2012 IL App (3d) 110502WC-U
Nos. 03-11-0502 & 03-11-0488 cons.
Order filed December 21, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

WAL-MART ASSOCIATES, Plaintiff-Appellee, v. ILLINOIS WORKERS' COMPENSATION COMMISSION DIVISION, Defendant, (Dan French, Defendant-Appellant).	))))))))))))	Appeal from the Circuit Court of LaSalle County. No. 10-MR-185 Honorable R.J. Lannon, Jr., Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Appleton, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* The law-of-the-case doctrine did not preclude claimant from seeking the damages at issue in this case, and the Commission's decision that claimant was permanently and totally disabled is not contrary to the manifest weight of the evidence.

¶ 2 I. INTRODUCTION

¶ 3 Claimant, Dan French, appeals an order of the circuit court of LaSalle County reversing a

decision of the Illinois Workers' Compensation Commission (Commission) awarding him certain benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2002)). The trial court found that the Commission's decision violated the law of the case. See, *e.g.*, *Irizarry v. Industrial Comm'n*, 337 Ill. App. 3d 598, 606-607 (2003). It is axiomatic that a court of review may affirm on any basis apparent in the record. *Will County Forest Preserve District v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110077WC, ¶ 22. To this end, respondent argues that, even if the law-of-the-case doctrine does not apply, the Commission's finding that claimant is permanently and totally disabled is contrary to the manifest weight of the evidence. For the reasons that follow, we reverse. We will address these issue in turn, discussing the facts as they become pertinent.

¶ 4 II. LAW OF THE CASE

¶ 5 This case was originally tried before an arbitrator in October 2003. Following this hearing, the arbitrator found that claimant had sustained a work-related injury to his lower back. It is now undisputed that claimant injured his back in two work-related incidents on September 8, 2002, and June 9, 2003. The arbitrator also found that claimant's testimony regarding his inability to work following the June 2003 accident lacked credibility. Part of the testimony presented by respondent from one of claimant's coworkers indicated that, on June 27, 2003, he had observed claimant operating a jet ski and riding in a boat during the period in which claimant was purportedly incapacitated. Further, the coworker stated that claimant asked him not to tell any of respondent's managers what the coworker had observed. The arbitrator found the coworker credible.

¶ 6 Generally, we review the application of the law-of-the-case doctrine using the *de novo* standard. See *In re Christopher K.*, 217 Ill. 2d 348, 363-64 (2005). However, in this case, the application of the doctrine depends on the resolution of a number of factual medical issues—namely,

whether claimant's current condition of ill being arose out of the same medical condition that was at issue in the 2003 hearing. The Commission possesses specialized expertise on such matters. *Yaeger v. Industrial Comm'n*, 233 Ill. App. 3d 936, 942 (1992). Accordingly, we owe it substantial deference here—as we are confronting a mixed question of law and fact lying within the Commission's expertise. *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979) ("Therefore, a finding of fact by the Commission on this issue, based on any medical testimony or on inferences to be drawn from medical testimony, should be given substantial deference because of the expertise acquired by the Commission in this area."). We will therefore give deference to the Commission's underlying factual findings and review them using the manifest weight standard. *Keller v. Industrial Comm'n*, 125 Ill. App. 3d 486, 487 (1984). A decision is contrary to the manifest weight of the evidence only if an opposite conclusion is clearly apparent. Venture-Newberg Perini Stone & Webster v. Illinois Workers' Compensation Comm'n 2012 IL App (4th) 110847, ¶ 14.

¶ 7 Ultimately, the arbitrator found claimant's medical expenses reasonable and necessary, awarding $10,090.35. He also found claimant eligible for temporary total disability (TTD) from June 9, 2003 (the date of the second accident), to June 27, 2003 (the date claimant was observed operating a jet ski). The arbitrator explained:

> "The accidents of September 8, 2002 and June 9, 2003 arose out of and in the course of [claimant's] employment and [claimant's] present condition of ill-being as it relates to his accidents (resolved sprain/strain having reached [maximum medical improvement (MMI)]—related to the June 9, 2003 [incident]) is causally related to the injuries sustained on those dates. However, his present condition of ill being as it relates to his ability to work is not causally related to the injuries sustained on those dates."

