2011 IL App (2d) 101052WC-U
No. 2-10-1052WC
Order filed October 28, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

SWANSON PARK COLLISION, INC./ ACCIDENT FUND,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellant,	)	
v.	)	No. 09-MR-1059
ILLINOIS WORKERS' COMPENSATION COMMISSION, SWANSON PARK COLLISION INC./GUARANTY FUND, and KEVIN OLSON,	)	Honorable J. Edward Prochaska,
Defendants-Appellees.	)	Judge, Presiding

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

ORDER

Held: (1) Date established by the Commission as the manifestation date of claimant's repetitive-trauma injury is not against the manifest weight of the evidence as there was adequate evidence to support a finding that date chosen by the Commission was the date that the fact of the injury and the causal relationship of the injury to claimant's employment would have become plainly apparent to a reasonable person; (2) the Commission's establishment of October 23, 2001, as the manifestation date of claimant's repetitive-trauma did not constitute a misapplication of prior case law;

(3) claimant was not required to notify employer's insurer of accident; but (4) the Commission erred in requiring employer's insurer to reimburse insolvency fund for benefits paid to claimant.

¶ 1 Accident Fund Insurance Company (Accident Fund) appeals an order of the circuit court of Winnebago County confirming a decision of the Illinois Workers' Compensation Commission (Commission). The Commission awarded benefits to claimant, Kevin Olson, pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2000)), on the basis that claimant sustained a repetitive-trauma injury while in the employ of respondent, Swanson Park Collision, Inc. The Commission set the manifestation date of claimant's injury as October 23, 2001. On that date, Accident Fund was respondent's workers' compensation carrier and therefore responsible for providing claimant's benefits. In this appeal, Accident Fund claims that the Commission should have set the manifestation date of injury as September 25, 2001. Because September 25, 2001, precedes the effective date of Accident Fund's policy with respondent, a different insurer would be responsible for paying claimant's benefits. For the reasons set forth below, we conclude that the manifestation date set by the Commission is not against the manifest weight of the evidence. However, we agree with Accident Fund's alternate contention that the Commission erred in ordering it to reimburse the Illinois Insurance Guaranty Fund (Guaranty Fund) for benefits the latter had already paid to claimant. Accordingly, we affirm in part and reverse in part.

¶ 2 I. BACKGROUND

¶ 3 Claimant filed two applications for adjustment of claim pursuant to the Act. Both applications alleged that claimant sustained injuries to his "right [and] left upper extremities [and] both hands" while working for respondent. The first application was filed on January 8, 2004, and

listed an accident date of September 25, 2001. On September 25, 2001, respondent's workers' compensation insurance carrier was Fremont Indemnity Company (Fremont). Fremont was subsequently liquidated and its claims were taken over by the Guaranty Fund (see 215 ILCS 5/532 *et seq*. (West 2000)). The second application was filed on June 7, 2004. The second application originally listed an accident date of November 1, 2001, but was subsequently amended to reflect an accident date of November 2, 2001. Accident Fund began providing coverage to respondent on October 15, 2001. As a result, Accident Fund was respondent's workers' compensation carrier on the accident date alleged in the second application for adjustment of claim. The two applications were consolidated on respondent's motion. An arbitration hearing was held on February 27, 2008, during which the following facts were established by the testimony presented and the exhibits admitted into evidence.

¶ 4 Claimant began working for respondent as an auto body repairman in June of 1987. During the course of a typical workday, claimant would regularly use a variety of tools, many of which were pneumatic or electric and would vibrate. Claimant described his work as heavy and stated that he was required to lift up to 150 pounds by himself. As claimant was performing his job, he noticed that he was losing strength in his right hand and that he was dropping things. He also began to experience pain in his right wrist and fingers and on the top of his right hand. Claimant related that his symptoms were progressive and did not suddenly begin on a particular date. On September 25, 2001, claimant spoke to John Davis, respondent's general manager. Claimant was unable to recall exactly what he told Davis, other than that he was having problems with his right hand. Despite his symptoms, claimant continued to work with no restrictions.

