaintiff to work with no restrictions, Plaintiff returned to full-duty work, and Dr. West completed the Form 25R indicating that Plaintiff was at MMI.

¶ 27 Moreover, the Commission found that Dr. West did not believe Plaintiff required a knee replacement as of 29 April 2013. Relying on *Malloy v. Davis Mechanical, Inc.*, 217 N.C. App. 549, 720 S.E.2d 739 (2011), Plaintiff contends that the Commission should not have considered this opinion in determining when

Plaintiff reached MMI because it was based on Dr. West's viewing of 2013 surveillance footage in 2019, prior to his deposition. Plaintiff argues that "the relevant opinion from Dr. West is the one made at the time the Form 26A in question was approved," based only on the "evidence exist[ing] at that time." We disagree. *Malloy* held that in determining whether a settlement agreement is fair and just under N.C. Gen. Stat. § 97-17, the Commission must evaluate the "agreement based strictly on the evidence available at the time the agreement was reached." *Id.* at 555, 720 S.E.2d at 743. *Malloy* did not prohibit the Commission from considering Dr. West's opinion in determining when Plaintiff reached MMI.

¶ 28 The Commission's finding that Plaintiff reached MMI for her left knee injury was supported by competent evidence, and therefore "will not be disturbed on appeal . . . even if there is contrary evidence in the record." *Hawley v. Wayne Dale Const.*, 146 N.C. App. 423, 427, 552 S.E.2d 269, 272 (2001) (citations omitted).

B. Request to Set Aside the Form 26A

¶ 29 Plaintiff next argues that the Commission erred by concluding that the Form 26A was approved upon a full investigation to ensure that it was fair and just and declining to set it aside. Plaintiff contends that prior to approving the Form 26A, Harris was obligated to "undertake some affirmative action," "[e]ither in writing or via direct contact by phone," to determine that she understood her rights.

¶ 30 Under the Workers' Compensation Act, the "Commission shall not approve a

settlement agreement . . . unless," inter alia, "[t]he settlement agreement is deemed by the Commission to be fair and just, and that the interests of all of the parties and of any person, including a health benefit plan that paid medical expenses of the employee[,] have been considered." N.C. Gen. Stat. § 97-17(b)(1). Our Supreme Court has held that this statute requires

> a full investigation and a determination that a Form 26 compensation agreement is fair and just, in order to assure that the settlement is in accord with the intent and purpose of the Act that an injured employee receive the disability benefits to which he is entitled, and particularly, that an employee qualifying for disability compensation under both sections 97-29 and -31 have the benefit of the more favorable remedy.

Vernon v. Steven L. Mabe Builders, 336 N.C. 425, 432-33, 444 S.E.2d 191, 195 (1994).

¶ 31 Plaintiff cites both *Vernon* and *Kyle v. Holston Group*, 188 N.C. App. 686, 656 S.E.2d 667 (2008), for the proposition that the Commission was obligated to affirmatively contact her prior to approving the Form 26A, but *Vernon* and *Kyle* do not impose such a requirement. The plaintiff in *Vernon*, "who was illiterate, unrepresented, and unknowledgeable about workers' compensation benefits," signed a Form 26 providing for permanent partial disability benefits under section 97-31. 366 N.C. at 428, 444 S.E.2d at 192. "An employee in the claims department simply checked the rating listed on the form against the physician's report attached thereto, verified the payment information, and approved the agreement." *Id.* The physician's

report stated "that the physician did not think plaintiff could return to work," indicating that the plaintiff may have been entitled to more favorable permanent total disability benefits under section 97-29. *Id.* at 434, 444 S.E.2d at 195. The Supreme Court held that the Commission failed to conduct a full examination to determine the fairness of the agreement because the claims department employee "apparently assumed, rather than determined, that plaintiff was knowledgeable about workers' compensation benefits, and, particularly, his right to claim permanent total disability compensation under section 97-29 rather than permanent partial disability compensation under section 97-31." *Id.* at 434, 444 S.E.2d at 195-96.

¶ 32 In *Kyle*, the unrepresented plaintiff was "unaware at the time of settling his case that, under the law, he was entitled to the most favorable remedy available to him, including total disability benefits if he was totally disabled." 188 N.C. App. at 696, 656 S.E.2d at 674. After making a settlement offer based on calculations of temporary partial disability payments, the plaintiff signed a settlement agreement for $ 60,000. *Id.* at 689, 656 S.E.2d at 669. Prior to approving the agreement, the Commission requested information showing the likelihood the plaintiff would be able to work in the future and received a memo from defense counsel indicating the plaintiff did not wish to participate in vocational rehabilitation but felt capable of finding work in another occupation on his own. *Id.* at 698, 656 S.E.2d at 675-76. However, the evidence, including the plaintiff remaining out of work more than three

years after his injury, "raise[d] questions as to whether [p]laintiff may have been entitled to total disability benefits under N.C. Gen. Stat. § 97-29 instead of benefits under N.C. Gen. Stat. §§ 97-30 or 97-31." *Id.* at 700, 656 S.E.2d at 675. This Court accordingly held that the Commission was obligated "to inquire into the possibility that [the] case was a total disability case rather than a scheduled injury or partial disability case." *Id.* at 700, 656 S.E.2d at 676. The Court suggested—but did not require—that the Commission do so by contacting the plaintiff to verify the assertions in defense counsel's memo. *Id.*

¶ 33 Here, in contrast to *Vernon* and *Kyle*, there was no evidence that Plaintiff was totally disabled and potentially entitled to greater benefits under section 97-29 at the time the Commission approved the Form 26A. Plaintiff does not challenge the Commission's finding that Defendant provided Plaintiff's medical records to the Commission alongside the executed Form 26A. Those records reflect that Plaintiff returned to her full-time pre-injury position with Defendant, without work restrictions, before the Commission approved the Form 26A. Harris testified that prior to approving a Form 26A, he would "review all the medical records, particularly paying attention to the records where the claimant is found to be at MMI and rated[.]" Additionally, as the Commission found, both the Form 26A and Form 28B included provisions advising Plaintiff that "[i]f you think you will need future medical compensation, you must apply to the Industrial Commission in writing within two

years, or your right to these benefits may be lost."

