BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEPHEN CARTER, Claimant, vs. BRIDGESTONE AMERICAS, INC., Employer, and OLD REPUBLIC INSURANCE CO., Insurance Carrier, Defendants.	File No. 1649560.01 ARBITRATION DECISION Head Note Nos.: 1600, 2400, 2401

STATEMENT OF THE CASE

The claimant, Stephen Carter, filed a petition for arbitration seeking workers' compensation benefits from Bridgestone Americas, Inc. ("Bridgestone"), and its insurer Old Republic Insurance Co. Jerry Jackson appeared on behalf of the claimant. Timothy Wegman appeared on behalf of the defendants.

The matter came on for hearing on October 20, 2020, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. An order issued on March 13, 2020, and updated June 1, 2020, August 14, 2020, and October 12, 2020, by the Iowa Workers' Compensation Commissioner, In the Matter of Coronavirus/COVID-19 Impact on Hearings (Available online at: https://www.iowaworkcomp.gov/order-coronavirus-covid-19 (last viewed December 29, 2020)) amended the hearing assignment order in each case before the Commissioner scheduled for an in-person regular proceeding hearing between March 18, 2020, and March 19, 2021. The amendment makes it so that such hearings will be held by Internet-based video, using CourtCall. The parties appeared electronically, and the hearing proceeded without significant difficulties. The matter was fully submitted on November 30, 2020, after briefing by the parties.

The record in this case consists of Joint Exhibits 1-4, and Defendants' Exhibits A-B. Testimony under oath was also taken from the claimant, Stephen Carter. Amy Rose was appointed the official reporter and custodian of the notes of the proceeding.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injury.

2. The claimant sustained an injury arising out of, and in the course of, employment, on August 1, 2017.

3. That the alleged injury is a cause of permanent disability.

4. That the disability is a scheduled member disability to the ears.

5. That the commencement date for permanent partial disability benefits, if any are awarded, is August 2, 2017.

6. That the claimant's gross earnings were $1,052.09 per week. That the claimant was married, and entitled to 2 exemptions. Based upon the foregoing, the parties believe that the appropriate weekly compensation rate is $663.69.

7. That prior to hearing, the claimant was paid 52.41 weeks of compensation at the rate of $663.69 per week.

8. That the costs listed in Joint Exhibit 4 have been paid.

Any entitlement to temporary disability and/or healing period benefits is no longer in dispute. Medical benefits are no longer in dispute.

The defendants waived some of their affirmative defenses.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. The extent of permanent disability, if any is awarded.

2. Whether the disability is an industrial disability.

The defendants assert an affirmative defense of lack of timely notice pursuant to Iowa Code section 85.23, and untimely claim pursuant to Iowa Code section 85.26

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Stephen Carter, the claimant, was 65 years old at the time of the hearing. (Testimony). He graduated from Southeast Polk High School in 1973. (Testimony). Prior to working at Bridgestone, he performed body work and rough carpentry. (Testimony; Defendants' Exhibit A:3-4). He worked in these positions from 1973 to 1989. (Testimony; DE A:3-4). In 1989, Mr. Carter began working for the defendant employer. (Testimony DE A:4). He worked there for just over 28 years until his retirement in 2017. (Testimony).

From 1989 to 1996, Mr. Carter worked as a Banbury cleaner for Bridgestone. (Testimony; DE B:2). He then proceeded to "master batch pigments" from 1996 to about 1998. (Testimony; DE B:2). He returned to work as a Banbury cleaner until 2007. (Testimony; DE B:2). He then worked in the "cement room" until approximately 2009. (Testimony; DE B:3). Finally, he returned to a job as a Banbury cleaner from 2009 to 2017. (Testimony; DE B:3).

Bridgestone acknowledged an occupational hearing loss sustained by Mr. Carter, and issued him hearing aids. (Testimony). Mr. Carter claims that he experienced a hearing loss, and is now hard of hearing due to his work at Bridgestone. (DE B:3). Mr. Carter testified that his hearing loss was gradual, and that he could not pinpoint the first time that he noticed his hearing diminishing. (DE B:3). Mr. Carter agreed in his deposition and at hearing that he experienced ringing in his ears, and hearing loss dating back to 2009. (Testimony; DE B:3). Mr. Carter also agreed in his deposition that he experienced high frequency hearing loss dating back to his youth. (DE B:5).

