

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRANDON SCHMIDT,

Claimant,

vs.

AGRI STAR MEAT &amp; POULTRY, LLC,

Employer,

and

GREAT AMERICAN ALLIANCE  
INSURANCE COMPANY,Insurance Carrier,  
Defendants.

File No. 5068601.01

ARBITRATION DECISION

Headnotes: 1108, 1108.20, 1402.30,  
1402.40, 1402.60, 1803, 1804, 2206,  
2907, 3002, 4100

Claimant Brandon Schmidt filed a petition in arbitration on November 19, 2020, alleging he sustained injuries to his head, cervical spine, and mental health while working for Defendant Agri Star Meat & Poultry, LLC ("Agri Star") on November 19, 2018. Agri Star and its insurer, Defendant Great American Alliance Insurance Company ("Great American"), filed an answer on December 22, 2020.

An arbitration hearing was held *via* Zoom video conference on December 7, 2021. Attorney Ben Roth represented Schmidt. Schmidt appeared and testified. Debra Schmidt, Schmidt's wife, testified on her husband's behalf. Attorney Lori Scardina Utsinger represented Agri Star and Great American. Brice Evans and Nolan Nelson appeared and testified on behalf of Agri Star and Great American. Joint Exhibits ("JE") 1 through 9, and Exhibits 1 through 11 and A through N were admitted into the record. The record was held open through February 18, 2022, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

At the start of the hearing the parties submitted a Hearing Report, listing stipulations and issues to be decided. Agri Star and Great American waived all affirmative defenses. The Hearing Report was approved at the conclusion of the hearing.

**STIPULATIONS**

1. An employer-employee relationship existed between Agri Star and Schmidt at the time of the alleged injury.

2. Schmidt sustained an injury on November 19, 2018, which arose out of and in the course of his employment with Agri Star.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. Temporary benefits are no longer in dispute.

5. The alleged injury is a cause of permanent disability.

6. The disability is an industrial disability.

7. At the time of the alleged injury Schmidt was married and entitled to two exemptions.

8. Prior to the hearing Schmidt was paid 25 weeks of compensation at the rate of \$567.98 per week.

9. Costs have been paid.

### **ISSUES**

1. What is the nature of the injury?

2. What is the extent of disability?

3. Has Schmidt established he is permanently and totally disabled under the common law or odd-lot doctrine?

4. What is the commencement date?

5. What is the rate?

6. Is Schmidt entitled to payment of medical expenses set forth in Exhibit 10?

7. Is Schmidt entitled to mileage?

8. Is Schmidt entitled to an award of penalty benefits?

9. Should costs be assessed against either party?

### **FINDINGS OF FACT**

Schmidt lives in Decorah with his wife. (Exhibits 2:95, 4:121) At the time of the hearing he was 61. (Tr.:9)

Schmidt graduated from high school in Decorah. (Exs. J:111, 4:121; Transcript:9) After high school, Schmidt completed an electrician certification program and he is a certified electrician. (Ex. J:111; Tr.:10) Schmidt completed a massage therapist program and he has been a licensed massage therapist since 1990. (Ex. J:111; Tr.:10, 65-66) Schmidt also studied computer technology network administration, but he did not complete a degree. (Ex. J:111; Tr.:10) Schmidt holds certificates as a green builder, boiler technician, home inspector, and he holds various solar and wind site assessment certifications. (Tr.:10) Schmidt is a licensed master plumber. (Tr.:11)

Schmidt has a valid driver's license, a chauffeur's license, and a motorcycle license. (Tr.:65)

From 2001 through 2018, Schmidt operated Twin Oaks Energy Solutions where he installed solar systems for space heating and domestic hot water using his training as a licensed master plumber, certified electrician, certified boiler technician, certified green builder, and NABCEP certified solar thermal installer. (Exs. J:112, 4:122) Schmidt also operated Twin Oaks Home Inspection from 2003 through 2018. (Exs. J:112, 4:122) While operating his businesses he also worked briefly for Slumberland Furniture as a retail furniture sales associate, and part-time sales clerk for Winneshiek True Value. (Exs. J:112, 4:122)

Schmidt has a cavernous angioma of his brain stem, which resulted in a brain bleed in November 2007. (JE 1:1) Schmidt experienced intermittent dizziness, double vision, and tinnitus and ringing in his ears following his brain bleed. (JE 1:1, 10, 16; JE 2:56) Schmidt initially received treatment locally and he sought a second opinion from the Mayo Clinic. Most of Schmidt's symptoms resolved, with the exception of his double vision.

In July 2012, Schmidt attended an appointment with Jimmy Fulgham, M.D., at the Mayo Clinic. (JE 2:57) Dr. Fulgham noted in 2007 Schmidt had been seen at the Mayo Clinic for a second opinion regarding a hemorrhage in his midbrain with weakness in his left eye and right face and diplopia. (JE 2:57) Dr. Fulgham documented diplopia was his main deficit that persisted and he recommended a referral to an ophthalmologist for consideration of strabismus surgery. (JE 2:57-58)

On August 1, 2012, Schmidt attended an appointment with Giuseppe Lanzino, M.D. with the Mayo Clinic, complaining of "on-and-off" headaches. (JE 2:60) Dr. Lanzino noted magnetic resonance imaging showed evidence of an old hemorrhage with possible associated developmental venous anomaly, but no evidence of a fresh bleed or growth of the presumed cavernous malformation. (JE 2:60) Dr. Lanzino listed an impression of a stable brainstem cavernous malformation. (JE 2:60) Later that month Schmidt underwent eye surgery for his diplopia, which was successful. (JE 2:61)

Schmidt also has a preexisting history of obstructive sleep apnea with CPAP and hand tremors treated by his family medical provider, Kurt Swanson, D.O. (JE 1:25-26) On February 20, 2018, he sought treatment from Dr. Swanson for depression and he reported having muscle spasms in his back and neck and difficulty sleeping. (JE 1:27)

In July 2018, Agri Star hired Smith as a maintenance specialist. (Tr.:25) Agri Star initially planned to use Smith for electrical matters, but given he is a master plumber, he focused on plumbing issues in the plant. (Ex. J:112; Tr.:25)

Schmidt testified on November 19, 2018,

I and my supervisor, Nolan Nelson were in the parts shop at Agri Star Meat & Poultry, and I tripped on a pallet, and while stumbling forward trying to catch myself, I basically did a running headbutt into a piece of

equipment called a jetter, which is a steel trailer. It's a big pump is what it is.

So I was stumbling trying to catch yourself, trying to catch yourself, and I don't know, I'm guessing I was probably three feet off the ground, more horizontal just falling and hit my head straight on and my hard hat flew off. That's kind of what I remember then.