The arbitrator's decision also provided that "[t]his award in no instance shall be a bar to a further

hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability."

¶ 8 The Commission affirmed and adopted the arbitrator's opinion, modifying it in one respect. It stated: "The Commission finds that [claimant] failed to prove the necessity of medical treatment rendered after June 27, 2003. The evidence established that [claimant's] strain/sprain had resolved as of that date. [Claimant's] credibility was severely undermined, such that he failed to prove the necessity of medical treatment rendered thereafter." Therefore, the Commission reduced the award of medical expenses to $409.06. It also remanded the matter "for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980)." Like the arbitrator's decision, the Commission's opinion stated that "this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any." No appeal was taken from the Commission's decision.

¶ 9 In May 2008, a permanency hearing was held in this case. In preparation for this hearing, claimant sought leave to depose Dr. George DePhillips, claimant's treating physician. Respondent objected, arguing that, under the law-of-the-case doctrine, no evidence concerning claimant's condition of ill being after June 27, 2003, should be considered at the permanency hearing. The arbitrator granted claimant's request, noting that claimant had a "legal right" to proceed with the deposition "per the terms of the Commission's [earlier] decision." He noted that the Commission specifically remanded the matter for further proceedings and that denying claimant's request would both violate due process and thwart the intent of the Act. At the permanency hearing, disputed issues included whether claimant's present condition of ill-being was causally related to his at-work

accidents; the nature and extent of the injury; further TTD; and whether the law of the case limited claimant's ability to a subsequent award.

¶ 10 Regarding the law-of-the-case issue, the arbitrator first noted that the earlier arbitration decision and the decision of the Commission both specifically stated that they constituted no bar to further awards of TTD or for permanent disability. He further noted that the application of the law-of-the-case doctrine should be considered in light of the totality of the record. He then observed that the evidence was unrefuted that claimant had suffered a change of condition on October 22, 2003. Claimant's condition had worsened, and it necessitated him being off work. Moreover, there was no intervening incident to explain this change. The arbitrator stated that this finding was not based "centrally" on claimant's testimony; rather, he was relying on the testimony of two lay witnesses (Julie Ajster and Jennifer Kiesewetter, whom the arbitrator noted were attorneys and thus officers of the court) familiar with claimant's condition. Accordingly, the arbitrator found that the law-of-the-case doctrine barred only any award for the period between June 27, 2003 (the date claimant was observed on a jet ski) and October 22, 2003 (the date claimant's condition changed). Citing *National Wrecking Co. v. Industrial Comm'n*, 352 Ill. App. 3d 561(2004), the arbitrator explained that the legal and factual issues presented in the permanency hearing were different than those involved in the earlier proceedings. The arbitrator then found that claimant's condition of ill-being was causally related to his employment. Accordingly, he awarded claimant TTD in the amount of $297.93 per week for 149 weeks; permanent total disability (PTD) of $376.66 per week for life, and medical expenses of $183,569.61, while recognizing respondent was entitled to a credit of $34,533.66 for medical bills it had paid previously. The Commission agreed with the arbitrator, affirming and adopting his decision.

¶ 11 The trial court reversed, finding that the law-of-the-case doctrine barred claimant's

entitlement to a further award. The court noted that the arbitrator who heard the matter on October 22, 2003, found that claimant's "strain/sprain condition had resolved" prior to October 2003. It further noted that Dr. DePhillips identified spondylolysis or spondylolisthesis as the reason for claimant's inability to work in early October 2003 and that he had discussed surgical alternatives for claimant's condition. The trial court then observed that the arbitrator had found that claimant's condition of ill-being pertaining to his inability to work was not causally related to his employment and that the conditions that were causally related to employment (that is, the strain/sprain) had resolved. As such, the trial court concluded it had been determined that the condition of claimant's back—which caused him to be unable to work—was not work related and that this was the condition upon which claimant was attempting to base his claim for further relief in the permanency hearing. This appeal followed.[1]

¶ 12 The law-of-the-case doctrine bars an issue that has been litigated and decided from being revisited in later stages of the same action. *People ex rel. Department of Public Health v. Wiley*, 384 Ill. App. 3d 809, 817 (2004). The issue must have been litigated to a final judgment and not