¶ 5 On October 23, 2001, claimant took his son to see Dr. David McCarty. During the visit, Dr. McCarty asked claimant how he was doing. Claimant told Dr. McCarty about his right-hand complaints and explained that he works as an auto repairman with a lot of vibrating tools. Dr. McCarty's office note reflects that claimant complained that his right hand was weak and gave way on occasion. Claimant also reported nighttime symptoms of paresthesia and aching. After conducting a physical examination, Dr. McCarty's impression was "[r]ight hand and arm pain, possible capsulitis or tendinitis, rule out median nerve involvement or carpal tunnel syndrome." Claimant testified that he had never heard of capsulitis or median nerve involvement prior to October 23, 2001. Dr. McCarty opined that claimant's work activities "would be a contributory factor based upon the type of work duties that [claimant] has described." Dr. McCarty recommended that claimant use a wrist splint, and he prescribed Medrol with one refill. Dr. McCarty noted that if claimant's condition did not improve, the next step would be to undergo an EMG. Claimant testified that he followed Dr. McCarty's recommendations, but did not treat with him again. He added that prior to October 23, 2001, he did not know what was wrong with his right hand, only that he had certain symptoms, and that he had not sought any treatment, worn a splint, or taken any prescription medication for the condition.

¶ 6 On November 2, 2001, claimant reported an accident to Joyce Shankey, respondent's office manager. Claimant testified that he told Shankey that he was experiencing pain in both hands, with the pain in the right hand being more severe. At that time, Shankey completed an accident report. The report indicates the nature of claimant's injury was severe pain in the right wrist. In the box

labeled "[d]ate & time of accident," the report indicates "severe pain started 9/25/01." Claimant testified that he was unaware that Shankey had completed an accident report.

¶ 7 Subsequently, claimant scheduled an appointment with Dr. Brian Bear upon a recommendation from his (claimant's) wife. Dr. Bear referred claimant for an EMG prior to the examination. Dr. Peter Park performed the EMG on December 19, 2001. Dr. Park's note contains a history of pain in the right arm and elbow with sleep sensations starting a year earlier. Dr. Bear examined claimant on January 17, 2002. Claimant told Dr. Bear that he works as an auto repairman and does a significant amount of heavy lifting with his hands. According to Dr. Bear's office note, claimant presented with a "greater than one year history of paresthesia in his right hand primarily affecting the thumb, index and long finger." Claimant also reported occasional symptoms at night, while talking on the telephone, while driving a car, and after a long day's work. Dr. Bear noted that claimant's EMG was negative for carpal tunnel syndrome. Dr. Bear diagnosed right hand paresthesia with two potential causes: (1) EMG negative carpal tunnel syndrome or (2) a cervical herniated disc. Dr. Bear administered a cortisone injection and prescribed physical therapy. Claimant testified that he continued to work without restrictions, but his therapist gave him anti-vibration gloves to use on the job. Claimant's hand therapy continued through March 18, 2002.

¶ 8 Claimant next sought treatment on July 15, 2002, with Dr. Mark Carlson. Claimant presented with complaints of weakness, numbness, and pain in the right forearm and wrist with an onset date one year earlier. Following a physical examination, Dr. Carlson diagnosed "right wrist tendinitis, rule out carpal tunnel syndrome, questionable cervical radiculopathy." He recommended light-duty restrictions, physical therapy, and medications. Claimant returned to Dr. Carlson on July

29, 2002, with continued complaints of right wrist discomfort and weakness. At that time, Dr. Carlson recommended surgery on claimant's right wrist. The surgery was performed on August 30, 2002. Claimant continued to work until the surgery, when he also began receiving temporary total disability (TTD) benefits from Fremont. Claimant subsequently underwent six additional surgeries to the right wrist, with the last procedure occurring on September 2, 2004. In a letter to claimant's attorney dated January 12, 2005, Dr. Carlson stated that it was his opinion that "the accident of 9/25/01, primarily affecting [claimant's] right wrist, was a significant cause of his current condition."

¶ 9 On December 9, 2003, while still under the care of Dr. Carlson, claimant saw Dr. David Kalainov for an independent medical evaluation (see 820 ILCS 305/12 (West 2000)). Dr. Kalainov's report states that claimant was in good health until September 2001 when he developed pain in both of his thumbs as well as numbness and tingling involving his right long ring and small fingers with diminished strength in both hands. Claimant told Dr. Kalainov that normal work activities involving the use of his hands would typically aggravate his symptoms. Dr. Kalainov examined claimant, reviewed his medical records, and ordered an X ray. Dr. Kalainov's impression was mild reflex sympathetic dystrophy (RSD) of the right upper extremity and basal joint arthritis of the left thumb. Subsequently, claimant began a course of pain management, principally under the care of Dr. W. Stephen Minore.