As an employee of Bridgestone, Mr. Carter received periodic hearing tests. (Testimony). In November of 1990, it was noted that Mr. Carter experienced some high frequency hearing loss. (Joint Exhibit 1:1). The resulting report advised Mr. Carter to wear hearing protection in high noise areas. (JE 1:1). In another test from 1996, Mr. Carter made no mention of ringing in his ears after work. (JE 1:2). In 1997, Mr. Carter noted no ringing in his ears, and indicated regularly wearing ear plugs or muffs while at work. (JE 1:3). The 1997 report also indicated Mr. Carter's participation in the "Ear Protection Training Program." (JE 1:3). In 1998, Mr. Carter again noted no trouble hearing or ringing in his ears after work. (JE 1:4). He also noted regularly wearing ear plugs or muffs at work. (JE 1:4).

In 2006, Mr. Carter indicated continued use of ear plugs or muffs. (JE 1:5). He also noted that he operated a lawnmower, or chainsaw. (JE 1:5). He noted exposure to loud noise for 12 hours on the day of his hearing test. (JE 1:5). He noted the same items in 2007 and 2008. (JE 1:6-7).

In 2009, Mr. Carter indicated noise exposure for 12 hours on the day of his hearing test, and further noted that he wore ear plugs. (JE 1:8). He further noted that he operated a lawnmower or chainsaw. (JE 1:8). For the first time in the evidence provided, Mr. Carter checked a box indicating that he experienced ringing in his ears. (JE 1:8). Mr. Carter testified that he did not know that the ringing in his ears, or tinnitus, would turn into a disabling condition, nor did he know that he could file a workers' compensation claim. (Testimony). This document is dated September 8, 2009. (JE 1:8). His 2010, 2011, 2012, 2013, 2014, and 2015 Audiometric History forms indicated continued ringing in his ears. (JE 1:9-16).

In 2011, Pete Goshorn, R.N., drafted a letter to Timothy Simplot, M.D., at ENT Clinic of Iowa. (JE 2:1). Nurse Goshorn requested that Dr. Simplot opine as to whether or not Mr. Carter experienced work related hearing loss. (JE 2:1). Finally, Nurse Goshorn noted that the defendant employer required the use of hearing protection while on the job at all times since 1995. (JE 2:1).

On August 22, 2011, Dr. Simplot examined Mr. Carter for the first time. (JE 2:2-4). Mr. Carter reported hearing difficulty dating back "many years" to Dr. Simplot. (JE 2:2). This included a diagnosis of high frequency hearing loss dating back to grade school. (JE 2:2). Mr. Carter denied any substantial, noticeable change in hearing on a subjective basis. (JE 2:2). However, Mr. Carter complained of some difficulties with bilateral nonpulsatile tinnitus for the previous few years. (JE 2:2). He described the tinnitus as high frequency and "fairly constant." (JE 2:2). Dr. Simplot reviewed Mr. Carter's previous hearing loss records, and noted baseline high frequency nerve loss on both sides at various hearing levels. (JE 2:2). Dr. Simplot noted that Mr. Carter smoked one pack per day, and had done so for 40 years. (JE 2:2). Dr. Simplot reviewed audiometry tests, and noted, "[t]esting today demonstrates relatively good symmetry, he has essentially normal hearing levels up to 1000 Hz he then drops in the higher frequencies fairly precipitously to a moderate-to-severe sensorineural loss." (JE 2:3-4). Dr. Simplot assessed Mr. Carter with sensorineural hearing loss, subjective tinnitus, and cerumen impaction. (JE 2:4). Dr. Simplot noted that he did not believe any threshold shifting in Mr. Carter's baseline hearing levels were work-related. (JE 2:4). Dr. Simplot opined that this appears to be a natural progression of his hearing decline. (JE 2:4). Dr. Simplot recommended continued use of hearing protection at all times while on the job, and using the formal audiometric testing results performed in office as a new baseline for further medical evaluation. (JE 2:4).