[1]Claimant filed two notices of appeal in this matter. The first was filed after the trial court's initial decision that the further award sought by claimant was barred by the law-of-the-case doctrine. Subsequently, claimant filed a motion for reconsideration and, when the trial court denied that motion, claimant sought leave to appeal to this court in accordance with Illinois Supreme Court Rule 306 (eff. February 16, 2001). We granted that request, and the two appeals have now been consolidated. Parenthetically, we note that there was no need for respondent to file a cross appeal to advance its argument regarding the manifest weight of the evidence, as this argument constitutes an alternate basis to affirm the trial court's judgment. *Hilgart v. 210 Mittel Drive Partnership*, 2012 IL App (2d) 110943, ¶ 37.

appealed. *Irizarry*, 337 Ill. App. 3d at 606. Alternatively, rulings made by a court of review prior to remand are also binding upon a trial court. *People v. Oaks*, 2012 IL App (3d) 110381, ¶ 18. Unlike *res judicata*, which applies not only to issues that were decided but to those that could have been raised in an earlier action (*Taylor v. Police Board of the City of Chicago*, 2011 IL App (1st) 101156, ¶ 20), the law-of-the-case doctrine only applies to issues that were actually decided and those decided by necessary implication (*Reich v. Gendreau*, 308 Ill. App. 3d 825, 829 (1999)). Exceptions exist, thus "invoking the law of the case might still not preclude reconsideration of an earlier judge's order if the facts before the court changed or error or injustice were manifest." *People v. Williams*, 138 Ill. 2d 377, 392-393 (1990). Orders must be interpreted as a whole, the goal being to ascertain the true intent of the order. See *Burns v. Industrial Comm'n*, 95 Ill. 2d 272, 277-78 (1983).

¶ 13 Thus, to determine whether the law-of-the-case doctrine serves as a bar here, we must examine the Commission's earlier order (as well as the arbitrator's decision, which the Commission largely adopted). The plain language of the Commission's decision indicates that it was based on claimant's lack of credibility with regard to the necessity of medical treatment during the period at issue in the 2003 proceedings. It stated that claimant's credibility was "severely undermined." In *National Wrecking Co.*, 352 Ill. App. 3d at 565-66, this court found that the law-of-the-case doctrine was not a bar to the claimant seeking PTD benefits where the Commission had previously determined that the claimant had failed to prove an entitlement to TTD. We noted that the Commission had not, in fact, determined that claimant was not totally disabled, only that he had not carried his burden of proof. *Id*. Similarly, in this case, claimant simply failed to carry his burden of proof regarding his entitlement to an award for the period following the date on which he was seen on a jet ski until the date on which his condition worsened.

¶ 14 Two affirmative statements made during the course of the earlier proceedings bear further comment. First, the arbitrator stated that claimant's "present condition of ill being as it relates to his ability to work is not causally related to the injuries sustained on [the] dates [of the at-work accidents]." We emphasize that we review the decision of the Commission, which exercises original jurisdiction, rather than the arbitrator. See *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009). When the Commission modified the decision of the arbitrator, it limited its discussion to claimant's failure to carry his burden of proof, and it did not reiterate the arbitrator's factual finding concerning causation as part of the rationale for its decision. As noted previously, the law-of-the-case doctrine only bars the relitigation of issues actually decided or those decided by necessary implication. *Reich*, 308 Ill. App. 3d at 829. The Commission did not expressly pass on the issue of causation, and, since it had an independent basis for it holding (claimant's credibility), the issue of causality was also not addressed by necessary implication. We recognize that the Commission adopted the majority of the decision of the arbitrator; nevertheless, it expressly revisited the award and articulated a basis for the modification that departed from the arbitrator's reasoning. Hence, we have doubts as to whether the Commission intended to make a finding on causation. Under such circumstances, we believe it inappropriate to apply a preclusive doctrine and remove this issue from the Commission's current purview. *Cf. Bidani v. Lewis*, 285 Ill. App. 3d 545, 550 (1996) ("Because judicial estoppel precludes a contradictory position without examining the truth of either statement, it necessarily eliminates the trial court's role as fact finder. [Citation.] For that reason, it should be cautiously applied to avoid infringing on the court's truth-seeking function and only when not to do so would result in an injustice."). Moreover, we note that the arbitrator found that claimant's condition worsened and therefore changed on October 22, 2003. The law-of-the-case doctrine is no bar where "the facts before the court changed." *Williams*, 138 Ill. 2d at 392-

393.