¶ 10 On March 28 and 29, 2005, claimant underwent a functional capacity evaluation (FCE). The FCE indicated that claimant was capable of performing productive work activity in a light/medium capacity. Respondent then referred claimant to Steve Blumenthal for a vocational assessment. Blumenthal concluded that claimant could find employment earning between $7 and $10 an hour

as an unarmed security guard. Subsequently, Blumenthal's vocational services were suspended due to claimant's need for further care and treatment to the left hand. To this end, Dr. Carlson performed surgery on claimant's left thumb on September 29, 2005. In March 2006, Dr. Carlson referred claimant for another FCE, which claimant underwent on April 19 and 20, 2006. The second FCE revealed that claimant could work at the light physical-demand level, lifting up to 20 pounds occasionally and 10 pounds frequently. Dr. Carlson thereafter imposed permanent work restrictions per the FCE.

¶ 11 Claimant testified that he is a high-school graduate and that he attended one year of trade school for collision repair. Claimant also stated that prior to the second FCE, he took some math, physical education, and business classes at a local community college. In addition, claimant took a real estate course. Although claimant passed the state real estate licensing examination, he did not obtain a license because of the cost. With respect to his efforts to find employment, claimant testified that he contacted a couple of insurance companies about working as an automotive estimator. He admitted that he was not qualified for one of the positions because he did not have a college degree. Claimant also testified that he contacted a few car dealerships to inquire about working as a service writer. Claimant, however, felt that he lacked the computer and typing skills required for such positions.

¶ 12 At the arbitration hearing, claimant testified that he continues to see Dr. Minore for pain management and the treatment of RSD. Claimant takes Lyrica, Mobic, various pain medications, and wears a lidocaine patch. He complained of numbness in his right hand with it being ice cold in the morning. He testified to difficulty with gripping small objects like a pen with the right hand.

He complained of left thumb pain and pain in the back of the left hand towards the wrist. Claimant no longer bowls, plays golf, or engages in water sports. He stated that it is difficult for him to open bottles and lids. He added that he helps around the house with small chores such as vacuuming and his brother helps him with the "big stuff."

¶ 13 Respondent submitted a labor market survey performed by David Patsavas, a vocational rehabilitation and career consultant, on February 11, 2008. Patsavas reviewed Blumenthal's report as well as Dr. Lubenow's November 29, 2007, office note. Patsavas concluded that claimant was capable of finding employment at a minimum of $10 per hour working as a security guard. However, given claimant's 25 years of experience in the automotive repair industry, Patsavas felt claimant could find employment earning $15 to $20 an hour.

¶ 14 Based on the foregoing evidence, the arbitrator determined that claimant sustained an injury arising out of and in the course of his employment with respondent and that claimant's current condition of ill-being is causally related to the injury. With respect to the date of accident, the arbitrator noted that in repetitive-trauma cases, the date of accident is the date the injury manifests itself. The arbitrator defined the manifestation date as "the date in which [*sic*] [claimant's] condition of ill-being and its relationship to his employment would have become plainly apparent to a reasonable person." Based on this definition, the arbitrator concluded that neither of the accident dates listed in claimant's applications for adjustment of claim was the correct manifestation date. Rather, the arbitrator determined that the date upon which claimant's condition of ill-being and its relationship to the employment would have become plainly apparent to a reasonable person was October 23, 2001, the day claimant initially sought treatment for his condition. As such, the

arbitrator also determined that claimant provided respondent with sufficient notice of an injury when he reported his complaints to Shankey on November 2, 2001.

¶ 15 The arbitrator further found that claimant's care and treatment with Dr. Carlson was outside the two-physician rule. See 820 ILCS 305/8(a)(3) (West 2000). As a result, the arbitrator concluded that medical care and treatment after July 15, 2002, are outside the scope of the Act. The arbitrator noted that respondent paid for some of the medical services provided by the doctors outside the two-physician rule. However, the arbitrator refused to require claimant to reimburse respondent, finding that to do so would be prejudicial to claimant. The arbitrator reasoned that had claimant been made aware that he had exceeded his two choices of physician, he would have made alternate arrangements for payment of the medical bills.

¶ 16 The arbitrator awarded claimant 189-2/7 weeks of TTD benefits (see 820 ILCS 305/8(b) (West 2000)), 96-2/7 weeks of maintenance benefits (see 820 ILCS 305/8(a) (West 2000)), and a wage-differential benefit of $534.16 per week for the duration of claimant's disability (see 820 ILCS 305/8(d)(1) (West 2000)). As a consequence of the arbitrator establishing the accident date as October 23, 2001, Accident Fund became responsible for paying the wage-differential award. Moreover, pursuant to section 546(a) of the Illinois Insurance Code (Code) (215 ILCS 5/546(a) (West 2000)), the arbitrator ordered Accident Fund to reimburse the Guaranty Fund for any workers' compensation benefits the latter previously paid to claimant. Both claimant and Accident Fund appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission).

