

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WARREN A. HAVILL,

Claimant,

VS.

QUAKER OATS COMPANY,

Employer,

and

INDEMNITY INS. CO. OF
NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5068734

ARBITRATION

DECISION

Head Notes: 2400, 2401, 2402

STATEMENT OF THE CASE

The claimant, Warren Havill, filed a petition for arbitration seeking workers' compensation benefits from Quaker Oats Company, and its insurer Indemnity Insurance Company of North America. Nate Willems appeared on behalf of the claimant. Kent Smith appeared on behalf of the defendants.

The matter came on for hearing on August 18, 2020, before deputy workers' compensation commissioner Andrew M. Phillips. An order issued on March 13, 2020, and updated June 1, 2020, and August 14, 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 August 14, 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 November 20, 2020. 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 September 30, 2020, after briefing by the parties.

The record in this case consists of Joint Exhibits 1-6, Claimant's Exhibits 1-6, and Defendants' Exhibits A-E. Testimony under oath was also taken from the claimant, Warren Havill. Abby Kurtz was appointed the official reporter and custodian of the notes of the proceeding. All exhibits were received into evidence.

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 commencement date of permanent disability benefits, if any are awarded, is June 11, 2019.
3. The claimant was married, and entitled to two exemptions.
4. The costs listed in Claimant's Exhibit 6 have been paid.

Additionally, there is no dispute as to the entitlement for temporary disability and/or healing period benefits, nor is there any dispute as to credits against any award. 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. Whether the claimant sustained an injury, which arose out of, and in the course of, employment, on June 10, 2019.
2. Whether the alleged injury is a cause of permanent disability.
3. The extent of permanent disability, if any is awarded.
4. Whether the disability is an industrial disability.
5. Whether the claimant's gross earnings were \$1,880.00 per week or \$1,691.06 per week.
6. Whether the weekly rate is \$1,166.44, or \$1,049.54.
7. Whether the claimant is entitled to reimbursement for an independent medical examination (IME) pursuant to Iowa Code 85.39.
8. Whether the claimant is entitled to alternate care pursuant to Iowa Code 85.27
9. Whether the claimant is entitled to an assessment of costs.

The defendants assert an affirmative defense of an untimely claim under Iowa Code 85.26.

FINDINGS OF FACT

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

Warren Havill, the claimant, was 61 years old at the time of the hearing. Mr. Havill graduated from Mount Vernon High School in 1977. (Testimony; Joint Exhibit 1:1). After high school, Mr. Havill completed a six-week blueprint reading class at Kirkwood Community College. (JE 1:1; Defendants' Exhibit B:19). From 1977 to 1978, Mr. Havill worked for Schoff Construction as a laborer. (JE 1:2; DE B:20). He quit that position for schooling. (JE 1:2; DE B:20). He then worked as a carpenter for Murphy Construction from April of 1978 to January of 1979. (JE 1:2; DE B:20). Murphy Construction laid him off in early 1979. (JE 1:2; DE B:20). Mr. Havill found work at Mount Vernon Steel Wire as a zinc plater from March to April of 1979. (JE 1:2; DE B:20). He was laid off by Mount Vernon Steel Wire. (JE 1:2; DE B:20). Mr. Havill then worked as a machinist from May of 1979 to October of 1983. (JE 1:2; DE B:20). In 1984, Mr. Havill applied for work at Quaker Oats Company ("Quaker"). (JE 1:1; DE B:20). In his initial application, Mr. Havill checked "no" next to a line asking if he had any ear or hearing problems. (JE 1:5). Quaker hired Mr. Havill in 1984. (Testimony). Mr. Havill has been represented by the same union since 1984 with various collective bargaining agreements. (Testimony). The collective bargaining agreements provide for certain bonuses. (Testimony).

Upon beginning employment with Quaker, Mr. Havill had a hearing test. (JE 2:1). Mr. Havill's hearing was normal, but the test results indicated a requirement for wearing hearing protection. (JE 2:1). Additionally, the test results indicated that Quaker issued hearing protection. (JE 2:1).

From 1984 to 1987, Mr. Havill was a general laborer who worked, "all over the plant." (Claimant's Exhibit 1:2).

In 1987, Mr. Havill worked in the Oat Mill as a Roll Helper on all floors of the D Mill. (CE 1:2).

In 1988, Mr. Havill worked as a night cleaner in the Oat Mill on the ninth through twelfth floors of the D Mill. (CE 1:2). A night cleaner cleaned the systems used to make rolled flakes. (Testimony). He wore hearing protection for this job. (Testimony).

From 1989 to 2005, Mr. Havill worked as Roll Helper in the basement of C Mill. (CE 1:2). Roll helpers wore hearing protection all of the time. (Testimony). Roll helpers controlled the oats going into rolls where groats are turned into flakes for oatmeal. (Testimony).

From 2005 to 2007, Mr. Havill worked as a Utility worker in the basement of A Mill, the third floor of Cleaning House #1, and all floors of Cleaning House #2. (CE 1:2). In this role, Mr. Havill was responsible for cleaning certain areas of the oat mill. (Testimony). He wore hearing protection all of the time. (Testimony).

From 2008 to 2012, Mr. Havill returned to C Mill as a Roll Helper on the eighth floor. (CE 1:2).

From 2012 to the present, Mr. Havill has worked in the Elevators. During that time, he worked as a Fumigation Specialist, a Utility Worker, a Bin Floor Operator, and a Systems Operator. (CE 1:2). As a systems operator, Mr. Havill unloads raw grain, such as corn or oats as they come into the plant. (Testimony). He wears hearing protection for that job most of the time. (Testimony). He took his hearing protection off when he was in the control room. (Testimony). As a bin floor operator, Mr. Havill took the unloaded raw grain, and put it into other silos so that the remainder of the plant could use it. (Testimony). He always wore hearing protection for that job. (Testimony). As a utility worker, Mr. Havill cleaned various areas of the plant of dust and oat dust. (Testimony). He wore hearing protection for that job. (Testimony). As a fumigation specialist, he put pesticide on raw grain to kill any bugs on the grain. (Testimony). He wore hearing protection and a respirator while working as a fumigation specialist. (Testimony).

Mr. Havill is also qualified as a Bin Floor Operator G on the sixth floor in Elevator G, a Bridge Attendant, a Grain Transfer Operator in Elevator F, and a Grader. (CE 1:2). This allows him to work overtime in these areas as opportunities arise. (Testimony).

According to Mr. Havill's discovery responses, Mr. Havill experienced ringing in his ears after exposure to loud noise on multiple occasions. (DE B:21-22). He reported noticing a "cicada/buzzing" sound in his left ear after work, which was not loud, and was only temporary. (DE B:21). In the fall of 2016, Mr. Havill claimed that he heard loud cicadas outside while watching TV. (DE B:21). He walked outside to investigate the sound, and did not see any cicadas. (DE B:21). He took a nap, and when he awoke, the noise was gone. (DE B:22). His tinnitus symptoms waxed and waned, but the volume and duration of the buzzing increased over time. (DE B:22). Mr. Havill claimed reporting his symptoms to Quaker in February and July of 2017. (DE B:22).