Mr. Carter returned to Dr. Simplot's office on September 11, 2014, for his Bridgestone hearing evaluation, as referred by Nurse Goshorn. (JE 2:6-8). Mr. Carter's nonpulsatile tinnitus was unchanged. (JE 2:6). Dr. Simplot found no appreciable change in hearing levels when compared to Mr. Carter's 2011 hearing tests. (JE 2:7). Dr. Simplot noted no evidence of active work related hearing issues. (JE 2:8).

In 2016 and 2018, Mr. Carter's hearing evaluations indicate that he sustained a severe loss in hearing, but also indicated no significant change in hearing since his baseline test. (JE 1:17-20).

On June 26, 2018, Mr. Carter returned to Dr. Simplot's office for repeated hearing testing. (JE 2:12-14). Mr. Carter's former employer, Bridgestone, requested the examination. (JE 2:12). Mr. Carter noted a gradual reduction in hearing over the years. (JE 2:12). Dr. Simplot noted that Mr. Carter experienced a high frequency hearing loss that progressed over time along with difficulties with bilateral nonpulsatile tinnitus. (JE 2:12). Mr. Carter told Dr. Simplot that his tinnitus "has been going on for ages," and that he was not really sure when it began. (JE 2:12). Dr. Simplot's physical exam found bilateral scarring of the tympanic membrane. (JE 2:13). Dr. Simplot diagnosed Mr. Carter with bilateral sensorineural hearing loss. (JE 2:14).

Dr. Simplot drafted a letter to "Ms. Joens" at Sedgwick Claims Management Services, Inc., dated June 28, 2018, providing his medical opinion in the matter. (JE 2:17). Dr. Simplot opined that Mr. Carter had a baseline high frequency nerve hearing loss upon commencement of employment with Bridgestone. (JE 2:17). His hearing loss progressed since that time, and has degraded "over and above" what Dr. Simplot expected due to age-induced decline. (JE 2:17). Dr. Simplot could not opine with any degree of medical certainty as to the primary cause of the progressive hearing loss. (JE 2:17). However, Dr. Simplot could not identify other contributing health conditions which would play a major factor in Mr. Carter's hearing decline. (JE 2:17). Based upon audiometric testing, Dr. Simplot found a 39.4 percent hearing loss to Mr. Carter's right ear, and a 28.1 percent hearing loss to his left ear, which equates to a 30 percent binaural hearing loss. (JE 2:17).

Richard S. Tyler, Ph.D., issued a report based upon a records review, and a February 1, 2019, phone interview of Mr. Carter. (JE 3:1-11). The phone interview lasted 15 to 20 minutes. (Testimony). Dr. Tyler reviewed Mr. Carter's employment history at Bridgestone. (JE 3:1-2). Dr. Tyler opined that Mr. Carter's noise exposure consisted of impulsive noise which was more damaging than continuous noise. (JE 3:2). Mr. Carter acknowledged wearing hearing protection beginning in 1995. (JE 3:2). Mr. Carter noted removing his hearing protection in order to perform his job, including talking with fellow employees and supervisors. (JE 3:2). Dr. Tyler opined that Mr. Carter's hearing loss in high frequencies became worse, which was "consistent with noise induced hearing loss." (JE 3:3). Dr. Tyler further opined that his approach would more appropriately measure Mr. Carter's hearing loss and using Dr. Tyler's own system, rather than that of the Iowa Code, Dr. Tyler found a 56 percent high-frequency binaural hearing loss. (JE 3:5-6). Mr. Carter reported that his constant tinnitus began 10 to 12 years prior, and that it worsened. (JE 3:6). Dr. Tyler noted that tinnitus can cause impairment and reviewed his own publications, and clinical experience and sets out his own method providing impairment measurements for those suffering from tinnitus. (JE 3:6-9). Based upon Dr. Tyler's own impairment rating system, which has not been adopted by this body, or more importantly, codified in Iowa law, Dr. Tyler opined that Mr.

