2013 IL App (4th) 121057WC-U

NO. 4-12-1057WC

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JOSEPH CHERNIS, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.,* (Decision One, Appellee).	) Appeal from the) Circuit Court of) Sangamon County.)) No. 11 MR 219)) Honorable) Leo J. Zappa,) Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission did not err is finding that the claimant failed to prove that he was permanently totally disabled under the odd-lot doctrine, or in awarding 40 percent loss if use of the person as a whole where there was no medical evidence that he was totally and

permanently disabled and a physician averred and the results of the FCE showed that he could perform some types of work.

¶ 2 The claimant, Joseph Chernis, filed an application for adjustment of claim against his employer, Decision One, seeking workers' compensation benefits for injury to his neck and shoulder allegedly caused by a workplace accident. The claim proceeded to an arbitration hearing under the Workers' Compensation Act (the Act) (820 ILCS 305/1 to 30 (West 2002)). The arbitrator found that the claimant sustained injuries that arose out of and in the course of his employment. He ordered the employer to pay the claimant temporary total disability benefits of $771.03 per week from August 18, 2003, through December 29, 2003, and from August 26, 2006, through November 16, 2006. The arbitrator found that the claimant failed to prove odd-lot total and permanent disability. He found that the claimant sustained 50 percent loss of use of a person as a whole and ordered the employer to pay the claimant $550.47 per week for a further period of 250 weeks.

¶ 3 The claimant and employer appealed to the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the arbitrator's ruling on causation and modified his ruling on temporary total disability and permanent partial disability. The Commission found that the claimant was temporarily totally disabled from August 18, 2003, through December 29, 2003, and from August 24, 2006, through February 5, 2007, and ordered the employer to pay him the sum of $771.03 per week for a period of 42 6/7 weeks. The Commission found that the injuries the claimant sustained caused him 40 percent loss of use of his person as a whole and ordered the employer to pay him $550.47 per week for a period of 200 weeks.

¶ 4 The claimant filed a timely petition for review in the circuit court of Sangamon County. The circuit court confirmed the Commission's decision. The claimant appealed.

¶ 5 BACKGROUND

¶ 6 The following factual recitation is taken from the record and the evidence presented at the arbitration hearing.

¶ 7 The claimant was born in 1947. His high school was also a trade school and he studied electrical work there. From 1969 until the date of his injury he worked as an electronic technician for the employer and its precursor companies. The claimant testified that his main job duties as an electronic technician for the employer involved repairing and maintaining electronic and electro-mechanical equipment such as microfilm equipment, duplicating equipment, and large format printers. The physical requirements of his job included lifting a tool bag weighing approximately 40 pounds, lifting and moving testing equipment weighing 40 to 50 pounds, and occasionally lifting and moving equipment weighing 100 to 400 pounds. He also installed equipment, pulled cables, and routed wires in overhead ceilings.

¶ 8 On July 3, 2004, the claimant was servicing a microfilm processor camera at the Adams County Courthouse. He was in a crouched position and as he stood up, he struck the back of his neck on the machine and felt a sharp pain in his neck and shoulder area.

¶ 9 The accident happened on a Thursday, before the July fourth holiday. The claimant's pain became progressively worse over the weekend, and on Monday, July 7, 2003, he sought treatment in the emergency department of St. John's Hospital. The claimant underwent magnetic resonance imaging (MRI) and

computed tomography (CT) scans of the cervical spine. Dr. W. Ross Stevens read the MRI scan and wrote in his report that there were multilevel degenerative changes in the cervical spine. At the C4-5 interspace level, there was a moderate sized central disc protrusion causing significant anterior effacement and displacement of the spinal cord. At the C5-6 interspace level, there was a right paracentral disc protrusion of moderate to large size causing significant anterior effacement and impression on the cervical spinal cord. At the C6-7 interspace level there was a diffuse bulging disc annulus which was combining with posterior facet and ligamentous hypertrophic changes to produce moderately severe central canal stenosis with a significant anterior effacement of the thecal sac. Dr. Theodore J. Gleason read the CT scan. He wrote in his report that at C3-4 there was evidence of degenerative disc disease with diffuse disc bulge causing moderate to severe central stenosis, at C4-5 there was a prominent central posterior disc protrusion causing severe central stenosis with flattening of the anterior aspect of the cord, at C5-6 there was advanced degenerative disc disease/spondylosis with partially calcified prominent focal right posterior paramedian disc protrusion, and at C6-7 there was prominent diffuse disc bulge with some minor endplate osteophyte formation and uncinate spurring.