Mr. Havill filed an initial injury report on June 10, 2019, for complaints of buzzing in his left ear. (DE E:29-30). He noted no injury to that body part in the past. (DE E:29 - 30).

Mr. Havill acknowledged that Quaker had noise levels tested by personal dosimeters. (Testimony). He noted that loud noises persisted at Quaker, including loud machinery, semi-trucks, rail cars, and compressed air. (Testimony). Mr. Havill currently wears custom dB blockers for sound, and has done so since 2014. (Testimony).

From 1984 through 1989, Mr. Havill's hearing continued to be tested. (JE 2:2). In 1985, his hearing remained within normal limits. (JE 2:6). In 1987, his hearing tested within normal limits for both ears. (JE 2:8). No significant adverse change in either ear was noted from the last testing period, or baseline. (JE 2:8). In 1988, his hearing test remained within normal limits for both ears with no significant adverse changes in either ear. (JE 2:10). By 1992, Mr. Havill's left ear showed mild hearing difficulty with high frequency noises. (JE 2:12). However, Mr. Havill's hearing test in 1997 returned to

within normal limits with no significant changes from his last test or baseline. (JE 2:14). In 1998, his hearing remained within normal limits for both ears, with no significant adverse changes. (JE 2:16). Mr. Havill's hearing test in 1999 remained within normal limits with no significant adverse changes. (JE 2:17).

Quaker's annual noise studies were included with the claimant's exhibits. In 2000, 53 personnel wore personal dosimeters. (CE 2:19). The conductor of the noise study recommended Quaker require employees to wear hearing protection. (CE 2:20). It also recommended that Quaker implement a periodic noise-monitoring program to identify employees for inclusion in a hearing conservation program, especially those who have noise exposures at or above a time weighted average of 85 dBA. (CE 2:20). The sound level survey found several areas where there was potential for noise exposure to exceed ACGIH recommended guidelines and OSHA mandated limits. (CE 2:19). Noise levels exceeding 90 dBA were measured in a number of locations, with overall sound levels ranging from 62 dBA to 112 dBA. (CE 2:19). It also recommended that Quaker notify employees, in writing, of their monitoring results. (CE 2:20). Quaker was also advised to provide workers training and education regarding the hazards of noise exposure. (CE 2:20). Mr. Havill initialed next to several names of employees indicating that he worked with those employees. (CE 2:22-24; Testimony). He also initialed next to areas in which he worked. (CE 2:26-39; Testimony). For many of these employees, who wore personal dosimeters, their eight-hour time-weighted average noise exposures, exceeded OSHA action levels of 85 dBA on a time-weighted average. (CE 2:19). However, the personnel who performed the noise studies noted that hearing protection would be enough to maintain employee exposures below OSHA limits, assuming proper usage. (CE 2:19).

By 2001, Mr. Havill had a mild hearing loss in his left ear, but normal hearing in his right ear. (JE 2:18). In 2002, Mr. Havill continued to have mild hearing loss in the left ear. (JE 2:20). In 2003, Mr. Havill continued to have mild hearing loss in the left ear. (JE 2:22). Mr. Havill's hearing continued to have a mild left-sided loss in 2004. (JE 2:24).

An additional noise study was provided dated 2004. (CE 2:51). Eighty-two personnel wore dosimeters for sound measurement. (CE 2:51). Measurements obtained indicated a potential for noise exposure exceeding the limits for exposure of unprotected employees. (CE 2:52). Some areas produced sound levels in excess of 100 dBA. (CE 2:52). The cleaning house and grain elevators appeared to be of some concern to have noise levels exceeding 100 dBA. (CE 2:52). The examiner also noted that the majority of the production and maintenance responsibilities involve spending at least a portion of a workday in areas with ambient noise exceeding 85 dBA. (CE 2:52). The examiners recommended a hearing conservation program for employees exposed to noise at or above threshold limit values as established by ACGIH. (CE 2:53-54). They also recommended prohibiting exposure of unprotected ears to impulse or impact noise greater than a peak sound level of 140 dB. (CE 2:54). The examiner noted observing employees wearing moldable foam earplugs with noise reduction ratings of 29 dB and 30 dB. (CE 2:56). These were noted to be adequate for exposures of less than 96 dBA as a time-weighted average. (CE 2:57). Only seven valid measurements

exceeded 96 dBA, and one additional measurement with suspect validity exceeded 96 dBA. (CE 2:57). Mr. Havill again circled and initialed next to employees and areas of the plant in which he worked. (CE 2:58-59).

In 2005, Mr. Havill completed a medical history form for Quaker. (JE 2:26). On that form, he checked "yes" indicating that he had ringing in his ears after work. (JE 2:26). Mr. Havill also checked "yes" indicating that he frequently participated as a musician with loud music. (JE 2:26). Mr. Havill's hearing test results continued to indicate a mild loss in hearing in the left ear. (JE 2:27).

An undated medical history form, which appears to be from 2006, indicated that Mr. Havill did not experience ringing in his ears after work, and no longer was a musician or listened to loud music. (JE 2:29). Mr. Havill indicated that he wears hearing protection since arriving at work, and regularly wore earplugs or earmuffs when required on the job. (JE 2:29). Mr. Havill's 2006 hearing test continued to indicate a mild hearing loss in his left ear, but normal hearing in his right ear. (JE 2:30).

A 2006 industrial hygiene evaluation for noise and airborne contaminants, prepared by Clayton Group Services, Inc., for Quaker, was provided as part of claimant's exhibits. (CE 2:60). Four samples of paraffin wax fumes remained below the lower limit of detection for sampling, and well below the ACGIH eight-hour time-weighted average exposure limit. (CE 2:68). One employee showed an increased exposure to phosphine, but Clayton Group Services, Inc., noted that the employee in question wore a 3M particulate respirator. (CE 2:69). Clayton Group Services, Inc., collected 33 personal noise dosimetry measurements. (CE 2:70). The noise exposures ranged from 67.8 dBA to 98.9 dBA. (CE 2:70). Mr. Havill initialed next to several positions that he held at Quaker. (CE 2:71). Clayton Group Services, Inc., recommended identifying the source of the phosphine, collect additional personal air samples, require employees whose personal noise dosimetry results equaled or exceeded the ACGIH time limit value to wear hearing protection with an adequate noise reduction rate, and continue their hearing conservation program for affected employees. (CE 2:74).

Mr. Havill's 2007 hearing test results indicated a continued mild loss in hearing in the left ear, and normal hearing in the right ear. (JE 2:32). Another undated annual medical history form was included with the exhibits. (JE 2:34). This appears, based upon its place in the exhibits to be from 2007. (JE 2:34). The form indicated no severe ringing in Mr. Havill's ears after work. (JE 2:34). Mr. Havill further indicated that he regularly wore earplugs or muffs when required, and that he wore hearing protection since arriving at work that day. (JE 2:34). Mr. Havill checked a box showing that he wore earplugs for hearing protection, and also that he had no problems wearing hearing protection. (JE 2:34).

