BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KERRY ELMORE, Claimant, vs. QUAKER OATS COMPANY, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 19700200.01 ARBITRATION DECISION Head Note Nos.: 1100, 1108, 1400

STATEMENT OF THE CASE

The claimant, Kerry Elmore, filed a petition for arbitration on August 15, 2019, seeking workers' compensation benefits from Quaker Oats Company, employer, and Indemnity Insurance Company of North America, insurance carrier. The claimant was represented by Nate Willems. The defendants were represented by Kent Smith.

The matter came on for hearing on November 16, 2020, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Court Call videoconferencing system. The record in the case consists of Joint Exhibits 1 through 3; Claimant's Exhibits 1 through 7; and Defense Exhibits A through H. The claimant testified at hearing. Debra Hoadley served as the court reporter. On November 17, 2020, claimant filed a motion to reopen the record, making allegations regarding his employment circumstances. The claimant submitted Claimant's Exhibit 8. On January 11, 2021, this motion was rejected under Rule 4.19(3)(e). The undersigned did not review Claimant's Exhibit 8. The matter was fully submitted on January 8, 2021, after helpful briefing by the parties.

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 his employment on August 1, 2019.

2. Whether the alleged injury is a cause of any permanent disability and whether claimant is entitled to any permanent partial disability benefits. If so, the nature and extent of such benefits are disputed.

3. The rate of compensation is disputed on the basis of gross wages.

4. Whether the claimant is entitled to the medical expenses set forth in Claimant's Exhibit 5.

5. Defendants assert the claim was not timely filed under Iowa Code section 85.26.

6. Whether defendants are entitled to a credit for benefits paid on his prior tinnitus claim (March 29, 2013) under Iowa Code section 85.34(7).

7. Defendants assert that the principles of res judicata apply to this claim as it relates to claimant's March 29, 2013, tinnitus claim.

8. Claimant seeks costs set forth in Claimant's Exhibit 7.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at all relevant times.

2. Temporary disability/healing period and medical benefits are not in dispute.

3. The parties have stipulated that if any permanent disability benefits are owed, the commencement date for any permanent disability benefits is August 2, 2019.

4. The parties have stipulated that the claimant was married and entitled to two exemptions for purposes of rate calculation.

5. Affirmative defenses have been waived with the exception of statute of limitations (as set forth above).

These stipulations have been accepted by the undersigned and these stipulations are deemed binding upon the parties.

FINDINGS OF FACT

Claimant Kerry Elmore was 59 years old as of the date of hearing. He has worked at Quaker Oats since 1982 up through the date of hearing. He served in the United States Army after receiving his GED in 1979. Since 2011, Mr. Elmore has worked as a general maintenance person (GMP). His job duties generally involved cleaning at the Quaker plant. His earnings are in the record. At the time of the alleged

injury he was earning $32.05 per hour and he worked regular overtime, up to 60 plus hours per week. (Defendants' Exhibit F) He also earned regular bonuses under his union contract.

Mr. Elmore filed two prior claims against Quaker Oats (hereafter "Quaker"). He filed a petition alleging a March 29, 2013, tinnitus injury which was settled on Agreement for Settlement on June 26, 2014. (Claimant Exhibit 1 pages 1-4) He was paid a total of 49.6 weeks of compensation amounting to $40,000.00. (Cl. Ex. 1, pp. 1, 3) He then filed a petition for review reopening on the same claim, which was eventually settled on a compromise basis on November 7, 2017. (Cl. Ex. 1, pp. 5-10) For the review-reopening claim, he was paid $40,000.00 on a full and final basis. (Jt. Ex. 1, p. 9) Richard Tyler, Ph.D., served as Mr. Elmore's expert in those cases. Marlan Hansen, M.D., served as the defendants' expert in those claims.

Mr. Elmore alleges that he sustained a cumulative noise exposure aggravation injury related to his hearing which manifested on or about August 1, 2019. Specifically, he contends that his condition of tinnitus has been materially aggravated since his November 7, 2017, compromise settlement. Therefore, his condition prior to the alleged injury is particularly relevant.

There is no doubt that Mr. Elmore has been exposed to a noisy work environment at Quaker. (Cl. Ex. 6, pp. 1-2) As a result, he has had hearing loss, which at the time of hearing was not compensable because he still worked in the noisy environment. In addition, at some point he developed the condition of tinnitus. Again, this fact is not really in dispute. The primary disputes are whether this condition was materially aggravated after his compromise full and final settlement in 2017, and whether the current claim is barred by res judicata and/or the statute of limitations.