¶ 10 On July 8, 2003, the claimant was examined by Dr. Terrence Pencek, a neurosurgeon. He reviewed the MRI and CT scans noting that they revealed a moderately large disc protrusion at C5-6 causing significant anterior effacement of the cervical spinal cord, moderate size central disc protrusion at C4-5 causing some narrowing of the spinal canal, diffuse bulging of the annulus at C6-7 as well as some posterior facet degeneration of the ligamentum hypertrophy causing moderately severe stenosis, and moderately severe stenosis from C3-4 through C6-

7. Because the claimant's symptoms were recent and he was not myelopathic on exam, Dr. Pencek recommended conservative treatment that included a trial of epidural steroid injections.

¶ 11 On August 18, 2003, the claimant was examined by his primary care physician, Dr. Daniel O'Brien, at which time he took the claimant off work. Between August 18, 2003, and December 29, 2003, both Dr. Pencek and Dr. O'Brien followed the claimant intermittently. On December 16, 2003, Dr. Pencek noted that the claimant felt he was improving and wanted to return to work to see how well he could tolerate resuming his normal activities. The claimant told Dr. Pencek that he had been doing some work at home on a daily basis such as answering his e-mails and checking in with his office. Dr. Pencek wrote in his office notes that he told the claimant that he would likely need surgical intervention at some point, but that he was pleased that he had made improvements with conservative treatment. He wrote that the claimant was at maximum medical improvement for his condition with cervical spinal stenosis and did not schedule any follow up visits.

¶ 12 Dr. O'Brien released the claimant to work on December 29, 2003, with restrictions of no lifting above the shoulders, no stress to neck, and no looking down for long periods.

¶ 13 The claimant returned to work on December 29, 2003. The employer accommodated his restrictions. After he returned to work, the claimant continued to obtain treatment for his injuries, with occasional visits to Dr. O'Brien and two visits to Dr. Pencek.

¶ 14 On December 14, 2004, Dr, Pencek examined the claimant. The claimant complained of persistent neck pain at the base of his skull that extended to both

arms. He noted that conservative management had improved the claimant's neck and left arm discomfort. He noted that the claimant had significant improvement with epidural injections, but that his last injections had been one year prior. Dr. Pencek recommended an updated MRI scan of the cervical spine and an electromyogram (EMG) of the upper extremities.

¶ 15 On March 23, 2005, the claimant underwent a repeat MRI scan. On April 19, 2005, Dr. Pencek examined the claimant and noted that the MRI scan showed degenerative changes from C3-4 through C6-7, spondylosis with moderate foraminal compromise at C3-4, prominent central disc herniation at C4-5 with associated bony spurring that caused severe central canal stenosis protruding into the cord, a central disc herniation at C5-6 which caused significant central canal stenosis with mild foraminal stenosis, and a broad base disc bulge at C6-7 with mild central stenosis, and bony reactive changes at C5, C6, and C7. Dr. Pencek recommended a C5-6, C6-7 anterior cervical discectomy and fusion with allograft and plating. He recommended a C3-7 laminectomy with fusion from C4-6 at a later date. The claimant requested further conservative treatment in the form of epidural injections. Dr. Pencek agreed to more epidural injections because the claimant had symptomatic improvement with the previous series of injections. According to the medical records offered into evidence, the claimant did not return to Dr. Pencek after April 19, 2005.

¶ 16 The claimant testified that he was able to work with restrictions from December 29, 2003, until August 24, 2006. He returned to Dr. O'Brien on August 24, 2006, complaining of increased pain. Dr. O'Brien issued the following note: "[Claimant] is to be off work until further notice. He has appointment with

neurosurgeon & with me in one month." The record contains no evidence that the claimant was examined by a neurosurgeon after the issuance of the note.

¶ 17 The claimant underwent cervical and epidural steroid injections on April 13, 2006, May 4, 2006, October 2, 2006, and May 31, 2007.