¶ 17 The Commission summarily affirmed the arbitrator's finding of the October, 23, 2001, manifestation date, without comment. The Commission also vacated the maintenance award and

determined instead that claimant was entitled to 286-4/7 weeks of TTD benefits. Although the Commission agreed that respondent was not entitled to reimbursement for the medical bills it paid to doctors outside the two-physician rule, its rationale differed from that of the arbitrator. The Commission reasoned that respondent was estopped from denying responsibility for the bills because it knew of Dr. McCarty and Dr. Bear early in the sequence of claimant's case and it paid for the majority of Dr. Carlson's bills without raising any objection or providing a basis for nonpayment. Thereafter, Accident Fund sought judicial review of the Commission's decision. The circuit court of Winnebago County confirmed. Accident Fund then filed the present appeal.

¶ 18 II. ANALYSIS

¶ 19 A. Manifestation Date

¶ 20 On appeal, Accident Fund first challenges the Commission's finding of October 23, 2001, as the manifestation date of claimant's repetitive-trauma injury. Accident Fund does so on two grounds. First, it claims that the Commission's finding is against the manifest weight of the evidence because the record "dictates" September 25, 2001, as the manifestation date. Second, Accident Fund claims that in setting the manifestation date as October 23, 2001, the Commission misinterpreted and misapplied the law as established by the supreme court in *Durand v. Industrial Comm'n*, 224 Ill. 2d 53 (2006).[1]

[1] In his answer to Accident Fund's brief, claimant raises the issue that the Commission's finding of October 23, 2001, as the accident date was erroneous, and that the Commission should have found that he proved two accident dates--one to his right hand on September 25, 2001, and one to both hands on November 2, 2001. However, claimant failed to appeal the Commission's decision

¶ 21 A reviewing court will not reverse the Commission unless its decision is contrary to law or its fact determinations are against the manifest weight of the evidence. *Durand*, 224 Ill. 2d at 64. An employee who alleges an injury based on repetitive trauma must meet the same standard of proof as a claimant who alleges a single, definable accident. *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 530 (1987); *Three "D" Discount Store v. Industrial Comm'n*, 198 Ill. App. 3d 43, 47 (1990). The employee must identify a manifestation date, *i.e.*, a date within the limitations period on which both the fact of the injury and the causal relationship of the injury to the employment would have become plainly apparent to a reasonable person. *Durand*, 224 Ill. 2d at 65; *Peoria County Belwood Nursing Home*, 115 Ill. 2d at 531. The test of when an injury manifests itself is an objective one, determined from the facts and circumstances of each case. *Three "D" Discount Store*, 198 Ill. App. 3d at 47. Setting the manifestation date in a repetitive-trauma injury is a question of fact for the Commission to determine. *Durand*, 224 Ill. 2d at 65. 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. *Durand*, 224 Ill. 2d at 64. As noted above, a court of review will reverse the Commission's decision on a factual matter only if it is against the manifest weight of the evidence. *Durand*, 224 Ill. 2d at 64. Factual determinations are against the manifest weight of the evidence only when an opposite conclusion is clearly apparent. *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 449 (1995).

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to the trial court and he did not file a notice of appeal to this court from the decision of the trial court. As a result, this issue is not properly before us. See *Herron v. Anderson*, 254 Ill. App. 3d 365, 371 (1993).

¶ 22 Accident Fund submits that the Commission should have set the manifestation date as September 25, 2001. In support of its argument, Accident Fund notes that it was on September 25, 2001, that claimant originally reported his symptoms to respondent. Accident Fund further notes that (1) the accident report completed by Shankey lists September 25, 2001, as the date claimant's "severe pain" commenced; (2) Fremont's payment logs reference a date of loss of September 25, 2001; (3) claimant's first application for adjustment of claim lists September 25, 2001, as the accident date; (4) Dr. Kalainov attributed claimant's condition to a September 2001 accident; and (5) Dr. Carlson's January 12, 2005, letter reflects an accident date of September 25, 2001. According to Accident Fund, given the consistency with which the record references September 25, 2001, it is clear that on that date, claimant had "an awareness of an injury and its possible relationship to his employment." In contrast, Accident Fund maintains that the only factor upon which to base a manifestation date of October 23, 2001, is the fact that that was the date of claimant's initial treatment.