¶ 15 Second, we note the Commission's finding that "[t]he evidence established that [claimant's] strain/sprain had resolved as of that [June 27, 2003]." If this were a finding that claimant had reached MMI, it would preclude future awards of TTD. See *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 542 (2007). However, the Commission expressly stated in its order that claimant could seek additional TTD in the future, remanding the matter "for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980)." Moreover, the Commission also stated "this award *in no instance* shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any." (Emphasis added.) The arbitrator's decision contained similar language. Allowing the Commission's earlier decision to serve as a bar in the current phase of the proceedings would essentially read this language out of the order. In any event, given the inclusion of such language in two places, we fail to see how the Commission could have intended the result at which the trial court arrived. Under such circumstances, giving preclusive effect to the earlier order is clearly inappropriate. *Cf. Cabrera v. First National Bank of Wheaton*, 324 Ill. App. 3d 85, 100 (2001) ("[A]n exception to *res judicata* exists when the court in an earlier action expressly reserves the plaintiff's right to bring a claim at a later time."). Parenthetically, we note that the trial court referred to this language as "boilerplate." We are aware of no authority that would allow us to flatly disregard such plain language in the order of a adjudicative body simply because it was preprinted.

¶ 16 Furthermore, we note that the evidence indicates that the condition at issue here is different than the one at issue in the 2003 hearing. During the 2003 hearing, the Commission (adopting the

decision of the arbitrator) made a number of findings relevant to the application of the law-of-the-case doctrine. It found that claimant had "suffered a compensable accident involving a low back sprain/strain on June 9, 2003," but that claimant's "testimony with regard to his inability to work after the June 9, 2003 accident was not credible." The Commission then found that claimant's sprain/strain reached MMI as of June 27, 2003 and that his "present condition of ill being as it relates to his ability to work is not causally related to the injuries sustained on those dates." Notably, the latter finding regarding causation is qualified by the statement "as it relates to his ability to work." The Commission made no general finding that any other conditions arising out of claimant's accidents were not work related; rather, it simply found that his inability to work after June 27, 2003 (the date on which he was observed riding the jet ski and TTD terminated) did not arise out of any condition resulting from his accidents.

¶ 17 Following the 2008 hearing, the Commission (again adopting the arbitrator's decision) , expressly found "the unrefuted evidence clearly indicated that [claimant] had a change in condition, a worsening in conditions, was required to be off work, with no intervening accident, and that he incurred additional reasonable and necessary medical expenses and is presently permanently totally disabled." In essence, the Commission found that the work-related injury that had not progressed to the point where it rendered claimant unable to work in 2003 had subsequently done so.

¶ 18 This finding is not contrary to the manifest weight of the evidence. *Venture-Newberg Perini Stone & Webster*, 2012 IL App (4th) 110847, ¶ 14 (holding that a finding is contrary to the manifest weight of the evidence only if an opposite conclusion is clearly apparent). Notably, Dr. DePhillips testified that claimant 'suffered several injuries during the accident that occurred on June 9th of 2003." He stated that, in addition to a sprain, the incident "exacerbated a preexisting condition of spondylolysis." He added that claimant "had underlying instability from exacerbation of the

spondylolysis *** which progressively worsened after the injury, despite the resolution of the lumbar sprain." The Commission's 2003 decision did not address the causal connection between claimant's employment and his spondylolysis—it only found that spondylolysis was not the cause of claimant's inability to work at that time. The law-of-the-case doctrine applies only to issues that were actually decided, whether expressly or by necessary implication. *Reich*, 308 Ill. App. 3d at 829. Hence, we cannot find error in the Commission's decision that it provides no bar to claimant seeking an award.