In 2007, Bureau Veritas North America provided an industrial hygiene assessment at Quaker. (CE 2:81). Bureau Veritas found that particulate concentrations were below OSHA limits. (CE 2:90). It also found that the airborne concentrations of grain dust in sampling were less than OSHA limits. (CE 2:90). The airborne

concentrations of phosphine were below ACGIH acceptable letters. (CE 2:91). Testing was also performed for hexavalent chromium, which was below OSHA acceptable limits. (CE 2:91). Bureau Veritas collected 54 personal dosimetry results from Quaker employees. (CE 2:92). The noise exposures measured ranged from 77.6 dBA to 113.4 dBA. (CE 2:92). Bureau Veritas continued to recommend that employees with noise exposures between 90 dBA and 98 dBA use hearing protection with a noise reduction rating of at least 33. (CE 2:94). If that is not enough, employees should be fitted with custom molded hearing protection, or be required to wear dual hearing protection. (CE 2:94). Mr. Havill again initialed next to an employee with whom he was acquainted and/or worked in a similar position. (CE 2:99; Testimony).

A description of the physical demands and environmental conditions for an Elevator G Bin Floor Operator, dated January 10, 2001, and revised October 16, 2007, was provided. (JE 1:10-14). Most of the demands revolve around physical positioning, or lifting. (JE 1:10-14). The report also noted the position required frequent or constant hearing usage for radio, phone and emergency system usage. (JE 1:13). The description also noted a requirement for frequent or constant ear protection. (JE 1:14).

In 2008, Mr. Havill had another hearing test. (JE 2:35). Mr. Havill exhibited a moderate hearing loss in his left ear, especially at higher frequencies. (JE 2:35). The hearing test results recommended that Mr. Havill visit a hearing specialist regarding his left ear. (JE 2:35). Mr. Havill's 2008 hearing test also indicated a mild loss of hearing to the right ear. (JE 2:35).

In 2009, Bureau Veritas conducted an additional industrial hygiene assessment for noise and air contaminants at Quaker. (CE 2:104). Several areas of Quaker were found to have noise exposures at or above the ACGIH threshold limit value of 85 dBA for an eight-hour time weighted average. (CE 2:107). All of the areas noted were in Cleaning House 3. (CE 2:107). Mr. Havill initialed a page indicating that he worked in the various areas of the cleaning house. (CE 2:111; Testimony). Bureau Veritas recommended hearing protections for employees to "attenuate in-ear noise levels to 85 dBA based on the highest eight-hour TWA." (CE 2:108). Bureau Veritas also recommended that Quaker investigate engineering controls for specific pieces of noise producing equipment that generate sound levels greater than 90 dBA. (CE 2:108).

In February of 2010, Mr. Havill completed an annual medical history form. (JE 2:37). On this form, Mr. Havill indicated no severe ringing in his ears after work, nor any sudden change or frequent changes in hearing. (JE 2:37). Mr. Havill also indicated no loud hobbies such as loud music, hunting, or shooting sports. (JE 2:37). Finally, Mr. Havill noted that he regularly wore earplugs while on the job, and further that he wore hearing protection since he arrived at work on the day of the examination. (JE 2:37). Mr. Havill's hearing test, conducted in the same month, again revealed a moderate hearing loss to the left ear, with a recommendation to visit a hearing specialist. (JE 2:38). His hearing in his right ear returned to a normal level. (JE 2:38).

In May of 2010, Bureau Veritas performed additional noise assessments at Quaker. (CE 2:115). In conducting noise dosimetry testing, Bureau Veritas collected

93 noise samples. (CE 2:117). Mr. Havill indicated several positions in which he worked, and people that he worked with. (CE 2:119-122). Specifically, Mr. Havill wore a dosimeter for this round of testing, as a roll oiler in the oat mill. (CE 2:119). Bureau Veritas continued to recommend engineering controls for areas where equipment generates sound levels greater than 90 dBA. (CE 2:123). Mr. Havill's noise exposure sampling occurred for 482 minutes. (CE 2:136). Mr. Havill's projected time-weighted average for sound exposure was projected to be 92 dBA. (CE 2:136).

On March 31, 2011, Mr. Havill completed another annual medical history form. (JE 2:40). Mr. Havill continued to indicate no severe ringing in his ears after work, nor any sudden change or frequent changes in hearing. (JE 2:40). Mr. Havill also indicated that he regularly wore earplugs while on the job, and that he wore hearing protection since he arrived at work on the date of the examination. (JE 2:40). Mr. Havill continued to have a moderate loss in hearing in his left ear. (JE 2:41). The report restated a recommendation that he seek examination with a hearing specialist. (JE 2:41). His right ear continued to have normal hearing. (JE 2:41).

In May of 2011, Associates in Acoustics, Inc., conducted an engineering noise control evaluation for Quaker. (CE 2:138). Mr. Havill initialed several sections of the report indicating that he worked in those locations of the plant. (CE 2:139-140, 149-150, 162-169; Testimony). A number of these areas showed sound levels exceeding 90 dBA. (CE 2:139).

On December 13, 2011, Mr. Havill signed a form indicating that he viewed a training video regarding ear protection. (JE 1:8). The form also indicated that Mr. Havill received "dB molded hearing protection." (JE 1:8).

The claimant reported to Mercy Medical Center on December 27, 2011, complaining of low back pain that was present for two to three months. (JE 6:1-3). During this visit, he reported no hearing loss, but did report tinnitus. (JE 6:2).

Mr. Havill completed a Hearing Test Case History form on January 4, 2012, in which he indicated that he did not have a hearing loss. (JE 2:43). He indicated that he has had his hearing tested in the past and worked in noise. (JE 2:43). He further noted not having ringing or roaring in his ears. (JE 2:43). Finally, Mr. Havill checked a box indicating use of custom hearing protection. (JE 2:43).

Mr. Havill's hearing evaluation in March of 2012, continued to indicate a moderate loss in hearing in the left ear. (JE 2:44). Specifically, Mr. Havill's hearing in his left ear showed mild issues with high-pitched sounds, such as birds, whistles, turn signals, and some speech. (JE 2:45). Additionally, the hearing evaluation continued to recommend seeking out a hearing specialist. (JE 2:44). The hearing in Mr. Havill's right ear remained normal. (JE 2:44).