¶ 23 At the outset, we note that while the date of September 25, 2001, is referenced throughout the record and listed as the accident date on the initial application for adjustment of claim, this information is not conclusive as to the manifestation date. Rather, it is merely evidence to be considered by the trier of fact in setting the manifestation date. To this end, in *Durand*, the supreme court instructed that the manifestation date in repetitive-trauma cases is typically set as either the date on which the employee requires medical treatment or the date on which the employee can no longer work. *Durand*, 224 Ill. 2d at 72. The court added, however, that because repetitive-trauma injuries are progressive, "the employee's medical treatment, as well as the severity of the injury and

particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work." *Durand*, 224 Ill. 2d at 72.

¶ 24 Here, the arbitrator, whose determination of the manifestation date was affirmed and adopted by the Commission, considered the evidence presented in light of *Durand* and concluded that the facts established a manifestation date of October 23, 2001. We cannot say that this finding is against the manifest weight of the evidence. The record indicates that claimant's symptoms were progressive, and while he told respondent's general manager on September 25, 2001, that his right hand was bothering him, he did not know what it was. Thereafter, claimant continued to perform his regular duties. Claimant did not seek medical intervention until he took his son to see Dr. McCarty on October 23, 2001, and, by happenstance, Dr. McCarty asked him how he was doing. At that time, Dr. McCarty noted a history of weakness of the right hand which occasionally gave way with nighttime paresthesia and aching. Dr. McCarty diagnosed "[r]ight hand and arm pain, possible capsulitis or tendinitis, rule out median nerve involvement or carpal tunnel syndrome." Dr. McCarty opined that claimant's work activities would be a contributory factor to claimant's condition. Claimant testified that prior to seeing Dr. McCarty, he did not know what was wrong with his right hand, only that it was bothering him. The foregoing suggests that while claimant may have been aware that he had an injury on September 25, 2001, he was not aware of the nature of his condition or its relationship to his employment at that time. Indeed, the injury was not so severe as to affect claimant's job performance. As such, the Commission could have determined that the causal relationship between the injury and claimant's employment would not have been clearly apparent

to a reasonable person until October 23, 2001, when claimant was told of the link by Dr. McCarty.

¶ 25 We reject the Accident Fund's claim that in setting the manifestation date as October 23, 2001, the Commission misinterpreted and misapplied the law as established by the supreme court in *Durand*. There, the employee worked as a policy administrator, scanning insurance policies into a computer and typing on a computer keyboard for several hours each day. On January 29, 1998, the employee informed her supervisor that she noticed pain in her hands several months earlier, in September or October 1997, and that she believed the pain was related to her work. The employee continued working, but the pain in her hands increased. On August 15, 2000, the employee sought medical treatment for hand and wrist pain. The employee told the physician that her symptoms had continued "on and off" for 1½ years. The doctor diagnosed probable carpal tunnel syndrome and referred the employee to another doctor to confirm the diagnosis. On September 8, 2000, the second physician agreed that the employee had carpal tunnel syndrome, which was "by history, * * * very work-related."

¶ 26 On January 21, 2001, the employee filed an application for adjustment of claim, alleging a repetitive-trauma injury with an accident date of September 8, 2000. The employer argued that the correct accident date was September or October 1997, when the employee first noticed her symptoms, and that the claim was therefore filed outside the three-year limitations period. See 820 ILCS 305/6(d) (West 2004). At the arbitration hearing, the employee testified that her symptoms began in September or October 1997. She further testified that she thought her condition was work related back in September or October 1997. The employee also related that she thought she had carpal tunnel syndrome, although she was not sure.

¶ 27 The arbitrator found that September 8, 2000, the date the employee was "officially diagnosed" with carpal tunnel syndrome was the date of the accident. As such, the arbitrator decided that the employee's claim fell within the limitations period. The Commission reversed, finding that the date when the fact of the injury and its causal relationship to the employee's employment was plainly apparent was September or October 1997. The circuit court confirmed, and this court affirmed the trial court. *Durand v. Industrial Comm'n*, 358 Ill. App. 3d 239 (2005). The supreme court, however, reversed.

¶ 28 In reaching its decision, the supreme court reasoned that to require an employee suffering from a repetitive-trauma injury to always fix as the date of the accident the date the employee became aware of the physical condition was unwarranted. *Durand*, 224 Ill. 2d at 71, citing *Oscar Mayer & Co. v. Industrial Comm'n*, 176 Ill. App. 3d 607, 610 (1988). Instead, after reviewing a series of repetitive-trauma cases, the court, as noted above, determined that "many factors" should be weighed in deciding when a repetitive-trauma injury manifests itself. *Durand*, 224 Ill. 2d at 71. Among the factors identified were the employee's medical treatment, the severity of the injury, and how the injury affects the employee's job performance. *Durand*, 224 Ill. 2d at 72. The court recognized that typically, the application of these factors has led to the manifestation date being set as either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities. *Durand*, 224 Ill. 2d at 72. Applying this analysis, the court noted that although the employee's pain led her to believe that she had carpal tunnel syndrome in September or October 1997, she did not know at that time what her condition was even though she believed it was work related. *Durand*, 224 Ill. 2d at 73. The court considered the fact