Mr. Elmore testified live and in-person (via Court Call) at hearing. I find his testimony to be highly credible. Mr. Elmore was an accurate historian and his testimony was consistent with other portions of the record. There was nothing about his demeanor which caused me any concern regarding his truthfulness.

Prior to August 1, 2019, Mr. Elmore's tinnitus was significantly disabling as documented in the evidence. When he began employment with Quaker, he did not have the condition of tinnitus. Quaker prepared noise measurement reports and other work records to document exposure in the plant. Mr. Elmore had regular hearing evaluations from the beginning of his employment through November 2020. In his September 6, 2013, independent medical evaluation (IME) Richard Tyler, Ph.D., summarized these reports, opining that Mr. Elmore was in a very noisy environment and was exposed to impulsive noises which is more damaging. (Cl. Ex. 2, pp. 2-3) Dr. Tyler also documented Mr. Elmore's substantial overtime worked and the manner in which this contributed to his tinnitus and hearing deficits. (Cl. Ex. 2, p. 5)

According to Dr. Tyler, in 2004, Mr. Elmore's tinnitus was first noted in his hearing examination. (Cl. Ex. 2, p. 7) His tinnitus progressed from there until he

sustained an injury as defined by Iowa law, which manifested on or about March 29, 2013. There was, of course, no specific event which occurred on that date, but rather his condition progressed as a result of repeated noise exposure until it manifested on that date. In his IME examination with Dr. Tyler, Mr. Elmore filled out a hearing loss and tinnitus questionnaire (in January 2013) which allowed Mr. Elmore to describe his symptoms at that time. (Cl. Ex. 2, pp. 20-27) Therein, Mr. Elmore described the "crickets" sound which he described as a "30" on a 100 point scale. (Cl. Ex. 2, p. 24) In the written portion, he described his inability to understand voices in conversations. (Cl. Ex. 2, p. 24) He described and rated his difficulties with concentration, his emotional well-being, hearing and inability to sleep. This is how he rated those areas on a 100 point scale (100 being total great effect; 0 no effect).

67.	Concentration	30
68.	Emotion well being	30
69.	Hearing	60
70.	Sleep	30

(Cl. Ex. 2, p. 25) Based upon his review of the records, history taken from Mr. Elmore, Dr. Tyler assigned an 11.4 percent body as a whole rating for the tinnitus. (Cl. Ex. 2, p. 13) He recommended hearing aids and opined the tinnitus was due to the noisy environment at Quaker and recommended significant restrictions at work and social activities. (Cl. Ex. 2, pp. 12-13) Neither party followed the restrictions.

Defendants had claimant evaluated by Marlan Hansen, M.D., at the University of Iowa Hospitals and Clinics. Dr. Hansen reviewed documents and examined Mr. Elmore. He opined Mr. Elmore did have tinnitus and apportioned his claim between the work-related and non-work portions. He assigned a 1 percent whole body rating for the tinnitus and did not recommend any medical restrictions. (Def. Ex. C, p. 9) He did feel Mr. Elmore may benefit from a trial of hearing aids.

As mentioned above, the parties settled this claim on an agreement for settlement on June 26, 2014. After the settlement, Mr. Elmore continued to work in the noisy environment. The condition apparently progressed further as Mr. Elmore filed a review-reopening petition on September 12, 2016. Both parties obtained subsequent evaluations from their original experts, Dr. Tyler and Dr. Hansen. (Def. Ex. C, pp. 17-19; Def. Ex. E) Both assigned higher impairment ratings from tinnitus and documented his increasing symptoms. Dr. Hansen noted that the condition of tinnitus is subjective and opined that his increase in symptoms was consistent with the natural progression of his tinnitus and hearing loss. (Def. Ex. C, p. 18)

In any event, Mr. Elmore's review-reopening petition was settled and then approved on November 7, 2017. This settlement, unlike the first, was a compromise settlement under Section 85.35(3). The basis for the dispute was set forth as follows:

> Claimant alleges he developed tinnitus due to exposure to noise in the course of his employment at Quaker Oats. The parties settled this claim on an Agreement for Settlement basis for 9.9% industrial disability, which was approved by the Workers' Compensation Commissioner on June 27, 2014. . . .
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> Claimant alleges he sustained a change of physical condition since the Agreement for settlement in June 2014 and he has sustained additional industrial disability. Claimant relies on the report from Richard Tyler Ph.D., finding Claimant's hearing loss had increased and he had significant tinnitus. Claimant argues that his increased tinnitus has resulted in additional industrial disability.
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> Defendants argue that Claimant's alleged increase in tinnitus is, at most, a natural progression of his condition that was expected to occur at the time of the June 2014 settlement. Defendants rely on the report from Marlan Hansen, M.D., finding that Claimant's hearing loss/tinnitus from June 214 [sic] to the present was a natural progression of his hearing condition that existed prior to the settlement. Defendants believe Claimant has not sustained any change of condition that would entitle him to additional benefits. In addition, Defendants argue Claimant has not sustained any industrial disability as evidenced by his ongoing employment at Quaker Oats.
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> Given the dispute, the parties have agreed to settle the March 29, 2013 tinnitus claim on a full and final basis for $40,000 in new money.