¶ 19 Finally, we note that even if we were to deem the 2003 decision to be a bar to claimant seeking an award based on his spondylolysis, we could still find no error in the decision of the Commission. In the latter decision, the Commission, crediting DePhillip's testimony, found that "while the sprain/strain aspect of the injury may have resolved, the segmental instability of [claimant's] spine developed an worsened." It continued, "At the time of the earlier hearings and proceedings, there was not specific evidence in reference to the segmental instability." In its earlier hearing, the Commission specifically discussed spondylolysis: "the follow up evaluation performed by Dr. DePhillips *** confirms the fact that the spondylolysis and spondylolisthesis is the reason for [claimant's] off work status." Hence, as the Commission found that segmental instability had not been addressed in the earlier hearing and since it had discussed spondylolysis in that hearing, it necessarily found that these were two separate conditions. Obviously, whether the segmental instability is a different condition that the spondylolysis is a medical question that lies within the core of the Commission's expertise. As noted above, we owe the Commission considerable deference such issues. *Long*, 76 Ill. 2d at 566. As the Commission's finding was supported by DePhillips' testimony, we cannot say that it is contrary to the manifest weight of the evidence.

¶ 20 In sum, we find that the trial court erred in applying the law-of-the-case doctrine as a bar to the relief plaintiff sought in this case (outside of the period between June 27, 2003 (the date claimant

was observed on a jet ski) and October 22, 2003 (the date claimant's condition changed)). Quite simply, the Commission's earlier decision did not involve the same issues as the permanency hearing. Moreover, giving preclusive effect to the earlier order would violate that order's plain language, as the Commission clearly contemplated that claimant would be able to seek additional relief in the future.

¶ 21 III. MANIFEST WEIGHT

¶ 22 Respondent asserts that the Commission's decision that claimant is permanently and totally disabled (820 ILCS 305/8(f) (West 2002)) is contrary to the manifest weight of the evidence. A decision is contrary to the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *City of Springfield v. Illinois Workers' Compensation Comm'n,* 388 Ill. App. 3d 297, 315 (2009). A claimant is entitled to PTD if he or she is obviously unemployable. *Schoon v. Industrial Comm'n,* 259 Ill. App. 3d 587, 590 (1994). However, an employee need not be reduced to complete physical incapacity to be entitled to PTD. *Ceco Corp. v. Industrial Comm'n,* 95 Ill. 2d 278, 286-87 (1983). If a claimant's disability is limited and it is not obvious that the claimant is unemployable, the claimant may nevertheless demonstrate an entitlement to PTD by proving he or she fits within the "odd-lot" category. *Westin Hotel,* 372 Ill. App. 3d at 544. The odd-lot category is made up of claimants who, "though not altogether incapacitated for work, [are] so handicapped that [they] will not be employed regularly in any well-known branch of the labor market." *Valley Mould & Iron Co. v. Industrial Comm'n,* 84 Ill. 2d 538, 547 (1981), citing 2 A. Larson, Workmen's Compensation sec. 57.51, at 10-164.24 (1980). A claimant generally fulfills this burden by showing (1) a diligent but unsuccessful search for employment or (2) that the claimant will not be regularly employed in a well-known branch of the labor force due to his or her experience, age, training, and skills. *Alano v. Industrial Comm'n,* 282 Ill. App. 3d 531, 534-35 (1996). If a claimant makes this showing, the

burden shifts to the employer to show that suitable work is available to the claimant. *Westin Hotel*, 372 Ill. App. 3d at 544.