Carter suffered a 15.8 percent whole body impairment. (JE 3:9). Dr. Tyler rounded this to a 16 percent whole body impairment rating. (JE 3:9). Dr. Tyler recommended bilateral hearing aids, to be replaced every four to five years, counseling and sound therapy for his tinnitus, and potentially a short-electrode cochlear implant. (JE 3:10). Dr. Tyler opined that Mr. Carter should have restrictions including: no working around loud noise, no working around unpredictable noise levels, no working in dangerous situations where accurate concentration is required, and no working in stressful situations. (JE 3:10).

On August 30, 2019, Dr. Simplot responded to a letter from defense counsel dated August 21, 2019. (JE 2:18-19). Dr. Simplot noted that, based upon audiometric testing, and Iowa workers' compensation guidelines, Mr. Carter sustained a 24.6 percent age-corrected binaural hearing loss. (JE 2:19). Dr. Simplot opined that quantifying and directly relating causation for tinnitus was challenging. (JE 2:19). Dr. Simplot further opined that Mr. Carter complained of subjective tinnitus which he had for "many years." (JE 2:19). Dr. Simplot noted that the maximum allowable rating for tinnitus is 5 percent. (JE 2:19). Finally, Dr. Simplot opined that Mr. Carter required no permanent work restrictions related to his alleged tinnitus or hearing loss beyond wearing noise protection in loud environments. (JE 2:19).

Mr. Carter indicated that the ringing in his ears persists. (Testimony). Over the years, the ringing worsened. (Testimony). However, since retiring, the tinnitus remains unchanged. (Testimony). The ringing causes Mr. Carter difficulty hearing and concentrating. (Testimony). At times, it is difficult to fall asleep due to the ringing. (Testimony).

Mr. Carter testified that he was unaware that he could approach management regarding the ringing in his ears. (Testimony). He further noted that he always felt that the ringing in his ears from 2009 to the present was due to his work at Bridgestone. (Testimony). Mr. Carter testified that he first learned that he could claim a workers' compensation injury due to his tinnitus and hearing loss after his retirement in 2017. (Testimony). He indicated that he spoke to a former coworker, who provided him with the card of claimant's attorney. (Testimony). Mr. Carter first met with his attorney in June of 2018, at which time, his attorney informed Bridgestone of a claim for hearing loss. (Testimony).

Since retirement, Mr. Carter has not worked for any other employer, nor has he applied for work. (Testimony; DE A:5, 7). Mr. Carter receives Social Security Retirement benefits of $1,670.00 per month, and a pension from Bridgestone. (Testimony; DE A:9). He has received these since August of 2017. (DE A:9). He testified in his deposition that he enjoyed retirement. (DE B). Mr. Carter testified at hearing that the only way that he would consider returning to work is if his wife's unspecified medical condition were to worsen. (Testimony). However, at this time, his wife's condition is stable. (Testimony). Mr. Carter felt that he could not return to Bridgestone due to his work restrictions from Dr. Tyler. (Testimony). He indicated that

he was too old to work construction, and that he has not worked in the auto body industry in 40 years. (Testimony).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

Affirmative Defense Pursuant to Iowa Code section 85.23

The defendants assert an affirmative defense pursuant to Iowa Code section 85.23. Before engaging in any analysis as to any of the other disputed issues in this claim, it is important to determine whether or not the claim can even stand based upon an analysis of the facts and applicable law. Therefore, I begin my review of this case with an analysis of the defendants' first asserted affirmative defense. Iowa Code section 85.23 was substantially modified in 2017 to state:

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed. For the purposes of this section, "*date of the occurrence of the injury*" means the date that the employee knew or should have known that the injury was work-related.