On April 11, 2012, Diane Bachman, M.S., CCC-A, reviewed Mr. Havill's hearing tests from 1984 through 2012. (JE 3:1-2). Ms. Bachman opined that the test results indicated a significant difference in hearing between Mr. Havill's ears. (JE 3:1-2). The

hearing loss showed on at least two consecutive tests. (JE 3:1-2). Ms. Bachman noted that this type of hearing loss can be associated with a history of exposure to gunfire without hearing protection and also some medical conditions that are unrelated to noise exposure. (JE 3:1-2). Ms. Bachman recommended the claimant consult with an ear specialist to determine the possible cause of his condition, and whether treatment may be available. (JE 3:1-2). Ms. Bachman made this recommendation because "OSHA regulations state '[t]he employee is informed of the need for an otological examination if a medical pathology of the ear that is unrelated to the use of hearing protectors is suspected.'" (JE 3:1).

In July of 2012, Mr. Havill answered a questionnaire regarding respirator usage. (JE 4:5-7). Mr. Havill circled, "no" when asked if he had difficulty hearing, wore a hearing aid, or had any other hearing or ear problems. (JE 4:7).

On August 23, 2012, a physician completed a respiratory physical examination form. (JE 4:1). The examiner noted that Mr. Havill could hear a whisper with both his right and left ears. (JE 4:1).

In October of 2012, Bureau Veritas conducted a repeat noise assessment at Quaker. (CE 2:176). Mr. Havill again initialed next to positions at which he was employed. (CE 2:179-182, 184-191, 193-195; Testimony). Bureau Veritas continued to recommend investigating engineering controls for specific pieces of noise producing equipment that generated sound levels greater than 90 dBA. (CE 2:183). Bureau Veritas also recommended reevaluating employee noise exposure by personal dosimetry every two years. (CE 2:183).

In 2013, Mr. Havill completed another Hearing Test Case History. (JE 2:46). Mr. Havill indicated that he was unsure as to whether he had a hearing loss. (JE 2:46). He further indicated that he previously had his hearing tested, and worked in noise. (JE 2:46). Mr. Havill continued to indicate that he had no ringing or roaring in his ears. (JE 2:46). Mr. Havill confirmed that he used muffs and pre-molded hearing protection. (JE 2:46). Hearing tests showed mild hearing loss of high-pitched sounds on the left in his left ear. (JE 2:47). Mr. Havill initialed several lines indicating that he received training in the effects of noise on hearing, the purpose of the hearing test, and the purpose of hearing protection. (JE 2:47). He also indicated that he was trained and fitted with hearing protections. (JE 2:47).

On March 7, 2013, Ms. Bachman performed a repeat Audiologist Review Report of Mr. Havill's 2013 hearing test. (JE 3:3). Ms. Bachman indicated that this was a second notice of asymmetric hearing loss. (JE 3:3). Ms. Bachman noted that the current test results indicated a significant difference in hearing between Mr. Havill's ears. (JE 3:3). Again, Ms. Bachman opined that this type of hearing loss could be associated with a history of exposure to gunfire without hearing protection, and also some medical conditions unrelated to noise exposure. (JE 3:3). Ms. Bachman encouraged the claimant to see an ear specialist. (JE 3:3).

In November of 2013, Bureau Veritas conducted a repeat industrial hygiene assessment at Quaker. (CE 2:196). They measured employees' exposure to acetoin, diacetyl, and 2,3 pentanedione, along with noise exposure. (CE 2:198). Employee exposure to diacetyl was below ACGIH levels. (CE 2:199). Employee noise exposure to 85 dBA of sound over a time-weighted average were measured at a number of locations. (CE 2:201-202).

On February 5, 2014, Mr. Havill filled out a repeat Hearing Test Case History. (JE 2:48). Mr. Havill indicated that he was unsure as to whether he had any hearing loss. (JE 2:48). He also indicated being unsure as to whether he had excessive ear wax. (JE 2:48). Mr. Havill confirmed that he had previously had his hearing tested, and previously worked in noise. (JE 2:48). Mr. Havill circled "no" in regard to a question as to him having ringing or roaring in his ears. (JE 2:48). Finally, he indicated that he used pre-molded hearing protection, and had not seen a physician in the last year regarding his ears. (JE 2:48). Mr. Havill's hearing testing indicated mild hearing loss in both ears for high-pitched sounds. (JE 2:49).

Mr. Havill returned to Mercy Medical Center on March 21, 2014, complaining of a cough following an upper respiratory infection. (JE 6:4-5). He also complained of some right knee pain. (JE 6:4). The medical record noted intermittent tinnitus. (JE 6:4).

In October of 2014, Mr. Havill answered a questionnaire regarding respirator usage. (JE 4:8-10). Mr. Havill circled, "no" when asked if he had difficulty hearing, wore a hearing aid, or had any other hearing or ear problems. (JE 4:10).

In 2015, it appears that Mr. Havill misdated his Hearing Test Case History as February 2, 2014. (JE 2:50). Mr. Havill continued to indicate that he was unsure as to having hearing loss. (JE 2:50). Mr. Havill again noted that he had his hearing tested, and that he worked in noise. (JE 2:50). He circled "yes" indicating that he experienced ringing or roaring in his ears. (JE 2:50). He had not seen a physician for his ears or hearing in the last year. (JE 2:50). Finally, Mr. Havill indicated that he wore custom hearing protection. (JE 2:50). The hearing in the claimant's right ear returned to normal upon testing, but his left ear continued to have mild hearing loss for high-pitched sounds. (JE 2:51). The claimant again initialed lines indicating that he was trained in the effects of noise on hearing, and the purpose of hearing protection. (JE 2:51). He also indicated that he was trained and fitted with hearing protection. (JE 2:51).

In March of 2016, Bureau Veritas performed a repeat industrial hygiene assessment at Quaker. (CE 2:207). Mr. Havill initialed next to a Bin Floor Elevator G job title employee who wore a dosimeter. (CE 2:212). The equivalent eight-hour time-weighted average for this employee was 89 dBA. (CE 2:212). Bureau Veritas continued to recommend evaluating employee noise exposure via personal dosimetry. (CE 2:213). Noise levels appeared to be normal based upon discussions that Bureau Veritas had with supervisors and employees. (CE 2:219). Noise exposures ranged from 70 dBA to 91 dBA. (CE 2:219). Mr. Havill initialed next to locations that indicated sound level between 88 dBA and 94 dBA. (CE 2:221). Mr. Havill wore a dosimeter during this round of testing. (CE 2:224). Mr. Havill's projected full shift noise exposure

for an eight-hour time-weighted average was 78 dBA. (CE 2:224). Someone handwrote, "NO Rail [sic]" presumably as an indication that no railcars were present on the date of the testing; however, this would be in direct conflict with Bureau Veritas' notations. (CE 2:224). The level of noise exposure based upon time-weighted averages, and depending on the measurements used were lower for Mr. Havill depending on the standard utilized. (CE 2:228-230).

On April 13, 2016, Mr. Havill returned to Mercy Medical Center complaining of an upper respiratory illness. (JE 6:6-8). Mr. Havill complained of sinus infections at least once per year. (JE 6:6). The medical record noted a denial of hearing loss, ringing in his ears, or earaches. (JE 6:6). Mr. Havill was diagnosed with a cough that was likely due to bronchitis, and acute recurrent frontal sinusitis. (JE 6:8).