¶ 18 On November 16, 2006, the claimant was examined by Dr. Margaret MacGregor at the request of the employer for an independent medical examination. Dr. MacGregor reviewed the MRI and CT scans, discussed them with the claimant, and agreed with the radiologists' interpretation of these studies. Dr. MacGregor found that the claimant had cervical spondylosis, cervical herniated discs at C3-6 and C6-7, disc bulge at C4-5, and advanced multilevel spondylosis at multiple levels from C3-C7. She also found that he had congenital spinal canal stenosis. She wrote in her report that the claimant was not currently severe enough clinically, based on the number of office visits and the medical records provided, to warrant surgical intervention from a pain standpoint. She opined that based upon his scans, he will require surgical intervention at some point. She wrote that she felt that epidural injections and continued monitoring were indicated. She stated that if the claimant opted not to pursue surgical intervention, he had reached maximum medical improvement and that his work abilities to perform job-related tasks would best be addressed by a functional capacity evaluation (FCE).

¶ 19 The claimant was examined by Dr. O'Brien on February 5, 2007. Dr. O'Brien opined that the claimant had reached maximum medical improvement and was capable of sedentary work with a weight restriction of lifting no more than ten pounds.

¶ 20 On May 8, 2007, the claimant underwent an FCE. The evaluation indicated that the claimant could only perform light duty work with weight restrictions including occasionally lifting 24 pounds to waist level, occasionally lifting five pounds overhead, occasionally carrying eighteen pounds, and occasionally pushing and pulling up to 25 pounds of force. The FCE findings concluded that the claimant would be most successful in a position that allows occasional positional changes, alternating between sitting, standing, and walking.

¶ 21 The claimant was last seen by Dr. O'Brien on June 8, 2009. In a note, Dr. O'Brien wrote that the claimant had a cervical disc herniation for 5 or 6 years, that he had not required surgery for control of the symptoms, and that his symptoms had been controlled with exercise and medication. Dr. O'Brien concluded that the claimant's functional status was very good and that he did not require surgery at that time.

¶ 22 The claimant testified that in addition to his employment with the employer, he also worked as an elected highway commissioner for Springfield Township from April 1, 1997, through April 2005. He stated that in this position he was responsible for the construction, maintenance, and repair of the roads within the district. His duties included the letting of contracts, employing laborers, and purchasing materials and machinery related to road construction and maintenance. The claimant testified that this job did not involve physical labor, but was administrative. He stated that he was able to perform the duties of the elected position and that his employment ended only because, in April 2005, he was not re-elected.

¶ 23 The claimant exhausted his benefits under the employer's short term and long term disability programs. The claimant testified that the employer terminated

him in February 2008, because he could not meet the full-duty requirements of the job.

¶ 24 The claimant testified that in his job search he had contacted employers in the area in person and by phone, had looked in two newspapers, and had searched on the internet. He offered an exhibit that was accepted into evidence containing a list of the job searches he conducted. The documentation began August 19, 2009, and ended December 22, 2009, and showed that the claimant had made 19 contacts. Of the contacts on the claimant's exhibit, one was for seasonal farm work and, due to his restrictions, he was not capable of the physical demands the job required. The other 18 contacts were businesses that were not hiring.

¶ 25 The arbitrator found that the claimant sustained an injury that arose out of and in the course of his employment. He found that the claimant was temporarily totally disabled for the period from August 18, 2003, until December 29, 2003, when he was released to work with restrictions. The employer accommodated the restrictions and the claimant worked from December 29, 2003, until August 24, 2006, when Dr. O'Brien again took the claimant off work. The arbitrator found that the claimant had reached maximum medical improvement at the latest on November 16, 2006, when Dr. MacGregor concluded that he had reached maximum medical improvement if he opted not to pursue surgery. The arbitrator found that the claimant did not undergo any active medical care and treatment subsequent to November 16, 2006, except for a single steroid injection administered on May 31, 2007. The arbitrator found that the claimant was temporarily and totally disabled from August 24, 2006, when Dr. O'Brien took him off work, through November 16, 2006, when he reached maximum medical improvement.