that claimant continued to perform her regular duties without seeking medical treatment until August 15, 2000. *Durand*, 224 Ill. 2d at 73. The court reasoned that the employee's description and understanding of her symptoms in September and October 1997 was "sketchy and equivocal" and her condition was not so "constant or severe" to warrant treatment or reassignment to different work. *Durand*, 224 Ill. 2d at 74. Given these facts, the court concluded that a reasonable person would not have known of this injury and its putative relationship to computer keyboard work prior to the fall of 2000. *Durand*, 224 Ill. 2d at 74.

¶ 29 Accident Fund faults the Commission for setting the manifestation date in this case as the date on which claimant first sought medical treatment. Accident Fund argues that *Durand* stands for the proposition that there are multiple factors that lead to the establishment of a manifestation date. Accident Fund claims that in this case, the Commission ignored the accident dates alleged by claimant in his applications for adjustment of claim and "establish[ed] a separate date completely out of thin air and based solely on the one factor of claimant's first date of treatment."

¶ 30 We agree that the manifestation date in a repetitive-trauma case will not always be the date on which the employee first sought medical treatment. See *Oscar Mayer & Co.,* 176 Ill. App. 3d at 612 (rejecting "any interpretation of [the] opinion which would permit the employee to always establish the date of accident in a repetitive-trauma case by reference to the last date of work"). However, we disagree that the Commission's decision to set the manifestation date in this case on such a date constituted a misapplication of the law as set forth in *Durand*. Contrary to Accident Fund's argument, the Commission did not set the date upon which claimant first sought medical treatement as the manifestation date "out of thin air." Rather, as *Durand* instructs, the Commission

concluded that October 23, 2001, was the manifestation date *after* considering various factors. See *Durand*, 224 Ill. 2d at 72. The Commission considered claimant's medical treatment, the severity of his injury, and how the injury affected claimant's performance. For instance, the Commission, in adopting the decision of the arbitrator, noted that claimant's condition prior to October 23, 2001, was not so constant or severe to warrant treatment such as prescription medication or the use of a splint. In addition, the Commission noted that prior to seeking medical treatment, claimant was aware of symptoms in his right hand, but he did not know in particular what was wrong with him or the cause of his condition. The Commission also found significant the fact that claimant reported the onset of symptoms with both work and non-work activities. In other words, the Commission considered a variety of factors in establishing the manifestation date, including claimant's medical treatment, the severity of the injury, and how the injury affected claimant's job performance. Thus, the Commission's analysis was consistent with *Durand*.

¶ 31 Accident Fund also argues that the Commission's decision is contrary to law because it "constitutes an injustice to Accident Fund." Accident Fund notes that while claimant filed an application for adjustment of claim alleging an accident date in November 2001, it "had no basis to consider its liability to [claimant] for that accident date as the [r]ecord reveals no evidence which supports a claimed injury in November 2001." We disagree. As the trial court noted in addressing a similar claim, "[s]imply because Accident Fund did not take an active role in defending this case prior to trial * * * as a result of the Commission's findings does not make the result contrary to law."

¶ 32 B. Notice

¶ 33 Next, Accident Fund claims that the Commission's determination of proper notice for an

October 23, 2001, injury should be reversed. Accident Fund argues that it was never provided notice in a timely fashion of an injury date within its coverage period of respondent. Notice is governed by section 6(c) of the Act (820 ILCS 305/6(c) (West 2000)). That provision provides in pertinent part that "[n]otice of the accident shall be given to the *employer* as soon as practicable, but not later than 45 days after the accident." (Emphasis added.) 820 ILCS 305/6(c) (West 2000). Notably, we find nothing in the plain language of the Act's notice provision requiring the employee to notify its employer's insurance carrier of an accident and Accident Fund has cited no authority requiring the employee to do so. Thus, Accident Fund's argument is not well taken.