(Tr.:20-21) Schmidt knows he fell because he was dirty following the incident, but he could not remember falling to the ground at hearing. (Tr.:22) Schmidt's supervisor asked him how he felt and Schmidt told him he thought he was "okay." (Tr.:22) After work Schmidt drove himself home and he went to bed. (Tr.:22, 77)

Schmidt testified the next day he went to work and he was reading a service manual and realized he was not retaining any of the information. (Tr.:23) Schmidt went to his supervisor and another employee and told them something was not right because he was not understanding the manual. (Tr.:23)

Schmidt completed an incident report on November 20, 2018, stating he injured his head, neck, shoulder, and hip by a "trip and fall" when he was "walking" and "looking for parts, trip on pallet, hit my head on the jetter." (Ex. 7:128) Schmidt reported feeling "dizzy, light headed" and that he was "not feeling himself." (Ex. 7:129)

Schmidt's employer sent him to Winneshiek Medical Center and he was examined by Kent Svestka, M.D. (JE 3:103) Schmidt reported he tripped the day before on a pallet and hit his head, right shoulder, and hip, and complained of light sensitivity, lightheadedness, and some nausea. (JE 3:103) Schmidt complained of a mild headache, which worsened, and neck discomfort. (JE 3:103)

Dr. Svestka ordered a head and neck computerized tomography exam. (JE 3:105) The reviewing radiologist listed an impression of "[a]ge indeterminate compression fractures with mild anterior wedging of the C6 and C7 vertebral bodies, although favored chronic with increased sclerosis," multilevel degenerative changes of the cervical spine, and no acute head findings. (JE 3:105) Dr. Svestka listed an impression of concussion without loss of consciousness, neck muscle strain, right shoulder strain, and right hip contusion. (JE 3:108) Dr. Svestka discharged Schmidt and ordered him to rest from physical and mental activities until released by his medical doctor, to ice the areas of discomfort and to take Tylenol or ibuprofen as needed, and directed him to follow up with occupational health the next day. (JE 3:107)

On November 21, 2018, Schmidt attended an appointment with John Eveltizer Olson, PA-C with Winneshiek Medical Center Family Practice. (JE 3:108) Schmidt complained of ringing in his ears, feeling very thirsty, tingling in his hands, some difficulty with concentration, and a headache aggravated by bright light and loud sounds. (JE 3:108-10) Eveltizer Olson assessed Schmidt with a concussion without loss of consciousness, neck strain, and right shoulder contusion, imposed restrictions of light duty with no lifting over 20 pounds and to avoid working at elevated heights and

with electronic screens or activities that require concentration, and he told Schmidt to rest. (JE 3:111)

On November 28, 2018, Schmidt attended an appointment with Winneshiek Medical Center Occupational Health, where he was examined by Kristen Heffern, ARNP. (JE 4:121) Schmidt complained of having a nagging and shooting headache in his forehead that is worse with light and not improving. (JE 4:121) Schmidt reported his headaches are persistent and worsen and move intermittently to the left of his forehead between his eyes with tingling, light sensitivity, sleeplessness, intermittent nausea, irritability and agitation. (JE 4:121) He also reported having a right shoulder bruise with pain with rotation and palpation, right elbow tenderness, and swelling and tenderness in his right hip. (JE 4:121) Heffern diagnosed Schmidt with a head contusion, right hip pain, right elbow contusion, and right shoulder pain, directed him to apply ice or heat for 15 minutes a few times per day as needed and to take Tylenol for pain, and released him without restrictions. (JE 4:122)

Schmidt testified he was frustrated with the workers' compensation process. (Tr.:28) He spoke with his supervisors and people in the safety department and told them he was still having headaches and he asked for help because he was not getting better. (Tr.:28)

On January 29, 2019, Schmidt returned to Winneshiek Medical Center Family Practice and he was examined by Samantha Reicks, ARNP. (JE 3:112) Schmidt reported his joint pain had resolved, but that he was having ongoing concussive symptoms, including a daily headache, chronic tinnitus, intermittent light and sound sensitivity, difficulty falling asleep, irritability, and difficulty focusing. (JE 3:112) Schmidt relayed he was experiencing a daily right-sided headache with tingling sensation that worsens from a chronic dull ache throughout the day. (JE 3:112) Reicks assessed Schmidt with chronic intractable headache, unspecified type, a history of concussion, and insomnia, prescribed trazodone, continued his citalopram, and ordered magnetic resonance imaging, noting his case is complex due to his history of venous malformation causing hemorrhage in the fourth ventricle with surgical repair. (JE 3:113) Schmidt underwent additional magnetic resonance imaging that did not show any acute findings. (JE 3:119-20)

On February 28, 2019, Schmidt attended an appointment with Brian O'Shaughnessy, M.D., a neurologist. (JE 5:123) Dr. O'Shaughnessy noted Schmidt had a past medical history of cavernous angioma in the temporal region with bleeding and surgery in 2007, anxiety, essential tremor, eye muscle surgery for strabismus, and left rotator cuff surgery. (JE 5:123) Dr. O'Shaughnessy opined Schmidt has posttraumatic headaches or posttraumatic migraine headaches, and documented he may have a cervical strain from the injury that is aggravating his headaches and post-concussion syndrome. (JE 5:126) Dr. O'Shaughnessy stopped Schmidt's trazodone because it was not helping him sleep, prescribed amitriptyline, prescribed physical therapy, and released him without restrictions. (JE 5:126)

Schmidt returned to Dr. O'Shaughnessy on March 28, 2019, reporting he was sleeping well with 25 mg of amitriptyline, but his headaches had not improved. (JE

5:127) Schmidt reported physical therapy had improved his neck range of motion, but he was still having headaches. (JE 5:127) Dr. O'Shaughnessy noted Schmidt had some mild decrease in ability to turn his head to the left on exam and he complained of some discomfort in the mid to upper cervical paraspinal region and cervical occipital region left greater than right. (JE 5:127) Dr. O'Shaughnessy prescribed Topamax and reported that if he continued to have headaches at his next visit he may try trigger point injections. (JE 5:127)

On April 10, 2019, Schmidt attended a follow-up appointment with Dr. O'Shaughnessy. (JE 5:129) Schmidt reported he could not tolerate the Topamax and stopped it. (JE 5:129) Dr. O'Shaughnessy administered trigger point injections and noted if the injections did not help, he did not have anything else to offer him. (JE 5:129)

On June 20, 2019, Schmidt attended an appointment for a second opinion with Kenneth McMains, M.D. with Allen Occupational Health. (JE 7:132) Dr. McMains reviewed Schmidt's medical records, examined him, and released Schmidt to return to work without any restrictions. (JE 7:133; Ex. A)

Dr. McMains issued an opinion letter on June 25, 2019. (Ex. A) Dr. McMains noted on exam Schmidt complained of daily headaches, some more severe than others, but usually occurring in the frontal area and then radiating to bitemporal with pain behind his eyes and on occasion in the occipital region. (Ex. A:1) Dr. McMains noted Schmidt had also complained of tinnitus following the work injury. (Ex. A:1)

Dr. McMains diagnosed Schmidt with closed head trauma with cephalgia and bilateral tinnitus. (Ex. A:2) Dr. McMains opined he found no objective findings supporting the need for ongoing treatment noting Schmidt had a negative workup, showing no evidence of any trauma to his brain or spinal cord. (Ex. A:2) Dr. McMains placed Schmidt at maximum medical improvement on June 20, 2019. (Ex. A:2) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. McMains opined Schmidt had sustained no permanent or partial impairment based on no objective evidence of injury and recommended no additional treatment. (Ex. A:2)

After Schmidt filed a pro se petition for alternate care, Agri Star and Great American arranged an appointment for Schmidt with a pain management specialist. On July 2, 2019, Schmidt attended an appointment with Ashar Afzal, M.D., complaining of headaches and neck pain. (JE 8:134) Dr. Afzal documented Schmidt reported he has primarily headaches in the temple, frontal, and occipital regions he describes as stabbing and associated with numbness, tingling, a sharp sensation, and knifelike pain. (JE 8:134) He also reported having dorsal neck pain, noting his symptoms are quite constant and were not present before his work injury. (JE 8:134) Dr. Afzal listed an impression of bilateral greater occipital neuralgia and cervical degenerative spondylosis with cervical facet arthropathy, noted Schmidt may benefit from a trial of greater occipital nerve blocks or blocking the innervation of the upper cervical facets. (JE 8:135) Dr. Afzal recommended Schmidt not wear a hard hat and use a soft pillow at night. (JE 8:135)

Dr. Afzal administered the occipital nerve blocks on August 15, 2019. (JE 8:136) When Schmidt returned on September 6, 2019, he reported he did not receive much relief from the occipital nerve blocks and reported having pain at the site of the injection for a couple of weeks. (JE 8:137) Dr. Afzal prescribed baclofen, stated Schmidt could resume wearing a hard hat, and recommended diagnostic C2 and C3 medial branch blocks. (JE 8:137)