¶ 26 The arbitrator found that the claimant failed to prove odd-lot total and permanent disability. He found that the claimant presented evidence of a job search, but that the search was not diligent. The arbitrator further found that the claimant failed to present any evidence from a rehabilitation provider or vocational counselor that he was not employable in a stable labor market.

¶ 27 The arbitrator found that the claimant failed to provide sufficient medical evidence to establish that he was totally and permanently disabled. He found that the medical evidence showed that the claimant was capable of returning to work with restrictions, but he was no longer physically capable of performing his old job duties because of his work related injuries. For that reason, the arbitrator found that the claimant was permanently and partially disabled to the extent of 50 percent loss of a person as a whole.

¶ 28 The claimant and employer sought review of the arbitrator's decision. The Commission affirmed the arbitrator's finding of causal connection between the claimant's condition of ill-being and his work accident. The Commission modified the arbitrator's ruling on temporary total disability. It found that while Dr. MacGregor opined that the claimant had reached maximum medical improvement as of November 16, 2006, she recommended additional epidural injections and monitoring. The Commission found that if the claimant had truly reached maximum medical improvement, no further treatment would have been recommended. The Commission found Dr. O'Brien's maximum medical improvement opinion to be more persuasive. The Commission ordered the employer to pay the claimant $771.03 per week in temporary total disability benefits from August 18, 2003, through December 29, 2003, and August 24, 2006, through February 5, 2007.

¶ 29 The Commission modified the arbitrator's permanent partial disability award. It found that the medical evidence showed that the claimant is capable of returning to work with restrictions; however, because of his work related injuries, he was no longer physically capable of performing his old job. The Commission noted that it was "in agreement with the Arbitrator that [the claimant] is entitled to a greater percentage of permanent disability." It stated that "it views the evidence slightly differently and modifies the Arbitrator's permanency award to 40% of a person as a whole." The Commission ordered the employer to pay the claimant $550.47 per week for 200 weeks.

¶ 30 The claimant appealed the Commission's decision to the circuit court. The circuit court confirmed the Commission's decision. The claimant filed a timely notice of appeal.

¶ 31 ANALYSIS

¶ 32 The claimant argues that the Commission erred in determining that he was not permanently totally disabled. The claimant bears the burden of establishing, by a preponderance of the evidence, the extent and permanency of his injury. *Professional Transportation, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 100783WC ¶ 33, 966 N.E.2d 40. "The extent of a claimant's disability is a question of fact to be determined by the Commission." *Id*. A reviewing court will set aside the Commission's decision only if its decision is contrary to law or its fact determinations are against the manifest weight of the evidence. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 924 (2006). "A reviewing court will not reweigh the evidence, or reject reasonable inferences drawn from it by the Commission, simply because other reasonable inferences could have been drawn." *Id*. The appropriate test for whether the

Commission's decision is supported by the manifest weight of the evidence is whether there is sufficient evidence in the record to support the Commission's determination. *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870, 877 (2010).

¶ 33 "An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of wages." *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1089, 871 N.E.2d 765, 773 (2007). However, an employee need not be reduced to total physical incapacity before a permanent total disability award may be granted. *Id*. To establish that he is permanently totally disabled, an employee must show that he is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *Id*. "If the employee's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, he may qualify for 'odd-lot' status." *Id*. An odd-lot employee is one who is not altogether incapacitated to work, but who is so handicapped that he is not employable in any well-known branch of the labor market. *Id*. "The claimant ordinarily satisfies his burden of proving that he falls into the odd-lot category in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market." *Westin Hotel v. Industrial Comm'n,* 372 Ill. App. 3d 527, 544, 865 N.E.2d 342, 357 (2007). "Whether a claimant falls into the odd-lot category is a factual determination to be made by the Commission, and that determination will not be set aside unless it is against the manifest weight of the evidence." *Id*.