¶ 34 Further, while Accident Fund does not dispute that claimant provided notice of a September 25, 2001, injury to respondent through Shankey, it asserts that there is no evidence that respondent was ever made aware of an injury date of October 23, 2001. However, section 6(c) provides only that "[n]otice of the accident shall give the *approximate* date and place of the accident." (Emphasis added.) 820 ILCS 305/6(c) (West 2000). Moreover, because the notice provision is to be given a liberal construction (*Atlantic & Pacific Tea Co. v. Industrial Comm'n*, 67 Ill. 2d 137, 143 (1977)), if some notice has been given, although inaccurate or defective, then the *employer* must show that he has been unduly prejudiced ((820 ILCS 305/6(c) (West 2000); *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill. App. 3d 92, 96 (1994)). In this case, there is no showing that respondent was prejudiced by any alleged inaccuracy in notice. While Accident Fund argues that it was so prejudiced, this is not what the Act requires. Accordingly, we reject Accident Fund's arguments on the issue of notice.

¶ 35 C. Reimbursement

¶ 36 Accident Fund next contends that the Commission's determination that it should reimburse the Guaranty Fund pursuant to section 546(a) of the Code (215 ILCS 5/546(a) (West 2000)) for benefits the Guaranty Fund paid to claimant is contrary to law and should be reversed. Accident Fund further contends that, to the extent that section 546(a) of the Code applies to the situation at bar, the Guaranty Fund failed to timely assert this defense. In response, the Guaranty Fund does not argue the applicability of section 546(a) of the Code. Rather, it claims that section 19(b) of the Act (820 ILCS 305/19(b) (West 2006)) specifically provides for reimbursement when the issue of coverage is in dispute.

¶ 37 The Guaranty Fund is "a not-for-profit association created by the Illinois legislature to limit the impact on the public, 'claimants and policyholders,' of losses arising out of insurer insolvencies." *Pierre v. Davis*, 165 Ill. App. 3d 759, 760 (1987). The intention of the legislature in creating the Guaranty Fund is to protect the public from lawsuits arising from the insolvency of Illinois insurers. *Lucas v. Illinois Insurance Guaranty Fund*, 52 Ill. App. 3d 237, 239 (1977); see also 215 ILCS 5/532 (West 2000). "Since all Illinois licensed insurers contribute to the Illinois Guaranty Fund, the philosophy of the [Guaranty] Fund is to have all potential claims against the [Guaranty] Fund's assets reduced by a solvent insurer, not the [Guaranty Fund], wherever possible." 215 ILCS 5/546(a) (West 2000); *Pierre*, 165 Ill. App. 3d at 760.

¶ 38 As noted above, here, the arbitrator determined that, pursuant to section 546(a) of the Code (215 ILCS 5/546(a) (West 2000)), Accident Fund was required to reimburse the Guaranty Fund for the benefits the latter paid to claimant. Section 546(a) provides in pertinent part:

"An insured or claimant shall be required first to exhaust all coverage provided by

> any other insurance policy, regardless of whether or not such other insurance policy was written by a member company, if the claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the [Guaranty] Fund. The [Guaranty] Fund's obligation under Section 537.2 [of the Code (215 ILCS 5/537.2 (West 2000))] shall be reduced by the amount recovered or recoverable, whichever is greater under such other insurance policy." 215 ILCS 5/546(a) (West 2000).

The arbitrator's rationale was as follows:

> "In the instant claim [claimant] alleges an injury to the same part of the body arising out of the same set of facts (repetitive trauma). Furthermore the Arbitrator notes that [claimant] is seeking an undistinguishable remedy for each of the alleged accidents. Given these set [*sic*] of circumstances, it is clear that the Illinois legislature from the plain language of the Illinois Insurance Code, Section 215 ILCS 5/546(a), that an insured shall exhaust all coverage provided under another insurance policy [*sic*].
>
> The Arbitrator notes that insurance coverage for Respondent changed on October 15, 2001 from Fremont (Illinois Guarantee [*sic*] Fund) to Accident Fund.
>
> Since the Arbitrator has found the date of manifestation to be October 23, 2001 the Arbitrator finds that liability for [claimant's] claim shall rest with Respondent's solvent carrier Accident Fund, and not the Guaranty Fund. The Accident Fund shall reimburse the Guarantee [*sic*] Fund for payments made by the Guarantee [*sic*] Fund for Medical and TTD to the [claimant] conditional upon resolution of the Accident Fund's Exhibit No. 2 which is a letter dated August 5, 2005 from [the Guaranty Fund's attorney] to Dr. Mark Carlson

> regarding an agreement on behalf of the Illinois Guarantee [*sic*] Fund to pay half of the costs associated with the care and treatment of [claimant's] left hand."

Without comment, the Commission affirmed and adopted the arbitrator's finding with respect to reimbursement. We find that the Commission erred in doing so.