Agri Star disciplined Schmidt following his work injury and ultimately terminated him on September 10, 2019. (Ex. D:42) Agri Star disciplined Schmidt for driving the wrong way as he exited the parking lot and almost collided with a safety vehicle. (Ex. D:42) After he was issued a suspension for the incident, he left the human resources office and he made a vulgar comment about a colleague. (Ex. D:42, 46) He had made an inappropriate comment in the past as well. The employer called him back and terminated his employment for "creating an intimidating, offensive or hostile environment." (Ex. D:42) Schmidt applied for unemployment benefits. (Ex. D) Iowa Workforce Development denied his application, finding Agri Star had discharged him for disqualifying misconduct. (Ex. D)

On September 26, 2019, Schmidt attended a follow-up appointment with Dr. Afzal complaining of continued headache and neck pain. (JE 8:138) Schmidt stated he was frustrated and upset because his symptoms were not improving. (JE 8:138) Dr. Afzal listed an impression of chronic headaches and cervicogenic headaches, prescribed tramadol, and recommended diagnostic medial branch blocks. (JE 8:139) Dr. Afzal administered diagnostic medial branch blocks on October 23, 2019. (JE 8:140)

Jonathan Fields, M.D., an occupational medicine physician, conducted an independent medical examination medical records review for Agri Star and Great American on November 15, 2019. (Ex. C) Dr. Fields diagnosed Schmidt with chronic idiopathic headache pain. (Ex. C:16) Dr. Fields agreed with Dr. McMains that Schmidt reached maximum medical improvement in June 2019. (Ex. C:16) Dr. Fields opined, based on his review of the records, no reported objective findings, noting Schmidt's magnetic resonance imaging showed no acute findings and there was no basis for an impairment under the AMA Guides, opining Schmidt's current symptoms are not related to the work injury. (Ex. C:16)

On January 7, 2020, Schmidt attended an appointment with Dr. Swanson. (JE 1:31) Schmidt told Dr. Swanson he tripped over a pallet at work while wearing a hard hat and he hit a steel beam with his head with no loss of consciousness, and since the injury he was experiencing daily headaches, tinnitus, and concentration problems. (JE 1:31) Schmidt relayed he had received physical therapy, trigger point injections, and an occipital nerve block with no relief, and he requested a referral to the Mayo Clinic. (JE 1:31) Dr. Swanson made a referral to the Mayo Clinic for Schmidt's post-concussion headaches noting the treatment would not be part of the workers' compensation case. (JE 1:33)

On April 21, 2020, Schmidt attended a telemedicine appointment with Carrie Robertson, M.D., a neurologist with the Mayo Clinic. (JE 2:65) Dr. Robertson noted in

2007 Schmidt was treated for a left-sided mid brain hemorrhage thought to be related to a cavernous hemangioma and he presented with left eye weakness, right facial weakness, and diplopia, and later underwent surgery for his diplopia in 2012. (JE 2:65) Schmidt reported no real history of headaches until the November 2018 work injury. (JE 2:65) Schmidt reported after a fall in 2018 he developed daily headaches and tinnitus after he “tripped while running forward causing him to hit the top of his head on heavy equipment – hard enough to blow his hardhat off.” (JE 2:65) The initial incident report Schmidt completed did not state he was running. Schmidt reported he was walking when he tripped. (Ex. 7:128)

Schmidt reported having some type of headache every day with more severe headaches four days per week. (JE 2:65) Dr. Robertson assessed Schmidt with chronic migraine, likely post-traumatic, possible superimposed bilateral supraorbital neuralgia, and mid-brain cavernous hemangioma. (JE 2:66) Dr. Robertson noted Schmidt’s headaches fit best with post traumatic headaches with a chronic migraine phenotype, prescribed amitriptyline, and noted he might benefit from bilateral supraorbital and greater/lesser occipital nerve blocks. (JE 2:66)

Schmidt attended a telemedicine visit with Halena Gazelka, M.D., a pain management specialist with the Mayo Clinic on August 20, 2020. (JE 2:70) Schmidt reported he had no real history of headaches before the November 2018 work injury. (JE 2:70) Schmidt reported having daily headaches and tinnitus and described having a severe headache four days per week that is frontal and extends up his forehead and onto the top of his head and in the temporal region. (JE 2:70) Dr. Gazelka assessed Schmidt with chronic daily headaches, bilateral supraorbital neuralgia, and history of midbrain cavernous hemangioma, recommended supraorbital nerve blocks, and recommended he discontinue amitriptyline and substitute nortriptyline for sleep. (JE 2:71)

Schmidt underwent a left and right supraorbital nerve block injection on September 2, 2020. (JE 2:73-77) Schmidt did not find the injection helpful. (JE 2:80) when he returned to Dr. Swanson on September 16, 2020, Schmidt reported the supraorbital block he received caused an exacerbation of his headaches and caused him to miss work. (JE 1:37)

On January 6, 2021, Chad Abernathey, M.D., a neurosurgeon, issued an opinion letter for Agri Star and Great American. (Ex. B) Dr. Abernathey diagnosed Schmidt with post-concussive syndrome with subjective complaints without objective findings, noting Schmidt had intact neurologic function, and recommending no additional medical management. (Ex. B:4) Dr. Abernathey opined Schmidt reached maximum medical improvement on November 19, 2020, and found he did not sustain a specific impairment from a neurosurgical standpoint. (Ex. B:4)

Schmidt underwent Botox injections through the Mayo Clinic for his migraine headaches on January 7, 2021. (JE 2:84-86) He also requested mental health treatment.

On March 2, 2021, Schmidt attended an appointment with Ronald Hougen, Ph.D., a psychologist. (JE 9:142) Dr. Hougen diagnosed Schmidt with a severe



episode of recurrent major depressive disorder without psychotic features and intractable chronic post-traumatic headaches and recommended individual therapy. (JE 9:142)

On March 10, 2021, Schmidt attended a telemedicine visit with Dr. Robertson, reporting he felt a little worse for days after the injections, and reported a possible improvement for a week where he felt like his brain fog lifted. (JE 2:88) Schmidt relayed he was experiencing daily headaches with more severe headaches approximately 15 days per month and reported he had started working with a local psychiatrist. (JE 2:88)

On March 18, 2021, Schmidt attended an appointment with Dr. Swanson complaining of chronic headaches and migraines. (JE 1:41) Dr. Swanson assessed Schmidt with persistent headaches and possible bilateral supraorbital neuralgia, stated he would prescribe Maxalt with Aleve as recommended by the headache specialist, and provided Schmidt with a note to be off work for six weeks due to his chronic migraines and persistent headaches. (JE 1:42, 44-48)

On April 1, 2021 and June 23, 2021, Schmidt underwent additional Botox injections through the Mayo Clinic. (JE 2:91-99)

During an appointment with Dr. Swanson on August 19, 2021, Schmidt complained of daily headaches since 2018 with occasional dizziness and photophobia, noting prescribed pain control medication had not offered any significant improvement. (JE 1:50-51)

On August 20, 2021 and August 21, 2021, Schmidt underwent a neuropsychological examination with Karla Brennscheidt, Psy.D. (Ex. 2) Dr. Brennscheidt noted Schmidt underwent a neuropsychological evaluation in December 2007, which identified no neurocognitive deficits. (Ex. 2:91) Dr. Brennscheidt documented Schmidt's wife reported he had "shallow irritability." (Ex. 2:91) Dr. Brennscheidt documented Schmidt acknowledged having a long-standing and chronic history of anxiety, taking 20 mg citalopram, an antidepressant, for a while before the accident. (Ex. 2:96) She also documented Schmidt's medical records documented in February 2018 he was experiencing elevated stress and having "some anger issues and difficulty dealing with it appropriately," and that Dr. Swanson had prescribed citalopram and trazodone for sleep. (Ex. 2:92)

Dr. Brennscheidt found Schmidt is cognitively intact and his overall intellectual abilities are well-preserved, ranging from low average to average and superior. (Ex. 2:99) She noted he had:

[m]arked variability within and across cognitive domains, likely the result of anxiety. Executive substrates of attention suggest that Mr. Schmidt experiences difficulty when trying to balance speed with accuracy. During testing, high cognitive load conditions resulted in mild decrements in functioning and triggered impulsive responding.