¶ 34 This case is analogous to *Salaam v. N.C. D.O.T.*, 122 N.C. App. 83, 468 S.E.2d 536 (1996). In *Salaam*, as here, the plaintiff contended that the Commission erred under *Vernon* by approving a Form 26 providing for compensation pursuant to section 97-31. *Id.* at 85, 468 S.E.2d at 537. This Court held that the Commission "appropriately exercised its judicial authority by approving [the] I.C. Form 26" because the plaintiff "was assigned a ten percent permanent partial disability of his back," and there was "no evidence in the medical records submitted to the Commission with [the] I.C. Form 26 which supports awarding permanent total disability benefits under section 97-29." *Id.* at 86, 468 S.E.2d at 538.

¶ 35 Plaintiff's argument that the Commission erred by concluding that the Form 26A was approved upon a full investigation to ensure that it was fair and just is without merit.

C. Findings Concerning Dr. DePaolo's Testimony

¶ 36 Lastly, Plaintiff challenges two of the Commission's findings concerning Dr. DePaolo's testimony "to the extent [they] can be read to infer Dr. DePaolo opined the treatment he provided is not causally related" to Plaintiff's compensable injury. Plaintiff specifically challenges the italicized portions of the following findings of fact:

> 27. At his deposition, Dr. DePaolo testified that a partial medial meniscectomy would likely contribute to the development of chondromalacia, and that Plaintiff's

> September 20, 2012 injury likely contributed to her chondromalacia. He indicated that chondromalacia is not curable and that after a meniscectomy, chondromalacia is likely to progress while a patient is performing normal daily activities. Dr. DePaolo, after reviewing an MRI of Plaintiff's left knee prior to September 20, 2012, noted that Plaintiff had moderate chondromalacia of the medial compartment prior to her injury, which had progressed by the time that Dr. West released her. He specifically stated that Plaintiff's chondromalacia in her patellofemoral joint was unrelated to Plaintiff['s] September 20, 2012 injury and subsequent treatment. *Dr. DePaulo indicated that Plaintiff's injury could have caused or contributed to the chondromalacia noted in Plaintiff's October 2012 left knee MRI, but that it was an assumption based on the differences between it and the pre-injury MRI.*
>
> 28. *Dr. DePaolo testified that he was unable to determine if the tear that necessitated his arthroscopic surgery on Plaintiff's left knee was related to her compensable injury.* Dr. DePaolo indicated that at the time of his deposition, the treatment he had provided to Plaintiff, via injections and arthroscopic surgery, was unsuccessful and that he was then recommending total knee replacement. Dr. DePaolo opined that Dr. West's rating from April 2013 was appropriate. Dr. DePaolo indicated that if Plaintiff were experiencing pain related to her left knee chondromalacia, he expected that she would have reported it to her treating providers between being released by Dr. West and her initial evaluation at his office.

¶ 37 Dr. DePaolo testified as follows:

> Q. From before she had the -- her injury was on September 20, 2012. So there's one MRI scan that's before that, which is the May, 2012.
>
> A. Right.
>
> Q. There's the second one from October, 2012.

> A. October, 2012. Clearly different from ---
>
> Q. And then she has the one in 2013 where she has the grade 4 -- 4 over 4 chondromalacia?
>
> A. Right.
>
> Q. Now, and my question is, based on that -- is that progression caused or contributed to by the original injury, the medial meniscal tear, and the arthroscopic removal of a part of the meniscus?
>
> A. It can be.
>
> Q. Are you able to --
>
> A. But life can also cause that, too. But based on, I guess, what I have here, there was clearly a change from May 24th, 2012, until October 24th, 2012, and it's clearly different.
>
> Q. And again, the question is, is that caused or contributed to by the 2012 injury ---
>
> A. It could have been caused or contributed to by the 2012 injury, yes.
>
> Q. You said it could be. I mean, based on ---
>
> A. I don't . . . know anything about the injury, but that's the only thing I know that happened in 2012, and I guess with that assumption, then the 2012 injury was -- if that's the only thin[g] that happened, then that's -- that's related.

Additionally, when asked whether the tear he found intraoperatively was a continuation of an existing tear or a new tear, Dr. DePaolo twice stated, "I don't know that I can answer that question."

Dr. DePaolo's testimony is competent evidence in support of the portions of finding

27 and 28 challenged by Plaintiff.

III. Conclusion

¶ 38 Because the Commission's findings of fact are supported by competent evidence and the Commission did not err in declining to set aside the Form 26A, we affirm the Commission's opinion and award.

AFFIRMED.

Judges HAMPSON and GORE concur.

Report per Rule 30(e).