(Cl. Ex. 1, pp. 5-6)

Mr. Elmore went back to work in the same noisy environment after the settlement. He now contends that his condition then worsened after November 7, 2017. It is undoubtedly the same condition he has had since at least 2013 when the first injury manifested.

At hearing, Mr. Elmore credibly testified that his tinnitus now wakes him up more often in a given night. (Tr., p. 13) He described significant fatigue and waking up numerous times per night, sometimes with headaches and feelings of anxiety. (Tr., pp. 14-15) He described the crickets sound as being louder, but he also described hearing sounds like a car engine "with really bad lifters ticking really superfast …" (Tr., p. 14) Mr. Elmore has had to develop creative strategies to address his waking up in order to relax. (Tr., pp. 15-16) This is new since 2017. (Tr., p. 16) He testified that before his 2017 settlement, when he would wake, he would simply roll over and go back to sleep. Since the condition has progressed with the new, louder noises it now takes him a half hour or so to get relaxed and back to sleep using new, creative strategies. He testified that his fatigue is so severe now that he occasionally misses work due to lack of sleep, anxiety and headaches. (Tr., pp. 16-19) Mr. Elmore also testified that he now fails to

hear important safety cues at work such as co-workers hollering at him, or fork trucks driving up behind him. (Tr., p. 19) He also testified that his inability to hear or understand his co-workers now causes him significant difficulties. He testified that some co-workers call him "stupid" or "dumb" due to his inability to hear or understand what is happening at work. (Tr., pp. 21-22) He now communicates often through text messages even with team leaders at work. He testified his inability to concentrate has caused him to turn over household tasks, such as paying bills, to his spouse. (Tr., p. 24)

Mr. Elmore filled out a new hearing loss and tinnitus questionnaire for Dr. Tyler in May 2020. (Cl. Ex. 2, pp. 28-35) On this form, he rated the loudness of the crickets sound as a 70 on a 100 point scale. (Cl. Ex. 2, p. 32) In the written comments section, he added a number of detailed problems his tinnitus causes including confusion, the inability to "define" voices, the inability to hear anything when there is background noise, inability to sleep and feeling exhausted and confused during the day, as well as social problems. He rated his deficits as follows:

67.	Concentration	90
68.	Emotional well being	80
69.	Hearing	90
70.	Sleep	80

(Cl. Ex. 2, p. 33) In comments he further described social isolation and confirmed a number of the problems and difficulties he has at work and in his activities of daily living. He wrote the following concluding comments: "I'd give anything to be a part in a conversation. I'm laughed at a lot because they think I'm stupid because I can't hear. And to be able to sleep or not be so tired all day." (Cl. Ex. 2, p. 34) In the tinnitus handicap questionnaire, he detailed his tinnitus interfering significantly with his life, more so than the earlier questionnaire. (Compare Cl. Ex. 2, p. 35 with Cl. Ex. 2, p. 27)

In August 2020, defendants had claimant evaluated by a new medical expert, Douglas Hoisington, M.D. Dr. Hoisington reviewed a number of records, as well as a detailed letter from defense counsel setting forth the course of events. He also examined Mr. Elmore. He offered the following opinions. "As stated above, there has been no additional hearing loss since September 2016, and the tinnitus has remained the same." (Def. Ex. D, p. 20) Dr. Hoisington recommended new hearing aids but did not assign any additional impairment or restrictions. (Def. Ex. D, p. 20)

Mr. Elmore's attorney wrote to Dr. Tyler on September 14, 2020. (Cl. Ex. 2, p. 17) He provided a number of important records to Dr. Tyler, including prior tests, medical reports, Mr. Elmore's deposition, answers to interrogatories, and defense expert reports. Dr. Tyler also had all of Mr. Elmore's questionnaires, including the July 2020 questionnaire. Dr. Tyler reviewed all of this information and interviewed Mr.