On tasks that are susceptible to and commonly adversely affected by anxiety (i.e., attention domain and cognitive processing speed), mild inefficiencies were noted. A preoccupation with somatic symptoms and anxious thought patterns appears to have adversely affected attentional resources and resulted in a narrowed attentional focus. Given Mr. Schmidt's variable attention and intermittent slowed processing of information, specifically complex information, he may require more time to function effectively, most notably in situations that place high demands on attention and concentration. Although Mr. Schmidt had reported significant anxiety and had in fact opened the assessment by stating "I have a lot of anxiety", this was not reported on the MMPI-2-RF.

Mr. Schmidt had reported being forgetful and having lost portions of his photographic memory. Test results suggest that verbal and visual memory domains are well-preserved. As subjective memory complaints do not typically predict actual memory problems on testing, Mr. Schmidt's subjective complaints appear to correlate with depression and even more so with pain. This is a well-established pattern according to the literature and consistent with Mr. Schmidt's presentation and history. Given Mr. Schmidt's migraine headaches and preoccupation with somatic symptoms, currently, he appears to function at a less than optimal level from a physical, cognitive and emotional standpoint.

(Ex. 2:99)

Dr. Brennscheidt listed a diagnostic impression of post-concussive headaches/migraines, moderate anxiety, and preoccupation with somatic and cognitive difficulty. (Ex. 2:100) Dr. Brennscheidt recommended Schmidt continue with psychotherapy and that hypnosis should be considered for the treatment of his pain. (Ex. 2:99-100)

Dr. Brennscheidt opined the work injury substantially aggravated Schmidt's pre-existing anxiety and caused him to develop depression. (Ex. 2:100) Dr. Brennscheidt opined Schmidt's "[c]urrent cognitive limitations include aspects of attention, working memory, and cognitive processing speed along with variability in overall performance," appear to be related to anxiety, noting magnetic resonance imaging following the accident "did not show any acute intracranial abnormalities but foci within the mid brain compatible with hemosiderin deposition which was felt related to a known cavernoma." (Ex. 2:100) Dr. Brennscheidt opined "[o]ther emotional difficulties, such as frustration, anger, and irritability, were reported and observed but did not meet diagnostic thresholds." (Ex. 2:100) A few months later, pursuant to an inquiry from Schmidt's counsel, Dr. Brennscheidt opined Schmidt does not meet the diagnostic criteria for somatic symptom and related disorders. (Ex. 2:102)

On September 24, 2021, Schmidt underwent a head magnetic resonance venography. (JE 1:54) The reviewing radiologist listed an impression of no evidence of dural venous thrombosis. (JE 1:54-55)

David Segal, M.D., conducted an independent medical examination for Schmidt on September 25, 2021, and issued his report on October 18, 2021. (Ex. 1) Dr. Segal reviewed Schmidt's medical records and examined him. (Ex. 1)

Dr. Segal diagnosed Schmidt with a closed head injury with traumatic brain injury and concussion, post-concussion syndrome with cognitive deficits, memory deficits, vestibular dysfunction, tinnitus with decreased hearing, sleeping disturbance, post-traumatic headache, nausea, psychiatric sequelae of brain injury with depression, anxiety, and emotional lability, post-traumatic migraine with trigeminal nerve dysfunction and supraorbital neuralgia, post-concussive vestibular dysfunction, post-traumatic sleep disorder, traumatic cervical facet arthropathy, occipital neuralgia, and trochanteric bursitis caused by the work injury. (Ex. 1:20)

With respect to his head trauma, Dr. Segal opined:

[t]o gauge the impact of Mr. Schmidt's head we can estimate that he weighs about 180 pounds, the acceleration was about half the force of gravity because he was falling and running, and the distance was about 6 meters. This would give a force impact of 188N. This converts to a g-force of 20,000. To put that in perspective, most concussions occur with 95 g's, and the average football player receives 103 g's when hit during a game. The force by which Mr. Schmidt propelled into the side of the trailer was a significant impact and was well above the range of impact that would cause traumatic brain injury.

(Ex. 1:21-22) Dr. Segal opined Schmidt sustained a "mild to moderate traumatic brain injury," and found that his "cognitive function is moderately impaired, which causes substantial difficulty in his participation in all activities of daily living." (Ex. 1:24)

Dr. Segal opined Schmidt suffers from frequent headaches that can be debilitating and are associated with photophobia, phonophobia, and occasional nausea, vestibular dysfunction, noting Schmidt reported he feels dizzy, often loses his balance, and has suffered falls, and tinnitus and hearing difficulties. (Ex. 1:25-26, 28) Dr. Segal found Schmidt has a sleep disorder, noting Schmidt reported he is in bed 12 to 14 hours per day, but gets three to four hours of uninterrupted sleep per night. (Ex. 1:28) Dr. Segal found Schmidt has emotional and behavioral impairments caused by his traumatic brain injury, noting Schmidt testified he is more irritable and less patient, "quick to anger, quick to cry, and his moods are off the chart." (Ex. 1:29)

Dr. Segal noted Schmidt reported having pain in the posterior neck and base of his skull, across to the lateral sides, and down into the upper and mid trapezius bilaterally, his neck always feels stiff, and any movement in his neck or lifting increases his pain. (Ex. 1:29) Dr. Segal opined the injury caused damage to Schmidt's cervical facet joints causing pain. (Ex. 1:29) He also opined the injury caused him to develop occipital neuralgia, noting "[o]ccipital neuralgia is a known etiology of headaches and may stem from trauma to the neck, such as with a concussion or whiplash injury." (Ex. 1:30) Dr. Segal found Schmidt has right hip trochanteric bursitis. (Ex. 1:30)

Dr. Segal noted Schmidt's last Botox injection was on June 23, 2021, and it did not work enough to continue that treatment. (Ex. 1:38) As a result, Dr. Segal found Schmidt reached maximum medical improvement for his post-concussion syndrome and cervical symptoms on June 23, 2021. (Ex. 1:38) He also found Schmidt had not received sufficient treatment for his right hip, but no treatment was planned, so he reached maximum medical improvement with respect to his hip on November 19, 2019, one year after the injury. (Ex. 1:38)

Dr. Segal found Schmidt sustained a permanent cognitive impairment using the Clinical Dementia Rating Scale ("CDR Scale") found in Chapter 13 of the AMA Guides at page 320. (Ex. 1:39) Under the CDR Scale the practitioner assigns impairments on a scale of 0 to 3 for Memory, Orientation, Judgment and Problem Solving, Community Affairs, Home and Hobbies, and Personal Care and may assign impairments based on ranges within four classes. Dr. Segal assigned Schmidt: (1) 1.0 for Memory finding he has moderate memory loss, more marked for recent events, which interferes with daily activities; (2) 0.5 for Orientation finding he is fully oriented except for slight difficulty in time relationships; (3) 0.5 for Judgment and Problem Solving because he has a slight impairment in solving problems, similarities and difference; (4) 0.5 for Community Affairs concluding he has a "slight impairment in these activities;" (5) 0.5 for Home and Hobbies, finding he has a "mild but definite impairment of function at home; more difficult chores abandoned; more complicated hobbies and interests abandoned; and (6) 0.5 for Personal Care finding he is fully capable of self-care. (Ex. 1:39) Based on his findings, Dr. Segal concluded Schmidt falls in the higher range of a Class 1 impairment and assigned him an 11 percent whole person impairment. (Ex. 1:39)