¶ 34 In the instant case there was no medical evidence that the claimant was totally and permanently disabled. The claimant worked from December 29, 2003, until August 24, 2006, within his medical restrictions. On August, 24, 2006, the claimant was taken off work by Dr. O'Brien. The claimant had little active medical treatment after that date. On February 5, 2007, Dr. O'Brien found that the claimant was at maximum medical improvement and that he was capable of performing sedentary work. Dr. O'Brien placed restrictions on lifting, bending, and overhead work. On May 11, 2007 the claimant underwent an FCE. After the evaluation, it was determined that the claimant could perform light duty work with limitations on standing, sitting, and walking. Additionally, the claimant continued his job duties as an elected township highway commissioner through April 2005. He testified that he was physically able to perform that job and that he only left it because he lost his re-election bid.

¶ 35 The claimant argues that he conducted a diligent job search. He states that his job search involved cold-call visits, reviewing job postings in local publications, and investigating employment opportunities in his home county and a neighboring county. The claimant asserts that his job search was limited because of his geographic isolation and was delayed because he was told that he would be given assistance in his job search that never materialized. He asserts that he actually looked for a job for a longer period of time than documented in his exhibit.

¶ 36 "The question of how long a search must continue before it becomes apparent that the possibility for realistic employment is futile is one of fact for the Commission." *City of Green Rock v. Industrial Comm'n*, 255 Ill. App. 3d 895, 902, 625 N.E.2d 1110, 1114 (1993). The Commission found that the claimant

failed to conduct a diligent job search. He did not start looking for a job until one and one-half years after the employer terminated him. The claimant searched for a job for a four month period from August 19, 2009, until December 22, 2009. During that time he only documented 19 inquiries. Most of the claimant's job inquiries were cold calls, and not in response to a job opening. Eighteen of the nineteen employers he contacted were not hiring, and due to his restrictions, he did not meet the physical requirements for the only other job for which he applied. Given the number of contacts made by the claimant and the quality of the contacts, we cannot say that the Commission's determination that the claimant did not conduct a diligent job search was against the manifest weight of the evidence.

¶ 37 The claimant argues that the Commission erred in determining that he failed to establish that because of his age, training, education, experience, and condition, there were no available jobs for a person in his circumstance. The claimant argues that he demonstrated by the preponderance of the evidence that due to his age, experience, training, capabilities, and condition, he is totally and permanently disabled. He argues that he was 56 on the date of his injury and 62 on the date of the Commission's hearing and that his age was a factor in preventing him from finding employment. The claimant states he only has a trade school degree and has worked as an electronic technician for the employer or its predecessor companies from 1969 until the date of his injury; therefore, his work experience and education were limited to his occupation as an electronic technician. He asserts that the only non-electrician training, education, or experience that he has is his eight years as Springfield's highway commissioner. The claimant argues that due to his age, training, education, experience, and his permanent physical restrictions, it is unreasonable to believe he could enter a new profession.

¶ 38 The employee bears the burden of persuasion in proving odd-lot status, and must establish by a preponderance of the evidence that he falls within the odd-lot category. *City of Chicago*, 373 Ill. App. 3d at 1090-91, 871 N.E.2d at 774-75. "Only after the employee establishes by a preponderance of the evidence that he falls into the odd-lot category, does the burden of production shift to the employer to show that the employee is employable in a stable labor market and that such a market exists." *Id*, 373 Ill. App. 3d at 1091, 871 N.E.2d at 775. The burden is on the claimant to show that, considering his present condition, age, experience, training, and education, he is unfit to perform any but the most menial tasks for which no stable market exists. *Reliance Elevator Co. v. Industrial Comm'n*, 309 Ill. App. 3d 987, 992, 723 N.E.2d 326, 330 (1999).

¶ 39 Dr. O'Brien opined that the claimant was capable of performing sedentary work with a restriction of lifting no more than ten pounds. The FCE showed that the claimant could perform light duty work and could lift 24 pounds to his waist, lift 5 pounds overhead, carry 18 pounds, and push and pull up to 25 pounds of force, all on an occasional basis. On June 8, 2009, Dr. O'Brien wrote that the claimant's functional status was very good and that his symptoms were controlled with exercise and medication. The claimant testified that he was able to physically perform the duties of his job as township highway commissioner. He ran for re-election and discontinued the job because he lost. The claimant's job as highway commissioner was an administrative job that involved letting contracts, employing laborers, and purchasing materials and machinery for the repair and maintenance of the roads in the district. This job encompassed a different set of skills than his job as an electronic technician.