Elmore. He prepared a lengthy report detailing the history of Mr. Elmore's condition and rendering expert opinions including a detailed appendix. (Cl. Ex. 2, pp. 36-54) Dr. Tyler disagreed with Dr. Hoisington's assessment and he assigned a 38 percent whole body impairment for Mr. Elmore's tinnitus pursuant to the AMA Guides to the Evaluation of Permanent Impairment. (Cl. Ex. 2, p. 42-43) He opined this was an 11 percent increase in functional impairment since November 2017. (Cl. Ex. 2, p. 42) The rating assigned impairment for hearing difficulties, sleep difficulties, concentration difficulties and emotional difficulties. Dr. Tyler noted the following restrictions:

> He should not work around intense noise, particularly impulsive noise. He should not work where careful concentration is needed. He should not work where communication with fellow workers is required. These restrictions have become more critical, because of his increase in hearing loss and tinnitus difficulties.

(Cl. Ex. 2, p. 37)

After reviewing the reports, I find Dr. Tyler's report compelling. Dr. Tyler has consistently evaluated Mr. Elmore on three distinct occasions since 2013, and is in the best position to provide an overall assessment. Dr. Tyler's professional credentials in the field of audiology are impeccable. (Cl. Ex. 2, pp. 55-98) I find his report is strong supporting evidence for Mr. Elmore's assertion that his condition has worsened since November 2017, when he settled his tinnitus claim. I find this report more convincing than Dr. Hoisington's report. Dr. Hoisington simply claimed without explanation that "the tinnitus has remained the same." It is entirely unclear in this record what he based this conclusion on. This was the first occasion Dr. Hoisington evaluated Mr. Elmore. It does not appear that he reviewed the claimant's deposition testimony or reviewed the same detailed description of symptoms which was available to Dr. Tyler. He did review a lengthy letter from defense counsel which, while generally accurate, did not specifically detail the symptoms Mr. Elmore has experienced since November 2017. (See Def. Ex. D, pp. 30-37) Furthermore, while Dr. Hoisington is undoubtedly qualified to render expert opinions, he does not have the breadth of experience and background in tinnitus claims as Dr. Tyler.

The problem for the claimant, however, is that Dr. Tyler did not provide an opinion that the claimant sustained a new tinnitus injury which manifested on or about August 1, 2019. Dr. Tyler merely opined that Mr. Elmore's condition had substantially worsened. "Based on the information available to me, I conclude that the sensorineural hearing loss and tinnitus experienced by Mr. Elmore worsened since 2017." (Cl. Ex. 2, p. 43) While it is clear in his report that he did not believe that Mr. Elmore should continue to be exposed to the noisy work environment, it is also clear that Dr. Tyler opined that this was the exact same condition he had been dealing with since at least 2013. There was no new cumulative trauma manifestation. The condition simply worsened.

CONCLUSIONS OF LAW

The first question submitted is whether the claimant sustained an injury which arose out of and in the course of his employment which manifested on or about August 1, 2019. Claimant has alleged that he substantially and materially aggravated his preexisting diagnosis of tinnitus as a result of his exposure to excessive noise for the employer since he settled his tinnitus claim in November 2017. He contends the condition manifested on August 1, 2019. Defendants do not seriously dispute that the claimant has suffered tinnitus. They assert both that the condition is the same as it was in November 2017, and to the extent it has worsened at all, that the condition has naturally progressed and that his work activities since 2017, have not substantially or materially aggravated the condition. The defendants further argue that claimant's claim is barred by the doctrine of res judicata since he settled his tinnitus claim in November 2017 on a full and final basis.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When the injury 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 inherently is a fact

based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include 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. 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).

Because a cumulative injury has been alleged, the issue of medical causation is significantly linked to the issue of whether he suffered an injury which arose out of and in the course of his employment.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

The first issue is whether the claim is barred by the doctrine of res judicata. The question is whether a worker can sustain a new, cumulative injury by aggravating a condition which has already been settled, in this case on a full and final basis under Section 85.35(3).

Defendants set forth the following argument.

> Claimant's alleged August 1, 2019 injury is precluded by res judicata. "It is well settled that the doctrines of claim preclusion and issue preclusion (formerly termed res judicata) are applicable in appropriate circumstances to administrative quasi-judicial adjudications." Price v. Koehring Cranes, File No. 5016412 (App. Dec. Aug. 19, 2008), citing Bd. Of Sup'rs, Carroll City v. Chi. & N.W. Transp. Co., 260 N.W.2d 813, 815 (Iowa 1977). Claimant already filed a Petition for tinnitus in 2013 and filed a Review/Reopening Petition in 2017. The Commissioner approved a settlement of this matter in November 2017. (Ex. 1, p. 5) Claimant's tinnitus didn't stop or improve at some point then reoccur unexpectedly. It persisted from 2013 through the present.