Dr. Segal documented Schmidt told him he is "quick to anger, quick to cry, and his moods are off the chart," and that he and his wife indicated his emotional changes have affected their relationship. (Ex. 1:40) Using the Criteria for Rating Impairment Due to Emotional or Behavioral Disorders, Dr. Segal found Schmidt has "mild limitation of activities of daily living and daily social and interpersonal functioning," and he assigned Schmidt a four percent whole person impairment for emotional or behavioral disorders. (Ex. 1:40)

Dr. Segal found Schmidt has a sleep disorder and assigned him a five percent whole person impairment. (Ex. 1:28, 41-42) In reaching his conclusion, Dr. Segal found Schmidt wakes up a few times per night and gets three to four hours of uninterrupted sleep, noting Schmidt reported he is in bed 12 to 14 hours per day, but gets three to four hours of uninterrupted sleep per night. (Ex. 1:28, 41-42)

Dr. Segal assigned Schmidt a seven percent whole person impairment for vestibular dysfunction causing a gait and station impairment. (Ex. 1:41) Dr. Segal noted on exam Schmidt had a positive Romberg test supporting his vestibular dysfunction finding. (Ex. 1:41) Dr. Segal also assigned Schmidt a two percent impairment for tinnitus. (Ex. 1:41)

Dr. Segal assigned Schmidt a three percent permanent impairment for a diagnosis of right trochanteric bursitis with an abnormal gait. (Ex. 1:42) Dr. Segal found Schmidt has a cervical traumatic facet disorder and occipital neuralgia with limitations in

range of motion and palpable muscle spasm, noting Schmidt has difficulty with standing, sitting, reclining, and climbing stairs, and he assigned him an eight percent whole person impairment. (Ex. 1:42) Dr. Segal assigned Schmidt a combined 44 percent whole person impairment for his brain injury with associated impairments, cervical injury, and trochanteric bursitis. (Ex. 1:43)

For his cognitive impairments, Dr. Segal assigned permanent restrictions of working one to two days per week, for a maximum of six hours with breaks, a work environment free of loud noise or a “busy” atmosphere, a limit of 30 minutes per day for tasks involving intense concentration, up to 10 minutes of prolonged static neck position before a break, never operating complex and/or very loud machinery, occasional driving due to cognitive deficit and dizziness, ability to use whiteboards to assist with memory impairment, assistance from fellow workers with memory and complex tasks, never use ladders due to balance, occasionally use stairs holding onto a handrail due to balance, never walk on uneven surfaces or at heights due to balance, rest as needed, and return home as needed. (Ex. 1:43-44)

For his cervical spine and hip impairments, Dr. Segal assigned permanent restrictions of working one to two days per week, sitting 40 minutes in a total shift of six hours, standing 20 minutes in a total shift of six hours, occasional overhead reaching, occasional lifting and carrying 20 to 30 pounds, occasional pushing and pulling up to 40 pounds, using a handrail for stairs, never using ladders, rarely working with neck extended or flexed, and never crawl. (Ex. 1:44)

Dr. Segal reviewed surveillance conducted by Agri Star and Great American and reported the activities Schmidt engaged in were consistent with his restrictions. (Ex. 1:84) He also opined “Schmidt does appear confused at times, and simple tasks, such as pumping gas, take him longer than average.” (Ex. 1:84)

Schmidt attended a three-week pain rehabilitation program with the Mayo Clinic Rehabilitation Center from September 27, 2021 through October 18, 2021, to help him manage his chronic pain. (JE 2:100-02)

On November 10, 2021, Dr. Fields conducted a second independent medical examination for Agri Star and Great American. (Ex. C:17) Dr. Fields reviewed Schmidt’s medical records and examined him. (Ex. C:17) Dr. Fields opined he had changed his medical opinion. (Ex. C:21) Dr. Fields opined he believed Schmidt sustained a mild traumatic brain injury as a result of the work injury, which resulted in a mild concussion with no evidence of any acute changes on imaging. (Ex. C:21) Dr. Fields acknowledged Schmidt struck his head, but opined the forces discussed by Dr. Segal in his report “appear to be out of proportion to what one would expect based on the discussed mechanism of injury and description of events.” (Ex. C:22) Dr. Fields noted he did not have an explanation of why Schmidt is reporting his symptoms were worsening, which is not the natural course of a mild concussion, especially three years from the incident. (Ex. C:22)

Dr. Fields opined Schmidt’s mild traumatic brain injury is the result of the trauma when he struck his head on a steel object and he believed he had sustained a permanent impairment due to his chronic headaches as a result of the traumatic brain

injury. (Ex. C:22) Dr. Fields further opined his right hip pain and cervical/trapezius pain were temporary in nature and that his chronic cervical degenerative disease and trapezius pain, and right hip pain are personal in nature and not related to the work injury. (Ex. C:22) Dr. Fields opined his complaints of “10 out of 10 pain” are not consistent with his conversational demeanor throughout the examination, and aside from some reported tenderness to palpation across his bilateral upper trapezius and right lateral thigh, his examination was essentially normal with no deficits noted in his cranial nerves. (Ex. C:22) Dr. Fields recommended no additional treatment. (Ex. C:22)

Dr. Fields opined Schmidt is capable of working, noting he confirmed on the health assessment questionnaire that he can perform all activities of daily living. (Ex. C:22) Dr. Fields found Schmidt reached maximum medical improvement on June 20, 2019, six months from his alleged injury, and opined he does not require any permanent restrictions. (Ex. C:23) Using Table 13-11 on page 331 of the AMA Guides, Dr. Fields classified Schmidt as in the middle of class 1, noting he is performing all activities of daily living without issue, and assigned him a 5 percent whole person impairment. (Ex. C:23)

Dr. Fields commented on Dr. Brennscheidt’s report, which notes Schmidt is cognitively intact and his overall intellectual abilities are well-preserved, ranging from low average to average and superior. (Ex. C:23) With respect to Dr. Segal’s report, Dr. Fields found:

Dr. Segal notes that Mr. Schmidt has a diagnosis of right trochanteric bursitis, yet notes on page 7 of his IME report that “walking seems to help.” This would be inconsistent with this diagnosis. In my medical opinion, if Mr. Schmidt had sustained a contusion of the right hip (noted in his Nov 20, 2018 ER visit) this would have been expected to resolve within 6 weeks. In my medical opinion, Mr. Schmidt’s pain in his right hip/trochanter is chronic in nature and unrelated to any work injury from Nov. 19, 2018. I would not consider this condition work-related.

Regarding Mr. Schmidt’s neck and shoulder pain, Dr. Segal speculates on page 29 of his IME report that “When Mr. Schmidt fell to the ground, likely his head turned.” He goes on to describe how this may result in injury to the cervical spine. In my medical opinion, this is mere speculation and Mr. Schmidt himself cannot recall how he fell. In addition, CT of the head and cervical spine performed immediately after the injury on 11/20/2018 showed no acute findings, but was consistent with multilevel degenerative changes in the cervical spine. Dr. Swanson noted issues with muscles spasms in Mr. Schmidt’s back and neck back in February 2018, nine months before the alleged work injury at AgriStar. In my medical opinion, Mr. Schmidt has chronic upper trapezius pain and degenerative changes in the cervical spine which are unrelated to the alleged work event from 11/19/2018. I would not consider his current cervical and upper trapezius chronic symptoms work-related.