When an injury, such as tinnitus, develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation is inherently a fact-based determination. The fact-finder is entitled to substantial latitude in making this determination, and may consider a wide variety of factors, none of which is dispositive in establishing a manifestation date. Relevant factors include, among others: missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. See e.g. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The parties stipulated to an injury date of August 1, 2017, but this is simply the date of the claimant's retirement from work with Bridgestone. The claimant's tinnitus manifested much earlier than 2017. On September 8, 2009, on his Bridgestone hearing test report, the claimant indicated that he experienced a ringing in his ears. The claimant testified in his deposition and at the hearing that he always felt that the ringing in his ears was related to his work activities at Bridgestone. At hearing, the claimant testified as follows:

> Q. The tinnitus complaints you testified started in 2009, and we covered this part in your deposition too, which I think's important. When you first started noticing the ringing in your ears, you say you put that down on the forms at Firestone; correct?
>
> A. Yes, correct.
>
> Q. And did you go to anybody in [a] management or supervisory position at Firestone between 2009 and 2017 and report to them that you had not only the ringing in your ears but you felt it was from your work at Firestone?
>
> A. No, I didn't know I could do that.
>
> Q. Fair enough. While you're working at Firestone between 2009 and 2017 though, you always felt that that ringing in your ears was due to the work at Firestone; correct?
>
> A. Correct.

See e.g. Transcript page 21, Lines 8-24.

Based upon the claimant's testimony, and the documentation in the record, it appears that the date of manifestation of the claimant's tinnitus is, at the latest, September 8, 2009. It could potentially be earlier than this, but there is no record or testimony indicating the claimant's belief regarding his tinnitus.

Iowa Code section 85.23 states:

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed. *For the purposes of this section, "date of the occurrence of the injury" means the date that the employee knew or should have known that the injury was work-related.*

(Emphasis added). The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred, and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Dept. of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. De Long v. Iowa State Highway Com'n, 229 Iowa 700, 295 N.W. 91 (1940).

The claimant agreed at hearing and in his deposition that he always felt that the ringing in his ears, or tinnitus, was due to his work at Bridgestone. Furthermore, he first indicated on a hearing test form that he experienced ringing in his ears as of September 8, 2009. Mr. Carter did not tell Bridgestone of his tinnitus or hearing loss until 2018, some 9 years after he first noticed it. He did not tell Bridgestone because he claimed that he did not know that he could bring a workers' compensation claim until meeting up with a former coworker in 2018, shortly prior to retaining counsel and notifying Bridgestone of his claim.

There may be an argument that Bridgestone had knowledge, as they instituted a mandatory hearing protection regimen in 1995, which implies they understood that their work environment was noisy. They also presumably received the hearing test results, and medical history forms; however, there is no evidence that they reviewed these forms. While Bridgestone was aware of the ringing in his ears, there is no indication in the record that they were alerted to a potential compensation claim or that a work related injury occurred. This situation is complicated further because Mr. Carter has pre-existing hearing loss issues.

Even if the pre-2017 statute were used to analyze this affirmative defense due to the manifestation of the injury in September of 2009, the defense still applies. The 2017 revisions to the statute added: "For the purposes of this section, 'date of the occurrence of the injury' means the date that the employee knew or should have known that the injury was work-related." Iowa Code section 85.23.

Based upon the foregoing, I find that the defendants proved, by a preponderance of the evidence, that the claimant failed to give notice of his claim within 90 days, as required by Iowa Code section 85.23. Therefore, the claimant is entitled to no compensation for his tinnitus injury.

Because the claimant failed to provide notice of his injury to his employer, pursuant to Iowa Code section 85.23, no additional analysis regarding permanent disability benefits is required.

Affirmative Defense Pursuant to Iowa Code section 85.26

The defendants assert an affirmative defense of failure to timely bring a claim pursuant to Iowa Code 85.26. The alleged date of injury in this matter is August 1, 2017. In 2017, significant changes were applied to Iowa Code Chapter 85. These changes became effective on July 1, 2017.

Iowa Code 85.26 states:

> An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed, or if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits. For the purposes of this section "*date of the occurrence of the injury*" means the date that the employee knew or should have known that the injury was work-related.