¶ 23 On this issue, the arbitrator found that claimant's condition had worsened between October 2003 and December 2003. The arbitrator explained that this finding was not based solely on claimant's testimony, acknowledging claimant's credibility problems. Rather, it was corroborated by Dr. DePhillips' deposition testimony as well as that of Julie Ajster (with whom claimant resided) who observed claimant's symptoms worsening during this period. The arbitrator also relied on the opinion of Dr. Malek (who assisted DePhillips with claimant's surgery) and the results of a discogram performed on December 3, 2003. The arbitrator adopted "in total the testimony of Dr. DePhillips." De Phillips opined that though claimant's sprain/strain had resolved, there was also present a "segmental instability" that worsened. Claimant underwent a fusion on January 13, 2004. From April 2004 through June 2004, claimant engaged in physical therapy. Claimant was released to light duty in June 2004, and he sought light-duty work. A functional capacity examination (FCE) conducted in October 2004 suggested claimant could perform light-duty or medium-duty work, and his job search included both types of employment. This was corroborated by Ajster, whom the arbitrator found credible. The arbitrator found that the evidence showed that claimant attempted to find work "until Dr. DePhillips opined that he was permanently and totally disabled on October 26, 2006." Claimant continued to treat with DePhillips and was taking substantial medications (Narcov, Zanax, Zanaflax, Mobix, Restorill, and Neurotin). Ultimately, relying on DePhillips' opinions (noting that it was not refuted by the record), the testimony of Ajster and Jennifer Kiesewetter (a friend of the family), objective testing, and claimant's testimony, the arbitrator concluded claimant was permanently and totally disabled. The Commission adopted the arbitrator's decision in total. Further, during the proceedings before the trial court, that court stated its belief that the

Commission's decision was not contrary to the manifest weight of the evidence.

¶ 24 Having examined the record, we find ample support for the arbitrator's decision, as adopted by the Commission. Dr. DePhillips testified via evidence deposition that he is a board-certified neurosurgeon. He began treating claimant in June 2003. Claimant was suffering from low back pain and shooting pain into his leg. In July 2003, diagnostic testing revealed spondylolysis and spondylolisthesis. DePhillips told claimant the only cure was surgery. DePhillips initially recommended conservative treatment. He noted that claimant did suffer from a lumbo-sacral sprain that had resolved, though his condition of ill-being had not. On October 23, 2003, DePhillips recommended a discogram, which revealed a progressive worsening of claimant's condition. DePhillips recommended surgery (a fusion), which was performed in January 2004. During the operation, there was an "intraoperative finding of a loose lamina" which explained "the progressive worsening of [claimant's] condition." In March 2004, claimant was experiencing some residual low back pain, but his condition was much improved.

¶ 25 DePhillips released claimant to work light duty on June 3, 2004. DePhillips stated claimant had reached MMI on this date. An FCE conducted in October 2004 placed claimant at the light to medium physical-demand level. DePhillips recommended further vocational rehabilitation, though he believed claimant's condition would require further surgery above the level of claimant's fusion. In October 2006, claimant still complained of lower back pain, that was not improving, though it was better than it had been before the fusion. DePhillips contemplated ordering another MRI. He opined that claimant was "unemployable and therefore totally disabled." DePhillips based his opinion on the following: "he had a condition of instability at the level above the fusion"; he had not been able to find work in a year; and he had to be on narcotic pain medication to control his pain. DePhillips explained that "it is not uncommon in [his] practice where patients have that due to the restrictions

[he places] on patients based on their condition of ill-being and that because of their medications and because of their educational level, although it can appear that they are employable, indeed they are not because of these concerns." Respondent objected at this point, asserting that DePhillips is not a vocational expert. The arbitrator overruled this objection, stating that this was a matter of the weight to which the opinion was entitled. DePhillips then opined that, vocational issues aside, to a reasonable degree of neurological certainty, claimant was not employable, "speaking strictly from a neurological standpoint." DePhillips further testified that, though he does not consider himself an expert in vocational matters, he encounters them in his practice on a daily basis. As such issues arise, he regularly takes into account the vocational background of his patients. DePhillips saw claimant on May 31, 2007. He again placed claimant at MMI and opined that he was "unemployable and permanently and totally disabled." In itself, DePhillips' testimony provides adequate support for the Commission's decision such that it is not contrary to the manifest weight of the evidence.

¶ 26 Moreover, additional evidence supports the Commission's decision. Julie Ajster testified that she resides with claimant. She has lived with him since 2002. She testified that she is a "Plaintiff's Petitioner attorney" employed at the Law Offices of Peter Ferracuti. Ajster testified that claimant's condition worsened in November and December of 2003. After claimant was released to light duty in June 2004, respondent never offered him a job. She assisted claimant in a job search, which is reflected in a log. After the October 2004 FCE, in which claimant was placed at the medium physical-demand level, claimant's search included jobs that fit within that restriction. Claimant was required to keep a job log for unemployment-compensation purposes until January 2005. After that, according to Ajster, claimant continued to seek employment, but did not keep a log of his search. Ajster identified some of the places claimant contacted, including Spring Valley Automotive, Direct TV, and Dish Network. He also sought work at some fast food establishments.