(Ex. C:24)

Dr. Fields noted Dr. Segal calculated Schmidt may have experienced a “g-force of 20,000,” and stated it is unclear how he arrived at this calculation through the online calculator tool mentioned in his report. (Ex. C:24) Dr. Fields opined, a force of that magnitude would have likely resulted in Schmidt’s “instant demise,” and according to Schmidt’s own report, he was able to get up on his own and return to work, there was no loss of consciousness and his helmet was not cracked, it fell off when he landed on the floor or from the impact to his head on the steel Jetter. (Ex. C:24) Dr. Fields noted “a typical median acceleration (g) force for a car crash that would result in traumatic brain injury is 75 g’s according to studies of motorsport crashes. Football players may have hits commonly resulting in acceleration forces of up to 63 g’s.” (Ex. C:24)

Dr. Fields further opined he does not believe Schmidt meets the criteria for an impairment from page 320 Table 13-5 because according to his own report he does not have any deficits in activities of daily living and neuropsychological testing noted him to be cognitively fully intact with intellectual abilities well preserved. (Ex. C:25) With respect to emotional and behavioral disorders on Table 13-25, in his opinion Schmidt has a known history of anger issues, anxiety and depression which he was treating before the work injury, noting on February 20, 2018, Dr. Swanson noted he was having a hard time dealing with anger issues and managing his anger appropriately and he had been taking escitalopram 20 mg for quite some time. (Ex. C:25)

Dr. Fields found under Table 13-13, on page 334, vestibulocochlear nerve, he did not find a basis for an equilibrium impairment based on his clinical exam, noting Schmidt had a negative Romberg and normal finger-to-nose test and as noted on his intake sheet, he reported tinnitus did not interfere with his activities of daily living. (Ex. C:25) Likewise, Dr. Fields did not find he met the criteria for impairment due to sleep and arousal disorders under Table 13-4, page 317, noting according to his own statements he typically sleeps 7 hours a night, and perhaps 5 hours in a bad night and he uses a CPAP machine for his chronic personal medical condition. (Ex. C:25)

Dr. Fields opined the surveillance videos from July 14, 2020 and July 16, 2020, support Schmidt’s own statements that he has no issues performing activities of daily living, noting he appears to be adjusting the guide of a table saw while not wearing sunglasses in one portion, which seems inconsistent with Dr. Segal’s statements on page 4 of his report where he notes bright light increases his headache and that he wears sunglasses when he can. (Ex. C:25)

Dr. Abernathey issued a second opinion letter for Defendants on December 1, 2021. (Ex. B:5) Dr. Abernathey found his opinions had not changed and from a neurosurgical standpoint Schmidt did not have any objective findings of injury, noting his imaging studies are unrevealing and his neurologic function is normal. (Ex B:5) Dr. Abernathey opined his complaints appeared to be primarily psychological and behavioral. (Ex. B:5)

Defendants provided Dr. Abernathey with surveillance material. Dr. Abernathey opined the surveillance material clearly demonstrates Schmidt is capable of higher cognitive function noting the degree of intellect required to drive a car, comparison shop at a store, and interact with people is enormous and found Schmidt demonstrates no

difficulty with complex activities. (Ex. B:5) Dr. Abernathey noted Dr. Segal's assessment is expansive and delves into areas outside of his expertise as a neurosurgeon, whereas his opinions are based on quantifiable and objective assessment. (Ex. B:5) Dr. Abernathey opined Schmidt's complaints are primarily associated with psychological and behavioral issues, noting he suffered from those types of issues prior to the work incident. (Ex. B:5) Dr. Abernathey further opined he agreed the subjective complaint of "10 out of 10" pain is not confirmed by real world surveillance, as Schmidt seemed quite comfortable with his daily activities and stated he concurred with Dr. Fields' assessment. (Ex. B:5-6)

Schmidt testified there is not a day when he does not have a headache he rates as a "10 out of 10" in terms of pain. (Tr.:51, 55) Schmidt described his headache as "[t]he knife in the forehead, twisted," which may last 10 seconds, one minute, or 10 minutes. (Tr.:51) Schmidt relayed he learned to breathe through his headaches at the Mayo Clinic Pain Clinic. (Tr.:51) Schmidt testified he experienced a "10 out of 10" headache during the hearing, reporting "[w]ell, I had one just while we were talking, and it was right here. It doesn't necessarily have to be right there," pointing to the left side of his head above his ear. (Tr.:52) I did not observe Schmidt grimace, squint, have any word-finding problems, speech or thought problems, or any other observable behaviors while he was testifying.

Schmidt relayed he has pain that is the knife pain, a feeling of a band squeezing his head, and a dull ache at the base of his skull every day. (Tr.:53) Schmidt reported the intensity of his headache varies all the time. (Tr.:54) Schmidt testified he has a headache all the time, noting at the moment he was testifying it was like "a band squeezing my head," and he gave it a rating of a six or seven out of 10. (Tr.:53) I again did not observe Schmidt grimace, squint, have any word-finding problems, speech or thought problems, or any other observable behaviors while he was testifying.

Schmidt testified he experiences ringing in both of his ears all of the time. (Tr.:57) He described it as a high pitch ringing in the ear that is sometimes pulsating and associated with dizziness or vertigo. (Tr.:57)

Schmidt reported he has neck pain "[p]retty much all the time." (Tr.:57) Schmidt rated his neck pain to be a five or six all the time, and relayed it becomes worse with "overdoing it." (Tr.:58) Schmidt testified he has right hip pain "most of the time," and relayed it is aggravated by standing a long time, walking long distances, hiking, and driving long distances. (Tr.:58)

Schmidt testified his memory "is not what it used to be," including his short-term and long-term memory. (Tr.:58) He also reports he has problems with word association, where he cannot find the words, which is very frustrating. (Tr.:58) During the hearing I did not observe Schmidt had problems with word association. His speech seemed fluid throughout the hearing. I did not observe he had problems with short-term and long-term memory while testifying.

Schmidt believes he becomes angry easily. (Tr.:58) While Schmidt was diagnosed with depression before his work injury, he believes it is worse because he is grieving his former self and relayed he has anxiety and sadness. (Tr.:59) Schmidt also



reported he has problems getting to sleep and testified he sleeps about five hours, but wakes up because of “the pain” and he sleeps a total of six hours. (Tr.:60)

The Depot Outlet, a thrift shop in Decorah, hired Schmidt as a part-time sales clerk in November 2019. (Ex. J:112) Schmidt prices items for sale. (Tr.:60) He worked an average of 20 hours per week, but reported he was working one to two five-hour days per week at the time of the hearing. (Tr.:61) Schmidt earns \$12.50 per hour. (Tr.:61) Schmidt reported he is not able to work two days in a row because it is “[t]oo much. It’s just I’m wiped out. I crash. You know, I look normal, but you know, it’s hard to work while you’re sick, you know. You say, ‘Okay. Here’s a guy that eats his food, look normal.’” (Tr.:61) The Depot Outlet is the only job Schmidt has applied for since Agri Star terminated his employment. (Tr.:80-81)

Schmidt testified he would not be able to return to doing site assessments or home inspections because he should not climb ladders or open up electrical panels because he is a danger to himself due to his fatigue and brain fog. (Tr.:62-63) Schmidt stated that he could not return to home construction because it took him four weeks to do trim work in a bedroom and bathroom because of his fatigue and no one would hire him if it would take him four weeks to do two rooms. (Tr.:63) Schmidt reported he could not do massage because his palpation skills are not there. (Tr.:63)

Schmidt is able to drive, shop, run errands, pump gas, use money to pay for items, go to his bank, go for walks with his wife, and complete his activities of daily living, including showering, dressing, and preparing meals. (Tr.:81-82)