¶ 40 The claimant presented no evidence that he could only perform the most menial of tasks, and no vocational opinion testimony that there is no stable labor market for him. There was no medical evidence that the claimant was totally and permanently disabled. Dr. O'Brien opined that he was capable of performing sedentary work, and the results of the FCE showed he was capable of light duty work. There are many types of employment that involve sedentary work or light duty work, and the claimant presented no evidence that he would be unable to perform sedentary or light duty employment. In fact, the claimant testified that he was capable of performing his job as highway commissioner. While the highway commissioner position is an elected job, the skills involved are transferable to other jobs. There is sufficient evidence in the record to support the Commission's finding that the claimant failed to show that because of his age, experience, training, and education, he was unable to perform any but the most menial tasks for which no stable job market exists.

¶ 41 The claimant argues that he presented sufficient evidence of his disability to shift the burden of proof to the employer. As we have determined that the claimant failed to present sufficient evidence of his disability to prove that he fell within the odd-lot category, we need not address this argument.

¶ 42 The claimant argues that the Commission's decision to reduce the arbitrator's award for permanent partial disability was contrary to the manifest weight of the evidence. The arbitrator awarded the claimant loss of 50 percent of a person as a whole, and the Commission reduced this award to loss of 40 percent of a person as a whole. The claimant argues that prior to his accident he was able to carry a tool bag weighing 40 pounds, and that his job required him to lift weight up to 50 pounds constantly, 51-100 pounds frequently, and more than 100 pounds

occasionally. After being injured, he is limited to occasionally carrying 18 pounds, pushing and pulling up to 25 pounds of force, and lifting 5 pounds overhead. The claimant argues that it is clearly apparent that he has lost the use of more than half of his person as a whole; therefore, the manifest weight of the evidence dictates that he lost more than 40 percent of the use of a person as a whole.

¶ 43 "It is well-settled that because of the Commission's expertise in the area of workers' compensation, its findings on the question of the nature and extent of permanent disability should be given substantial deference." *Mobil Oil Corp. v. Industrial Comm'n*, 309 Ill. App. 3d 616, 624, 722 N.E.2d 703, 709 (2000). The Commission resolves disputes in the evidence, and draws reasonable inferences and conclusions from that evidence, and its decision will not be set aside on review unless it is contrary to the manifest weight of the evidence. *Id*. A reviewing court may not substitute its judgment for that of the Commission merely because it might have made a different finding. *Id*.

¶ 44 When the Commission reviews an arbitrator's decision, it exercises original and not appellate jurisdiction and is not bound by the arbitrator's findings. *City of Chicago*, 373 Ill. App. 3d at 1096, 871 N.E.2d at 779. The arbitrator did not delineate how he determined that the claimant was permanently and partially disabled to the extent of 50 percent of a person as a whole. The Commission found that it viewed "the evidence slightly differently" and modified the arbitrator's permanency award. In making its determination that the claimant was permanently partially disabled to the extent of 40 percent of a person as a whole, the Commission looked at more than the claimant's reduced ability to lift, push, or pull weight or force. The Commission found that the claimant was no longer

physically capable of performing his old job. It also found that the medical evidence showed that he is capable of returning to work with restrictions. Dr. O'Brien averred that the claimant was capable of performing sedentary work, the FCE showed that the claimant could perform light duty work, and the claimant testified that he was physically able to perform his job as highway commissioner. The Commission's determination that the claimant was disabled to the extent of 40 percent of a person as a whole is not against the manifest weight of the evidence.

¶ 45 The claimant failed to establish that he was permanently totally disabled. There was no medical evidence that he was totally and permanently disabled. The claimant did not conduct a diligent job search. He only searched for a job for four months, and the contacts he made were to employers who were not hiring or for a job he was not able to perform. The claimant failed to show that because of his age, experience, training, and education he could perform only the most menial tasks. Dr. O'Brien averred that the claimant could do sedentary work. The results of the FCE showed that he could perform light duty work. The claimant testified he was able to perform his job as a highway commissioner. The Commission did not err in finding that the claimant failed to prove that he was permanently totally disabled under the odd-lot doctrine, or in awarding 40 percent loss of use of the person as a whole.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 48 Affirmed.