Iowa Code 85.26(1). The Iowa Supreme Court has ruled that "for discovery rule purposes, the statute of limitation on a workers' compensation claim does not begin to run until the claimant knows or should recognize the nature, seriousness, and probable compensable character of his or her injury." Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 680-81 (Iowa 2015). A claimant must have knowledge, either actual or implied, of all three characteristics of the injury before the statute begins to run. Perkins v. HEA of Iowa, Inc., 651 N.W.2d 40, 45 (Iowa 2002) (citing Swartzendruber v. Schimmel, 613 N.W.2d 646, 650 (Iowa 2000); Estate of Montag By and Through Montag v. T.H. Agriculture & Nutrition Co., Inc., 509 N.W.2d 469, 470 (Iowa 1993)). The court applies the discovery rule in cases where cumulative injuries or occupational diseases developed over time. Baker, 872 N.W.2d at 681. In cases where a cumulative injury occurs, it is deemed to have occurred when it manifests. Id. Manifestation is the time when "both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." Id. (citing Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 829 (Iowa 1992) (citation omitted)).

The first component of the discovery rule is recognition of the nature of his injury. Id. at 680-81. Mr. Carter reported continuous high frequency hearing loss during his time at Bridgestone. In 2009, he reported ringing in his ears. He testified that he always attributed this ringing, or tinnitus, to his employment with Bridgestone.

The second component of the discovery rule is recognition of the seriousness of the injury. Id. The court noted that ". . . the limitations period does not commence 'until the employee . . . knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability.'" Id. at 681 (citing Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001)). The court further noted,

". . .not every ache, pain, or symptom will be understood as possibly suggesting a permanent adverse impact on a claimant's health or physical capacity for employment." Id. As noted above, Mr. Carter has a long history of high frequency hearing loss. In 2009, Mr. Carter reporting a ringing in his ears. He attributed this to his work at Bridgestone. Mr. Carter continued to report ringing on his annual hearing test reports. Mr. Carter indicated that he wore hearing protection at work, and Bridgestone indicated that it had a mandatory hearing protection policy since 1995. A reasonable person would be concerned with the seriousness of ringing occurring after being exposed to loud noise through their work, being required to wear hearing protection on the job, and having experienced progressive high frequency hearing loss.

The final aspect of the discovery rule is whether or not the individual recognizes the probable compensable nature of their injury. Id. at 680-81. The Iowa Supreme Court has previously held, "[k]nowledge is imputed to a claimant when he gains information sufficient to alert a reasonable person of the need to investigate. As of that date he is on inquiry notice of all facts that would have been disclosed by a reasonably diligent investigation." Perkins v. HEA of Iowa, Inc., 651 N.W.2d 40, 44 (Iowa 2002) (citing Ranney v. Parawax Co., Inc., 582 N.W.2d 152, 155 (Iowa 1998)). In this case, the claimant testified that he always considered noise from Bridgestone to be the cause of the ringing in his ears, and his hearing loss.

The claimant filed his petition on August 1, 2019, with an alleged date of injury of August 1, 2017. Based upon the foregoing analysis under the discovery rule, the claimant experienced tinnitus as far back as the fall of 2009. Therefore, the claimant failed to file his claim within the two-year statute of limitations. The claimant is entitled to no compensation.

Even if the pre-2017 statute were used as the basis for the analysis above, the claimant failed to bring his claim within two years of the manifestation of the injury.

Because the claimant failed to bring his claim within the statute of limitations pursuant to Iowa Code section 85.26, no further analysis regarding his claim for permanent disability benefits is required.

Costs

Claimant seeks the award of costs as outlined in Joint Exhibit 4. Costs are assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original

notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

The administrative rule expressly allows for the taxation of costs for a filing fee and certified mailing fees. In this matter, the filing fee is $100.00, and $6.85 for certified mailings. I decline, in my discretion, to award costs in this matter.

ORDER

THEREFORE, IT IS ORDERED:

The claimant shall take nothing further.

That defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 3rd day of March, 2021.

ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jerry Jackson (via WCES)

Timothy W. Wegman (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.