Evans was one of Schmidt’s supervisors when he worked for Agri Star. (Tr.:89) Evans interacted with Schmidt on a daily basis and supervised the plumbers. (Tr.:89, 93) Evans testified during Schmidt’s employment Schmidt worked as the facility maintenance plumber where he would evaluate and solve plumbing maintenance issues plant-wide, including installing and modifying equipment. (Tr.:89) After his work injury Schmidt returned to his position within the plant. (Tr.:91) Evans testified he did not notice Schmidt was having any performance issues in getting work done after the work injury. (Tr.:91)

Nelson was a lead foreman for Agri Star during Schmidt’s employment. (Tr.:95-96) Nelson worked for Agri Star for 10 years. (Tr.:95) At the time of the hearing he was not working for Agri Star. (Tr.:95) Nelson interacted with Schmidt for approximately four hours per day during his employment with Agri Star. (Tr.:96) Nelson was present during his work injury. (Tr.:97) Following his work injury Schmidt returned to his position on a full-time basis. (Tr.:98) Nelson testified he did not notice Schmidt had any performance issues before and after the injury. (Tr.:98) Nelson reported his demeanor was the same before and after the work injury. (Tr.:99) Nelson agreed Schmidt was frustrated with his treating physicians after the work injury because he “wasn’t getting anywhere.” (Tr.:100)

## **CONCLUSIONS OF LAW**

### **I. Nature of the Injury**

The parties agree Schmidt sustained a permanent impairment, chronic headaches, as a result of the November 19, 2018, work injury. In addition to his chronic headaches, Schmidt alleges he sustained permanent impairments to his brain, cognitive functioning, mental health, tinnitus, vestibular function, cervical spine, and right hip as a result of the work injury. Agri Star and Great American dispute his contention.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). 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, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability

found to exist,” the claimant is entitled to compensation. Iowa Dep’t of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

a disease which under any rational work is likely to progress so as to finally disable an employee does not become a “personal injury” under our Workmen’s Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

#### **A. Traumatic Brain Injury with Headaches**

Dr. Fields and Dr. Segal both opined Schmidt sustained a traumatic brain injury with no evidence of any acute findings on imaging, which caused him to develop chronic, permanent headaches. (Ex. C:22) Dr. Segal assigned Schmidt a 15 percent whole person impairment and Dr. Fields assigned Schmidt a five percent whole person impairment. The record evidence supports the traumatic brain injury he experienced caused him to develop chronic, permanent headaches.

#### **B. Anxiety and Depression**

The record also supports Schmidt sustained an aggravation of his preexisting anxiety and depression as supported by Dr. Brennscheidt’s opinion. The record does not support Dr. Segal’s conclusory opinions concerning Schmidt’s emotional and behavioral impairment.

Dr. Segal documented Schmidt told him he is “quick to anger, quick to cry, and his moods are off the chart,” and that he and his wife indicated his emotional changes have affected their relationship. (Ex. 1:40) Using the Criteria for Rating Impairment Due to Emotional or Behavioral Disorders, Dr. Segal found Schmidt has “mild limitation of activities of daily living and daily social and interpersonal functioning,” and he assigned Schmidt a four percent whole person impairment. (Ex. 1:40) His conclusions make no reference to Dr. Brennscheidt’s testing and opinions and do not reference her diagnoses. (Ex 1:40)

Schmidt retained Dr. Brennscheidt to conduct a full neuropsychological examination in August 2021. (Ex. 2) Dr. Brennscheidt used objective testing in reaching her conclusions and I find her report credible. (Ex. 2) Contrary to Schmidt’s allegation of cognitive problems affecting his short-term and long-term memory and ability to read, Dr. Brennscheidt found Schmidt cognitively intact and that his overall intellectual abilities are well-preserved, ranging from low average to average and superior. (Ex. 2:99)

Dr. Brennscheidt opined Schmidt’s “[c]urrent cognitive limitations in aspects of attention, working memory, and cognitive processing speed along with variability in overall performance,” appear to be related to anxiety, noting magnetic resonance

imaging following the accident “did not show any acute intracranial abnormalities but foci within the mid brain compatible with hemosiderin deposition which was felt related to a known cavernoma.” (Ex. 2:100) Dr. Brennscheidt opined “[o]ther emotional difficulties, such as frustration, anger, and irritability, were reported and observed but did not meet diagnostic thresholds.” (Ex. 2:100) No other neuropsychological testing or other testing based on objective indicators of psychological functioning were administered by any other expert. I find Dr. Brennscheidt’s opinion persuasive and consistent with the other evidence I believe. I do not find Dr. Segal’s opinion persuasive.

### **C. Dementia/Cognitive Changes Unrelated to Anxiety and Depression**

Unlike the opinion of Dr. Brennscheidt, I do not find the opinion of Dr. Segal persuasive, credible, or consistent with the other evidence I believe with respect to his dementia/cognitive impairment findings and opinions.

With respect to Schmidt’s head trauma, Dr. Segal opined:

[t]o gauge the impact of Mr. Schmidt’s head we can estimate that he weighs about 180 pounds, the acceleration was about half the force of gravity because he was falling and running, and the distance was about 6 meters. This would give a force impact of 188N. This converts to a g-force of 20,000. To put that in perspective, most concussions occur with 95 g’s, and the average football player receives 103 g’s when hit during a game. The force by which Mr. Schmidt propelled into the side of the trailer was a significant impact and was well above the range of impact that would cause traumatic brain injury.

(Ex. 1:21-22) Dr. Segal opined Schmidt sustained a “mild to moderate traumatic brain injury,” and found that his “cognitive function is moderately impaired, which causes substantial difficulty in his participation in all activities of daily living.” (Ex. 1:24) I do not find Dr. Segal’s opinion persuasive, as supported by Dr. Fields’s second independent medical examination. Dr. Segal does not explain how Schmidt accelerated from the trip on the pallet to support his finding. A review of the website he used says:

This versatile impact force calculator is useful for estimating the impact forces involved in collisions of different kinds. For example, it can be used to calculate the impact force of a vehicle (car, truck, train), plane, football, of birds hitting a plane or wind mill, as well as for falling bodies that crash into the ground.

<https://www.gigacalculator.com/calculators/impact-force-calculator.php> (last visited on April 6, 2022). The website does not indicate that it can be used for the type of incident in this case. The website does not refer to any professional peer-reviewed publications supporting the conclusions reached. According to Dr. Segal, a direct hit during a football game results in an average receipt of 95 g’s. He does not explain why the trip and collision into the jetter would be 210 times greater. Nor does he indicate what the g force would be in a head-on car collision. There is no evidence Dr. Segal has any

special training in engineering or accident scene investigation to give such an opinion. I do not find his opinion credible or trustworthy.