The claimant's 2016 Hearing Test Case History indicated he was unsure as to a hearing loss. (JE 2:52). Mr. Havill denied having ringing or roaring in his ears. (JE 2:52). Mr. Havill utilized custom hearing protection, and had not seen a physician for his ears or hearing in the last year. (JE 2:52). The claimant's hearing test continued to indicate a mild hearing loss to his left ear at high frequencies. (JE 2:53). The hearing in his right ear remained normal. (JE 2:53). Mr. Havill again indicated that he was trained in the effects of noise on hearing, and the purposes of hearing protection. (JE 2:53). Mr. Havill also indicated that he was trained and fitted with hearing protection. (JE 2:53).

On August 22, 2016, Mr. Havill visited Michael Telisak, M.D. for a new patient examination. (JE 5:1-4). Mr. Havill reported sinus symptoms including a recurrent sinus infection and resultant cough. (JE 5:1). He also reported left ear pain. (JE 5:1). His past medical history noted a high level of environmental noise. (JE 5:2). Mr. Havill's ears showed normal tympanic membranes. (JE 5:3). No audible tinnitus was heard. (JE 5:3). Dr. Telisak recommended Fluticasone Propionate for allergic rhinitis. (JE 5:4).

Mr. Havill followed-up with Dr. Telisak on October 7, 2016, for his cough and sinus issues. (JE 5:5-7). His cough resolved with the treatment previously recommended by Dr. Telisak. (JE 5:5). Mr. Havill reported a recent episode of spinning vertigo the night before and the morning of the visit with Dr. Telisak. (JE 5:5). He noted the episodes lasted about 10-15 seconds. (JE 5:5). The vertigo occurred with head positioning and improved when Mr. Havill reported for work. (JE 5:5). Mr. Havill reported never having had an episode of vertigo in the past. (JE 5:5). He denied any other ear complaints such as hearing loss, tinnitus, or pressure. (JE 5:5). Dr. Telisak diagnosed Mr. Havill with "BPPV" which appears to stand for benign paroxysmal positional vertigo. (JE 5:7). Dr. Telisak recommended that the claimant perform Brent Darhoff Houma ventilation exercises, and follow-up if his symptoms do not improve in the next two weeks. (JE 5:7).

On October 13, 2016, Mr. Havill had a noise monitoring session, as conducted by Quaker's health and safety. (JE 1:9). During a 10-hour shift as an Elevator G Systems Operator, Mr. Havill was exposed to 78 decibels on the A scale of the measuring

instrument, which is the measuring unit for noise (“dBA”). (JE 1:9). A note indicated, “QFS uses the American Conference of Governmental Industrial Hygienists (ACGIH) Threshold Limit Values (TLVs) as internal standards. The TLV for noise is more stringent than the Occupational Safety and Health Administration’s (OSHA) Permissible Exposure Limit (PEL) that is a regulatory requirement.” (JE 1:9). The ACGIH TLV time-weighted average exposure to noise based upon Mr. Havill’s shift length was 85 dBA. (JE 1:9). The OSHA PEL time weighted average exposure based on shift length for Mr. Havill was 90 dBA. The OSHA action level, the level at which Mr. Havill was required to participate in a hearing conservation program, was 85 dBA. The report noted in a comments section that the noise dosimetry results indicated that Mr. Havill’s exposure to noise did not exceed the ACGIH TLV of 85 dBA; however, since Mr. Havill’s results were equal to 85 dBA eight-hour time-weighted average, he was required to participate in the site hearing conservation program. (JE 1:9). Quaker recommended that Mr. Havill continue to wear his hearing protection in high noise and posted areas. (JE 1:9).

Mr. Havill reported to Mercy Medical Center on January 27, 2017, with complaints of tinnitus in his left ear. (JE 6:9-10). Mr. Havill noted that he had tinnitus since the fall. (JE 6:9). He wore earplugs at work, and had yearly hearing tests. (JE 6:9). He noted some hearing loss, but indicated being told it was age-related. (JE 6:9). He noted no buzzing in the right ear. (JE 6:9). His previous episode of vertigo was also noted. (JE 6:9). The examiner found wax in both of the claimant’s ears, but it did not occlude the ear canals. (JE 6:10). The examiner diagnosed him with tinnitus and provided a referral to an ear, nose, and throat doctor for further management. (JE 6:10). The examiner also noted a need to rule out acoustic neuroma and Meniere’s disease. (JE 6:10).

Mr. Havill returned to Dr. Telisak’s office on February 10, 2017, where Elizabeth Northern, PA-C, examined him. (JE 5:8-10). Mr. Havill complained of left sided tinnitus, which started the previous fall. (JE 5:8). He reported four straight days of constant buzzing. (JE 5:8). His history indicated noise exposure from working at Quaker for 20 years. (JE 5:8). He further noted that he did not use guns, and was not a hunter. (JE 5:8). Mr. Havill had not noticed decreased hearing. (JE 5:8). Physician Assistant Northern indicated that Mr. Havill suffered no hearing loss or earache. (JE 5:8). Audiometry found a mild high frequency sensorineural hearing loss in the right ear, and a moderate sloping to severe high frequency sensorineural hearing loss in the left ear. (JE 5:10). Tympanometry revealed normal volume and compliance. (JE 5:10). Physician Assistant Northern diagnosed Mr. Havill with asymmetric sensorineural hearing loss and asymptomatic tinnitus. (JE 5:10). She further recommended an MRI and possibly a hearing aid. (JE 5:10).

In early 2017, Mr. Havill completed another Hearing Test Case History form which indicated he was unsure as to whether he had a hearing loss. (JE 2:55). He also indicated that he had a chirping in his left ear and circled “yes” for a ringing or roaring in his ears. (JE 2:55). He continued to utilize custom hearing protection. (JE 2:55). He noted having visited a physician for his ears or hearing in the last year, and wrote, “chirping” under this section. (JE 2:55). The claimant’s hearing test results indicated mild hearing loss of high pitched sounds in his right ear, and moderate hearing loss for

high pitched sounds in his left ear. (JE 2:56). The hearing test results noted the importance of wearing hearing protection whenever one was exposed to loud noise. (JE 2:56). Mr. Havill indicated that he was trained in the effects of noise on hearing and the purpose of hearing protectors. (JE 2:56). He also indicated being trained and fitted with hearing protectors. (JE 2:56).

In March of 2017, Bureau Veritas completed a repeat industrial hygiene assessment at Quaker. (CE 2:233). Mr. Havill indicated, via initialing the exhibit, the locations at which he worked. (CE 2:258-259). Of these locations, none showed an equivalent eight-hour time-weighted average exposure above 85 dBA. (CE 2:258-259). The dosimetry results showed several employees with noise exposures above 85 dBA based upon a time-weighted average. (CE 2:239-240). Bureau Veritas noted that employees wore hearing protections, including molded earplugs. (CE 2:249-250).