¶ 39 The Guaranty Fund's obligations are limited to those claims falling within the statutory definition of a "covered claim." 215 ILCS 5/534.3 (West 2000); *Pierre*, 165 Ill. App. 3d at 760. The Code defines a "covered claim," in pertinent part, as follows:

> " (a) 'Covered claim' means an unpaid claim for a loss arising out of and within the coverage of an insurance policy to which this Article applies and which is in force at the time of the occurrence giving rise to the unpaid claim, including claims presented during any extended discovery period which was purchased from the company before the entry of a liquidation order or which is purchased or obtained from the liquidator after the entry of a liquidation order, made by a person insured under such policy or by a person suffering injury or damage for which a person insured under such policy is legally liable, and for unearned premium, if:
>
> (i) The company issuing the policy becomes an insolvent company as defined in Section 534.4 after the effective date of this Article; and
>
> (ii) The claimant or insured is a resident of this State at the time of the insured occurrence, or the property from which a first party claim for damage to property arises is permanently located in this State or, in the case of an unearned premium claim, the policyholder is a resident of this State at the time the policy was issued; provided, that for

> entities other than an individual, the residence of a claimant, insured, or policyholder is the state in which its principal place of business is located at the time of the insured event." 215 ILCS 5/534.3 (West 2000).

Here, we find that there was no "covered claim" as that term is defined in section 534.3 of the Code. Claimant in this case did not suffer a loss "arising out of and within the coverage of" the Fremont policy, which the Guaranty Fund took over. Fremont's insurance policy was effective only until October 14, 2001. However, the loss for which the Commission determined that claimant was entitled to benefits did not manifest itself until October 23, 2001. See *Beatrice Foods Co. v. Illinois Insurance Guaranty Fund*, 122 Ill. App. 3d 172, 173-75 (1984). Pursuant to the plain language of section 546(a) (215 ILCS 5/546(a) (West 2000)), reimbursement is only required where a "covered claim" is involved. Since there was no "covered claim" against the Guaranty Fund, section 546(a) is not applicable. Accordingly, the Commission erred in holding that the Guaranty Fund was entitled to reimbursement pursuant to section 546(a) of the Code.

¶ 40 The Guaranty Fund correctly notes that section 19(b) of the Act provides for reimbursement between multiple insurers where one insurer paid benefits to the injured employee, but another insurer is found liable. 820 ILCS 305/19(b) (West 2006). The relevant provision states:

> "Where 2 or more insurance carriers, private self-insureds, or a group workers' compensation pool under Article V 3/4 of the Illinois Insurance Code dispute coverage for the same injury, any such insurance carrier, private self-insured, or group workers' compensation pool may request an expedited hearing pursuant to this paragraph to determine the issue of coverage, provided coverage is the only issue in dispute and all other issues are

> stipulated and agreed to and further provided that all compensation benefits including medical benefits pursuant to Section 8(a) continue to be paid to or on behalf of petitioner. Any insurance carrier, private self-insured, or group workers' compensation pool that is determined to be liable for coverage for the injury in issue shall reimburse any insurance carrier, private self-insured, or group workers' compensation pool that has paid benefits to or on behalf of petitioner for the injury." 820 ILCS 305/19(b) (West 2006).

We note at the outset that this provision did not become effective until well after claimant's accident occurred and he filed his applications for adjustment of claim. See Pub. Act 94-277 (eff. July 20, 2005) (amending 820 ILCS 305/19 (West 2006)). The question of the applicability of section 19(b) aside, there is no evidence that the Guaranty Fund invoked the expedited procedure outlined therein to determine the issue of coverage. As such, we find any claim by the Guaranty Fund that section 19(b) requires Accident Fund to reimburse it is forfeited.

¶ 41 In short, we find that the Commission erred in requiring Accident Fund to reimburse the Guaranty Fund for the benefits the latter paid to claimant as section 546(a) of the Code is not applicable and the Guaranty Fund did not invoke the reimbursement provision of section 19(b) of the Act. However, Accident Fund is liable for any benefits to which claimant was entitled that were not previously paid by the Guaranty Fund. Given our conclusion, we need not address Accident Fund's alternative claim that the Guaranty Fund did not assert its claim for reimbursement in a timely manner.

¶ 42 III. CONCLUSION

¶ 43 For the reasons set forth above, we find that the Commission properly set the manifestation

date of claimant's repetitive-trauma injury as October 23, 2001. Further, we reject Accident Fund's argument that it was not properly notified of claimant's accident. However, we agree that the Commission erred in concluding that section 546(a) of the Code obligated Accident Fund to reimburse the Guaranty Fund for benefits the latter paid to claimant. Accordingly, the judgment of the circuit court of Winnebago County, which confirmed the decision of the Commission, is affirmed in part and reversed in part.

Affirmed in part and reversed in part.