(Def. Brief, pp. 11-12) The defendants go on to argue that tinnitus is subjective.

I reject this argument. The claimant settled his 2013 claim for tinnitus on November 1, 2017, on a full and final basis. He then filed a petition alleging he sustained a new cumulative trauma hearing injury on August 1, 2019. It is the claimant's burden to prove he sustained a new cumulative trauma injury which manifested on that date. The fact that he had experienced a previous disability, which he settled, does not bar him from attempting to prove that he sustained a new cumulative trauma injury.

I find, however, that the claimant failed to prove that he sustained a new, cumulative trauma injury, following his 2017 settlement. His condition undoubtedly worsened somewhat after the settlement. Mr. Elmore continued to work for Quaker in a noisy environment and Quaker continued to allow him to work, probably because their own expert at that time placed no restrictions on him. In any event, he did continue to experience noise exposure, including impulsive noise. With the benefit of hindsight, it appears it was unwise for the claimant to continue to work in the noisy environment given the nature and severity of his condition.

The condition also progressed naturally and it is somewhat difficult to determine how much of his condition is from a natural progression and how much is from continued noise exposure. In any event, it is likely that his condition worsened somewhat because of his continued noise exposure. I find, however, that claimant has failed to meet his burden of proof that he sustained a new, distinct cumulative trauma injury.

In Ellingson v. Fleetguard, Inc., the Supreme Court addressed the issue of a subsequent personal injury which arises from an aggravation of a prior work-related injury. In Ellingson, the claimant had suffered a traumatic event work injury in 1985 which resulted in a serious cervical condition. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440, 442 (Iowa 1999) Ellingson argued that she sustained a discreet cumulative injury which manifested later and was partially responsible for her disability.

> To the extent that the evidence reveals a subsequent aggravation of Ellingson's January 4, 1985 injury, this is a relevant circumstance in fixing the extent of her permanent disability. Aggravating work activities were doubtless a causal factor with respect to the total degree of disability that she exhibited at the time of the hearing. It is clear, however, that she may not establish a cumulative-injury claim by merely asserting that her disability immediately following the January 4, 1985 injury was increased by subsequent aggravating work activities. That circumstance only serves to increase the disability attributable to the January 4, 1985 injury. To show a cumulative injury she must demonstrate that she has suffered a distinct and discreet disability attributable to post–1985 work activities rather than as an aggravation of the January 4, 1985 injury. In presenting that claim to the commissioner, she could only prevail if the commissioner, as primary fact finder, found that a factual basis for a cumulative-injury disability existed. The commissioner did not make that finding. The findings of the commissioner have the effect of a jury verdict. Ward v. Iowa Dep't of Transp., 304 N.W.2d 236, 237 (Iowa 1981); Paveglio v. Firestone Tire & Rubber Co., 167 N.W.2d 636, 640 (Iowa 1969).

Ellingson, 599 N.W.2d at 444.

Mr. Elmore's condition is the exact same condition he had in 2013 and settled in 2014 and 2017; namely severe tinnitus. It is now slightly worse than it was at the time he effectuated his full and final settlement in 2017. Mr. Elmore asserted that the type of noise he hears is new (a loud roaring as opposed to loud crickets). He also asserts that he is more isolated and has had to develop new strategies to deal with the worsening condition. A number of symptoms are somewhat more severe. Dr. Tyler, however, did not opine that the claimant sustained a new, distinct or discreet cumulative trauma injury as a result of the continued noise exposure. Rather, Dr. Tyler opined that his condition has simply worsened over time. "Based on the information available to me, I conclude that the sensorineural hearing loss and tinnitus experienced by Mr. Elmore has worsened since 2017." (Cl. Ex. 2, p. 43) Having reviewed Dr. Tyler's report thoroughly, I simply do not have enough evidence that the claimant sustained a new, discreet cumulative trauma injury to his hearing which arose out of and in the course of his employment.

For these reasons I find that claimant has failed to prove that he sustained a cumulative trauma injury which arose out of and in the course of his employment. The remaining issues, therefore, are deemed moot.

ORDER

THEREFORE IT IS ORDERED:

Claimant shall take nothing from these proceedings.

Each party shall pay their own costs.

Signed and filed this 10th day of September, 2021.

JOSEPH L. WALSH
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.