A position description, along with essential functions and required physical demands for a grain shipping and receiving operator dated June 6, 2017, was also included in the exhibits. (JE 1:15-18). Shifts are 10 hours with two 15-minute breaks and a 30-minute lunch. (JE 1:15). The description noted that the worker is required to wear eye and hearing protection. (JE 1:15). The description also required frequently “[p]erceiving the nature of sounds by ear.” (JE 1:17). The essential functions of the job included: responsibility for operating the equipment that unloads grain from rail cars and truck trailers, responsibility for delivery of grain to proper bins, and responsibility for maintaining cleanliness of the work area. (JE 1:18).

On July 3, 2017, Mr. Havill had an MRI of his brain due to sensorineural hearing loss. (JE 5:11-12). Mr. Havill reported to the technologist that he had buzzing in his left ear since November. (JE 5:11). The MRI identified no abnormality to explain the patient’s symptoms. (JE 5:12).

Mr. Havill received another respiratory physical examination on July 11, 2017. (JE 4:2). No notation was made with regard to his hearing. (JE 4:2). Additionally, no disease or injury was noted. (JE 4:2). Mr. Havill again answered a questionnaire regarding respirator usage. (JE 4:11-13). Mr. Havill circled, “yes” to indicate that he had difficulty hearing, and any other hearing or ear problems. (JE 4:13). He added, “[b]uzzing in ears” to explain his “yes” answers. (JE 4:13).

Mr. Havill returned to Dr. Telisak’s office on July 14, 2017, to discuss the MRI of July 3, 2017. (JE 5:13-14). The results were normal. (JE 5:13). Dr. Telisak noted a history of unilateral tinnitus, mostly on the left side, where Mr. Havill also experienced an asymmetric hearing loss in high frequencies. (JE 5:13). The hearing loss was present for several years. (JE 5:13). The tinnitus started the previous fall. (JE 5:13). He reported some improvement. (JE 5:13). Dr. Telisak recommended sound masking, cognitive behavioral therapy, or tinnitus retraining therapy. (JE 5:13). Mr. Havill noted plans to follow-up as-needed and would continue to get his routine audiogram through work. (JE 5:14).

In 2018, Mr. Havill filled out another Hearing Test Case History form. (JE 2:57). Mr. Havill indicated that he had his hearing tested, worked in noise, and had a hearing loss. (JE 2:57). He also indicated that he had ringing or roaring in his ears, "L > R." (JE 2:57). He utilized pre-molded hearing protection. (JE 2:57). Finally, he circled "yes" indicating examination by a physician for his ears or hearing in the last year. (JE 2:57). Mr. Havill experienced mild hearing loss in his right ear and moderate hearing loss to his left ear. (JE 2:58). He again initialed acknowledging training in the effects of noise on hearing and the purpose of hearing protection. (JE 2:58). He also initialed acknowledging being trained and fitted with hearing protectors. (JE 2:58).

Another respiratory physical examination form, dated May 29, 2018, noted no issues with Mr. Havill's hearing, nor any disease or injury. (JE 4:3). Mr. Havill filled out a repeat respirator medical evaluation questionnaire. (JE 4:14-17). Mr. Havill indicated that he had never had an injury to his ears. (JE 4:16). He further indicated that he experienced difficulty in hearing and had other ear problems. (JE 4:16). The claimant noted "[b]uzzing in ears." (JE 4:16).

In 2019, Mr. Havill's Hearing Test Case History form acknowledged that he had worked in noise, and had his hearing tested. (JE 2:59). He further indicated sustaining a hearing loss, and that he experienced ringing or roaring in his ears. (JE 2:59). He utilized pre-molded hearing protection. (JE 2:59). He had not seen a physician in the last year for his ears or hearing. (JE 2:59). Mr. Havill experienced mild hearing loss for high-pitched sounds in his right ear and moderate hearing loss for high-pitched sounds to his left ear. (JE 2:60). He again initialed acknowledging training in the effects of noise on hearing and the purpose of hearing protection. (JE 2:60). He also initialed acknowledging being trained and fitted with hearing protectors. (JE 2:60).

Douglas R. Hoisington, D.O., FACS, of ENT Clinic of Iowa, P.C. reviewed various records and reports and issued a letter addressed to Quaker's counsel on October 8, 2019. (Defendants' Exhibit A:1-8). Dr. Hoisington is board certified in otolaryngology and head and neck surgery, as well as being a fellow of the American College of Surgeons. (DE A:16). Dr. Hoisington concluded that Mr. Havill sustained an asymmetric sensorineural hearing loss, as noted in his audiometric data. (DE A:1). Dr. Hoisington utilized the applicable Iowa Code sections to calculate that Mr. Havill had a zero percent age-corrected binaural hearing loss. (DE A:1). Dr. Hoisington noted that Mr. Havill had an asymmetric hearing loss, which is "usually not related to noise induced hearing loss," and instead can be related to noise exposure in one ear greater than the other or a medical condition such as a viral infection damaging one ear more than the other. (DE A:1). The other possibility mentioned by Dr. Hoisington is an acoustic neuroma of the VIII cranial nerve. (DE A:1). Dr. Hoisington further noted, "[h]e may very well have tinnitus but there is no way to measure this, there are no double-blind controlled studies on any measuring of tinnitus." (DE A:1). With no objective data, Dr. Hoisington opined that there was no way to gauge disability due to tinnitus. (DE A:1). Since Mr. Havill suffered no hearing loss, Dr. Hoisington concluded that Mr. Havill sustained a zero percent disability. (DE A:1). Dr. Hoisington issued restrictions including continued hearing protection around loud noises. (DE A:1).

Dr. Hoisington responded to a “check box” letter from counsel for defendants dated May 26, 2020. (DE A:9-10). Dr. Hoisington agreed that Mr. Havill’s hearing loss was asymmetrical and therefore inconsistent with the effects of workplace noise on hearing. (DE A:9). Further, he agreed that the claimant’s hearing loss was most consistent with some other type of noise-induced hearing loss. (DE A:9). Dr. Hoisington agreed with the statement “[g]iven that the pattern and progression of claimant’s hearing loss is not consistent with the effects of workplace noise on hearing, I do not believe that workplace noise exposure was a factor in causing Claimant’s current hearing loss or tinnitus.” (DE A:10). Dr. Hoisington also did not believe that any workplace noise exposure aggravated, accelerated, or lit up any tinnitus symptoms. (DE A:10). Regardless of the cause of Mr. Havill’s tinnitus, Dr. Hoisington did not believe Mr. Havill sustained any permanent impairment due to tinnitus pursuant to the AMA Guides. (DE A:10).