Claimant continued to seek work until DePhillips opined that he was totally disabled. Ajster testified that claimant is in constant pain. She believed that claimant should not drive due to the medications he takes. Ajster stated that claimant also has pain in his "butt and his legs" and this causes difficulty in walking.

¶ 27 Jennifer Kiesewetter, an attorney who works with Ajster, testified that she is a friend of claimant. She testified that claimant "is on a considerable amount of pain medication." At times, he is forgetful and has a hard time paying attention to things. He is sometimes moody and can become frustrated or agitated. Sometimes he can be irrational. His sleep patterns are irregular. If claimant walks for 10 to 15 minutes, his back swells and he needs pain medication. When claimant flew to Las Vegas, he had to use a wheelchair in the airport and was preboarded on the airplane. Kiesewetter does not like to drive with claimant due to his lack of concentration. When claimant entered a casino in Joliet, security stopped him and inquired if he was drunk. Kiesewetter stated that she has never seen claimant drink alcohol. She has never observed claimant doing any housekeeping or yard work.

¶ 28 The arbitrator explicitly found the testimony of Ajster and Kiesewetter credible. He also credited DePhillips' testimony. He noted that objective testing provided additional corroboration. The arbitrator did not reference the term "odd-lot" in ruling that claimant was permanently and totally disabled. Hence, it is apparent that the arbitrator determined that claimant proved that he was "obviously unemployable." See *Schoon*, 259 Ill. App. 3d at 590. An opposite conclusion is not clearly apparent. DePhillips opined claimant was totally disabled. Ajster and Kiesewetter provided concrete testimony regarding claimant's disability, including the profound effect on him that the narcotics claimant is required to take have. Given this compelling combination of lay and expert testimony regarding claimant's condition of ill-being , we find no legitimate basis to disturb the

decision of the Commission.

¶ 29 Respondent's attack on the Commission's decision amounts to attacks upon DePhillips' opinion and the quality of claimant's job search. On the first point, respondent puzzlingly claims, "[A]t no point did DePhillips concluded [*sic*] that from a medical perspective [claimant] was permanently and totally disabled." However, in his deposition, DePhillips stated:

> "[I]n my opinion to within a reasonable degree of neurological certainty, [claimant] was unemployable in October of '06 based on the fact that he is—he required narcotic medications for pain control, as well as based on the restrictions that were placed on him due to the type of surgery he had."

"Unemployable" would seem to be a fair proxy for "permanently and totally disabled" since one of the ways one can prove that he or she is "permanently and totally disabled" is a diligent but unsuccessful job search (*Alexander v. Industrial Comm'n*, 314 Ill. App. 3d 909, 918 (2000); see also *Westin Hotel*, 372 Ill. App. 3d at 544 (equating employability with disability)). Additionally, following an evaluation on March 31, 2007, DePhillips testified that he "declared maximum medical improvement again, stating that [claimant] was unemployable and permanently and totally disabled." In short, respondent's assertion that claimant provided no medical testimony indicating he was permanently and totally disabled is not supported by the record.

¶ 30 As for respondent's attack upon the quality of claimant's job search, we note such evidence is relevant to proving an entitlement to PTD through an odd-lot theory. See *Valley Mould & Iron Co.*, 84 Ill. 2d at 547. The Commission, adopting the decision of the arbitrator, did not rely on such a theory, and we have determined that this decision is not contrary to the manifest weight of the evidence. Accordingly, respondent's assertion is beside the point. Having rejected both of respondent's contentions, we cannot conclude that the Commission erred in finding claimant

permanently and totally disabled.

¶ 31 IV. CONCLUSION

¶ 32 In light of the foregoing, the decision of the circuit court of LaSalle County is reversed, and the decision of the Commission reinstated.

¶ 33 Trial court reversed; Commission decision reinstated.