On May 28, 2020, Richard Tyler, Ph.D., a member of the University of Iowa Hospitals and Clinics Department of Speech Pathology and Audiology, issued an independent medical evaluation report. (Claimant’s Exhibit 1-89). Dr. Tyler is an audiologist and consultant in hearing loss, tinnitus, hyperacusis and acoustics. (CE 1:15). In preparation for the IME, Mr. Havill completed a hearing loss and tinnitus questionnaire. (CE 1:7-13). In the questionnaire, Mr. Havill noted his time as a system operator exposed him to impulsive noise like banging or clanging. (CE 1:8). He also reported exposure to chemicals. (CE 1:8). He confirmed being given the opportunity to select hearing protectors from a variety of suitable hearing protectors. (CE 1:9). From 1984 to 1987, Mr. Havill wore earplugs as available at Quaker. (CE 1:9). From 1987 to the time he completed the questionnaire, earplugs were mandatory. (CE 1:9). He reported often needing to work overtime, and sometimes six to seven days per week. (CE 1:9). Mr. Havill noted no health conditions that caused any hearing loss. (CE 1:10). He further indicated not having fired a gun in 40 years, not using a gas powered chain saw, or a snowmobile. (CE 1:10). With regard to his current symptoms, Mr. Havill complained of ringing or noises originating inside of his head, specifically in his left ear. (CE 1:11). The noises sounded like constant crickets, which he first noted in 2016. (CE 1:11). The loudness varied from 20 to 90 on a scale of 1 to 100. (CE 1:11). Mr. Havill described himself as being uncomfortable in groups to hear and talk, as some common sounds would exaggerate the cricket noise. (CE 1:11). When the tinnitus first began, it effected Mr. Havill’s concentration and caused him to worry a lot. (CE 1:12). Tinnitus caused him some depression, anxiety, and frustration. (CE 1:12). Tinnitus also affected his hearing, as he required other people to repeat what they said. (CE 1:12). Mr. Havill noted difficulty hearing on the phone or radio while at work. (CE 1:13). Mr. Havill wrote:

My wife notices the level of music and TV is very loud. Frustration at family gatherings because he either [sic] does not hear and has to ask people to repeat often. Grandchildren do not understand why grandpa does not hear/understand them. My wife [sic] is bothered greatly by his [sic] distraction when the crickets are loudest in quiet times together. This causes him to be anxious about [sic] condition.

(CE 1:13). Dr. Tyler interviewed Mr. Havill via phone on May 9 and 10, 2020. (CE 1:15). Dr. Tyler noted Mr. Havill's work history at Quaker. (CE 1:16). Mr. Havill told Dr. Tyler that he had to periodically raise his voice to communicate suggestive to Dr. Tyler that "the noise was intense enough to produce noise induced hearing loss and tinnitus." (CE 1:16). Mr. Havill also noted to Dr. Tyler that he worked in the noisiest part of the plant, and was exposed to impulsive noise, which "is more damaging than continuous noise." (CE 1:16). Impulsive noise included railway cars banging together, transfer belts banging over rollers, and the chain drive. (CE 1:16).

Dr. Tyler reviewed Noise Surveys conducted by Quaker dating back to 1997. (CE 1:16). Some of these noise surveys showed increased exposure to noise by Quaker employees. (CE 1:17). Dr. Tyler claims, without evidence, that Quaker purposefully organized testing in 2016 on a day when no railcars were present at their factory location. (CE 1:18). Dr. Tyler further claims "[i]n general, they neglected to measure impulsive noise at all test dates provided. In later years, they even chose not to report the highest dBA levels recorded." (CE 1:18). Dr. Tyler noted that Mr. Havill reported working as many as 12 hours in one day, and 80 hours in one week. (CE 1:18-19). Mr. Havill informed Dr. Tyler that he worked 40 hours or more per week 76% of the time. (CE 1:19). Dr. Tyler opined that this would not give Mr. Havill's ears time to rest from noise. (CE 1:19). Dr. Tyler was critical of Quaker's guidelines. (CE 1:19). He further criticized Quaker, indicating that Quaker was aware Mr. Havill was losing his hearing, but did not take steps to "save his hearing loss." (CE 1:19). Dr. Tyler also noted that Mr. Havill was exposed to certain chemicals that can cause tinnitus. (CE 1:19). Dr. Tyler indicates that, while Dr. Hoisington suggested that there is no objective measurement for tinnitus, Dr. Tyler opined that he developed his own model of tinnitus testing to determine disability. (CE 1:21). Dr. Tyler indicated that his model focused on reactions. (CE 1:21). Dr. Tyler cited to several studies indicating noise induced hearing loss can be asymmetrical among factory workers. (CE 1:21). One of these studies was from the National Institutes of Health, as published in 1990. (CE 1:21). Dr. Tyler indicated that asymmetrical hearing loss occurs in factory workers because noise exposure is not always equal to both ears. (CE 1:21). Dr. Tyler identified train cars banging together as a source of intense noise causing asymmetrical hearing loss. (CE 1:22). Dr. Tyler approximated a 4 percent bilateral hearing loss, which exceeded any previous hearing loss. (CE 1:22). It also was reduced by an average age-related hearing loss. (CE 1:22). Dr. Tyler noted that Mr. Havill's hearing loss was mostly in higher frequencies. (CE 1:22). Dr. Tyler compared Mr. Havill's hearing loss to the standards of the military. (CE 1:23). Dr. Tyler opined that Mr. Havill had a 12 percent hearing loss with regard to high frequency sounds. (CE 1:23).

Dr. Tyler's report noted that Mr. Havill's tinnitus began after work in 2005 based upon the 2005 hearing evaluation. (CE 1:24). Dr. Tyler noted that hearing tinnitus occasionally after work and then off-and-on during work is common. (CE 1:24). Tinnitus became a "permanent experience" in about 2016, when he reported a sound like crickets in his left ear. (CE 1:24). Dr. Tyler opined that tinnitus could cause impairment in four major areas: 1. Concentration, 2. Emotional well being, 3. Hearing, and 4. Sleep. (CE 1:24). Dr. Tyler, in making up his own impairment measurements, proposed to rate from zero to 100 the impairment for the four categories noted above.

(CE 1:24). Dr. Tyler then imposed his own “severity rating” for Mr. Havill. (CE 1:25). Mr. Havill’s subjective severity rating was 42.5 out of 100. (CE 1:25). Dr. Tyler’s subjective severity rating was 31.25 out of 100. (CE 1:25). Dr. Tyler took the tinnitus impairment rating and attempted to convert this to a whole body impairment rating. (CE 1:26). Dr. Tyler spends some time criticizing the difficulty in providing a rating based on tinnitus and suggesting on his own that a maximum whole body impairment for tinnitus should be 60 percent. (CE 1:26-27). Based upon Dr. Tyler’s own system, he opined that Mr. Havill sustained an 18.8 percent whole body impairment, which he increased to 19 percent. (CE 1:27). Dr. Tyler stated, “I could use the AMA guidelines (sic) for tinnitus, although I think the authors of the guidelines do not fully appreciate the consequence of hearing loss and tinnitus.” (CE 1:27). Dr. Tyler finally gives a rating pursuant to the AMA guidelines as follows: hearing difficulties: 5 percent; sleep difficulties: 0 percent; concentration difficulties: “as much as” 30 percent; and, emotional difficulties: “as much as” 30 percent. (CE 1:28). This provides a combined, whole body impairment “as much as” 53 percent in the opinion of Dr. Tyler. (CE 1:28). Dr. Tyler recommended hearing aids due to noise induced hearing loss. (CE 1:30). These hearing aids should be replaced every four to five years. (CE 1:30). Dr. Tyler also recommended that Mr. Havill undergo counseling and sound therapy devices due to noise induced tinnitus. (CE 1:30). Dr. Tyler provided the following restrictions: no work around loud noise, no work in a situation where noise levels are unpredictable, no work in dangerous situations where accurate concentration is required, and no work in stressful situations. (CE 1:30). Finally, Dr. Tyler concluded his report indicating that the sensorineural hearing loss and tinnitus experienced by Mr. Havill were a result of Mr. Havill’s work at Quaker. (CE 1:30).

Along with the above evidence, documentation concerning hazardous materials used at Quaker was produced in the claimant’s exhibits. (CE 3:1-16). The hazardous materials to which Mr. Havill alleged exposure included aluminum phosphide and weevil-cide. (Testimony). A Material Safety Data Sheet (MSDS) was provided for each of these substances. The MSDS for aluminum phosphide indicated that mild exposure via inhalation could cause malaise, ringing in the ears, fatigue, nausea, and pressure in the chest. (CE 3:4). Exposure to aluminum phosphide should immediately have been followed by seeking fresh air. (CE 3:4-5). The MSDS recommended wearing NIOSH/MSHA approved full face masks up to certain airborne concentrations, along with protective gloves. (CE 3:6). The MSDS for weevil-cide recommended wearing protective gloves, eye protection, and face protection. (CE 3:8). If inhaled, it was recommended to move the afflicted individual to fresh air. (CE 3:9). Mild inhalation caused malaise, ringing of ears, fatigue, nausea, and pressure in the chest. (CE 3:9).

Mr. Havill complains of a ringing sound that comes and goes. (Testimony). He indicated that there was a distinction between the crickets reported in 2014, and the cicadas that he noted. (Testimony). The sound can be in either ear, and sometimes both. (Testimony). He indicated first noticing the cricket or cicada noise in 2016. (Testimony). Mr. Havill never sought out the hearing aids recommended by Dr. Telisak, despite claiming that he simply wished to get better or find a cause of his hearing issues. (Testimony).

CONCLUSIONS OF LAW

Affirmative Defense Under Iowa Code 85.26

The defendants assert an affirmative defense of failure to timely bring a claim pursuant to Iowa Code 85.26. 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' asserted affirmative defense. The alleged date of injury in this matter is June 10, 2019. 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); Montag v. T.H. Agri. & Nutrition Co., 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.E.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. In 2001, Mr. Havill began experiencing mild hearing loss in his left ear. This progressed as he continued his employment with Quaker. By 2008, Mr. Havill's hearing loss was deemed moderate in the left ear. This continued into 2010. Quaker, or its agents counseled Mr. Havill to seek examination with a hearing specialist as early as 2010, and again in 2012 and 2013. In 2014, records noted intermittent tinnitus, and in 2015, records indicated an affirmative response to a question regarding hearing

ringing or roaring. In October of 2016, Mr. Havill indicated experiencing an incident of vertigo, but at that time, denied tinnitus. By January of 2017, Mr. Havill reported tinnitus in his left ear since the previous fall. In February of 2017, Mr. Havill reported ringing and roaring or chirping in his left ear. The sheer number of incidences and diagnoses, including a worsening in the fall of 2016, and early part of 2017 show that Mr. Havill was aware of the nature of his hearing and tinnitus issues prior to June of 2017.

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. Havill has a long history of hearing loss and intermittent ringing in his ears after exposure to loud noise on multiple occasions. He also noted in his discovery responses an incident in the fall of 2016, when he heard cicadas or a buzzing noise outside of his house while watching television. He went to investigate this, and saw no cicadas. This caused Mr. Havill to become distraught. He took a nap, and when he awoke the noise was gone. He also reported four straight days of tinnitus or buzzing in his ears which caused him to seek medical examination with a personal provider in early 2017. Between becoming distraught about the alleged cicada noises and seeking care, I find ample evidence that Mr. Havill understood the seriousness of his condition. A reasonable person would be concerned with the seriousness of this occurring after being exposed to noise through their work, being required to wear hearing protection on the job, and having experienced ringing or roaring in their ears in the past. This is not a case where there was an “ache or pain” as the court noted, this is a case where a reasonable person would be concerned about the occurrence in the fall of 2016, and early parts of 2017, as evidenced by the fact that the claimant sought care for his ears despite recommendations to do so dating back to 2010, 2012, and 2013.

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., 582 N.W.2d 152, 155 (Iowa 1998)). In this case, the claimant testified that he did not consider Quaker the source of his issues until he went through a process of elimination of all other potential issues. He alleges that it was not until after his MRI in July of 2017 that he considered the probable compensable nature of his tinnitus. The MRI as a timeline for probable compensability is problematic considering the claimant spends most of his post-hearing brief discussing the noise levels at Quaker.

After his tinnitus incident in the fall of 2016, the medical records pertaining to his treatment in 2017 note his exposure to loud noises at Quaker. Mr. Havill has worked for Quaker for 36 years. During that time, Quaker has done annual noise studies, including having employees wear dosimeters. Mr. Havill wore hearing protection while on the job at Quaker. After several decades of employment at Quaker, Mr. Havill experienced hearing loss and later tinnitus issues. It was recommended as early as 2010 that he seek additional medical help from an ear specialist. He continued to have progressively worse hearing test results. Finally, in the fall of 2016, Mr. Havill experienced an episode of tinnitus that was so severe it caused him to have an emotional reaction, including the need to lie down. Mr. Havill then noted to his medical providers that he worked around noise at Quaker. The subsequent treatment was Mr. Havill being a reasonable person investigating the cause of his tinnitus. This satisfies the third aspect of the discovery rule.

The claimant filed his petition on June 18, 2019, with an alleged date of injury of June 10, 2019. Based upon the foregoing analysis under the discovery rule, the claimant experienced tinnitus as far back as the fall of 2016. Therefore, the claimant failed to file his claim within the two-year statute of limitations. The claimant is entitled to no compensation.

Considering the claimant did not file his claim in a timely manner, the remainder of the issues are moot.

ORDER

IT IS THEREFORE ORDERED:

That the claimant shall take nothing further from these proceedings.

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 12th day of November, 2020.

A handwritten signature in black ink, appearing to read "Al M. Phillips", is written over a horizontal line.

ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nate Willems (via WCES)

Kent Smith (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.