Moreover, Dr. Segal's opinions concerning the force of the accident are not consistent with the accident report Schmidt prepared after the work injury. Schmidt completed an incident report on November 20, 2018, stating he injured his head, neck, shoulder, and hip by a "trip and fall" when he was "walking" and "looking for parts, trip on pallet, hit my head on the jetter." (Ex. 7:128)

Dr. Segal found Schmidt sustained a permanent cognitive impairment using the CDR Scale for dementia found in Chapter 13 of the AMA Guides at page 320. (Ex. 1:39) Under the CDR Scale the practitioner assigns impairments on a scale of 0 to 3 for Memory, Orientation, Judgment and Problem Solving, Community Affairs, Home and Hobbies, and Personal Care and may assign impairments based on ranges within four classes. Dr. Segal assigned Schmidt: (1) 1.0 for Memory finding he has moderate memory loss, more marked for recent events, which interferes with daily activities; (2) 0.5 for Orientation finding he is fully oriented except for slight difficulty in relationships; (3) 0.5 for Judgment and Problem Solving because he has a slight impairment in solving problems, similarities and difference; (4) 0.5 for Community Affairs concluding he has a "slight impairment in these activities;" (5) 0.5 for Home and Hobbies, finding he has a "mild but definite impairment of function at home; more difficult chores abandoned; more complicated hobbies and interests abandoned; and (6) 0.5 for Personal Care finding he is fully capable of self-care. (Ex. 1:39) Based on his findings, Dr. Segal concluded Schmidt falls in the higher range of a Class 1 impairment and assigned him an 11 percent whole person impairment. (Ex. 1:39)

No other physician or practitioner has opined Schmidt has sustained a permanent cognitive impairment independent from his mental health conditions as a result of the traumatic brain injury he sustained. Dr. Segal's findings are contrary to the credible, objective findings of Dr. Brennscheidt, which are supported by objective neuropsychological testing. None of the treatment records from Schmidt's self-selected treatment at the Mayo Clinic support he has a permanent cognitive impairment independent from his mental health conditions as a result of the traumatic brain injury he sustained. Dr. Segal makes conclusory statements in support of his bare opinions, which are not supported by the record. While Schmidt experienced interpersonal difficulties at work and with his spouse, those difficulties are attributable to his psychological conditions, not a cognitive impairment caused by the traumatic brain injury. Shortly after the work injury he was released without restrictions and performed his normal duties until his termination.

Dr. Segal also opined Schmidt's "cognitive function is moderately impaired, which causes substantial difficulty in his participation in all activities of daily living." (Ex. 1:24) As correctly pointed out by Dr. Fields, Schmidt testified he is able to perform his activities of daily living. Dr. Segal's opinion is also inconsistent with the testimony from Schmidt's supervisors, including a supervisor that no longer works for Agri Star. Following the work injury Schmidt returned to work without restrictions. His supervisors testified he did not have any difficulties performing his job. Schmidt has not proven he

sustained a permanent cognitive impairment independent from his mental health conditions as a result of the traumatic brain injury he sustained.

**D. Sleep Disorder**

Dr. Segal found Schmidt has a sleep disorder and assigned him a five percent whole person impairment. (Ex. 1:28, 41-42) Dr. Fields opined Schmidt does not meet the criteria for a sleep disorder. (Ex. C:28)

In reaching his conclusion, Dr. Segal found Schmidt wakes up a few times per night and gets three to four hours of uninterrupted sleep, noting Schmidt reported he is in bed 12 to 14 hours per day, but gets three to four hours of uninterrupted sleep per night. (Ex. 1:28, 41-42) Dr. Fields noted that Schmidt reported he typically sleeps seven hours per night, and perhaps five hours in a bad night. (Ex. C:25) Dr. Segal's finding is inconsistent with Schmidt's testimony and the record evidence. The record evidence supports Schmidt has difficulty getting to sleep, not staying asleep. His medical records document he had sleep disturbance problems and obstructive sleep apnea and was using a CPAP machine before the work injury. (JE 1:25) When treating at the Mayo Clinic and with Dr. Swanson Schmidt reported his sleep was fine or improved. (JE 2:75, 83; JE 9:143) I do not find Schmidt has established he sustained a permanent impairment related to a sleep disorder caused by the work injury.

**E. Tinnitus and Vestibular Dysfunction**

Dr. Segal assigned Schmidt a seven percent whole person impairment for vestibular dysfunction causing a gait and station impairment. (Ex. 1:41) Dr. Segal noted on exam Schmidt had a positive Romberg test supporting his vestibular dysfunction finding. (Ex. 1:41) Dr. Fields examined Schmidt later in time and found he had a negative Romberg and normal finger-to-nose test, noting he did not find a basis for an equilibrium impairment. (Ex. C:21, 25) No treating physician has diagnosed Schmidt with vestibular dysfunction, including the Mayo Clinic, a tertiary care center. I do not find Schmidt has established he sustained permanent vestibular dysfunction caused by the work injury.

Dr. Segal assigned Schmidt a two percent impairment for tinnitus. (Ex. 1:41) Dr. Fields did not address or challenge this finding in his report. (Ex. C) While Schmidt complained of tinnitus following his brain bleed in 2007, the record does not report he continued to complain of ongoing tinnitus, rather he continued to have problems with double vision. After the November 2018 work injury he continued to complain of tinnitus up through the time of the hearing. The record evidence supports Dr. Segal's findings Schmidt sustained permanent tinnitus caused by the work injury.

**F. Right Hip**

Dr. Segal assigned Schmidt a three percent permanent impairment for a diagnosis of right trochanteric bursitis with an abnormal gait. (Ex. 1:42) This finding is not supported by the record. During his appointment with Reicks on January 29, 2019, Schmidt reported his joint pain had resolved, but he was having ongoing concussive symptoms, including daily headaches, chronic tinnitus, intermittent light and sound

sensitivity, difficulty falling asleep, irritability, and difficulty focusing. (JE 3:112) There is no mention of ongoing hip pain or any gait dysfunction during any of his appointments with Dr. Swanson, with the pain specialist, Dr. Afzal, or with his providers at the Mayo Clinic, a tertiary care center. Schmidt tries to explain the absence of any such complaints with his assertion that he was focused on his headache pain. I do not find his testimony credible, or consistent with the other evidence I believe. No treating physician in this case has diagnosed Schmidt with permanent trochanteric bursitis, any permanent hip condition, or any permanent gait dysfunction. I do not find Dr. Segal's opinions persuasive, also taking into consideration my concerns with his opinions discussed above. I do not find Schmidt has established he sustained a permanent impairment to his right hip caused by the work injury.

### **G. Cervical Spine**

Dr. Segal found Schmidt has a cervical traumatic facet disorder and occipital neuralgia with limitations in range of motion and palpable muscle spasm, noting Schmidt has difficulty with standing, sitting, reclining, and climbing stairs, and he assigned him an eight percent whole person impairment. (Ex. 1:42) Dr. Fields found Schmidt had full range of motion for the cervical spine and that he had sustained no permanent impairment caused by the work injury. (Ex. C:21, 24) Dr. Fields correctly noted a computerized tomography scan taken shortly after the work injury found no acute findings, but was consistent with multilevel degenerative changes. (Ex. C:24; JE 3:105)

Dr. Fields challenged Dr. Segal's finding noting in his report Dr. Segal stated, "[w]hen Mr. Schmidt fell to the ground, likely his head turned" (Ex. 1:29) Dr. Fields noted Dr. Segal's finding is based on mere speculation because Schmidt could not recall exactly how he fell. (Ex. C:24) At hearing Schmidt testified he knows he fell because he was dirty following the incident, but he could not remember falling to the ground at hearing. (Tr.:22) I find Dr. Segal's opinion based on speculation.

Schmidt complained of occasional spasms in his back and neck to Dr. Swanson in February 2018. (JE 1:27) The record evidence supports Schmidt complained of cervical spine pain and range of motion difficulties immediately following the work injury and through his medical treatment through September 26, 2019. (JE 3:103, 108, 111-12; JE 4:121; JE 5: 123-24, 127; JE 8:134-35, 137-38) He did not report any cervical spine problems or pain to his treating physicians at the Mayo Clinic, including during the three-week pain rehabilitation program he participated in at the Mayo Clinic from September 27, 2021 through October 18, 2021, to help him manage his chronic pain. (JE 2:100-02) The record evidence supports Schmidt sustained a temporary, but not a permanent aggravation of his preexisting cervical spine problems. I do not find Schmidt has met his burden of proof he sustained a permanent impairment to his cervical spine or permanent aggravation to a preexisting condition in his cervical spine caused by the work injury.

## II. Rate

The parties stipulated at the time of the injury Schmidt was married and entitled to two exemptions, but disagree on the amount of his rate based on whether the individual weeks leading up to the injury are representative or not.

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The basis of compensation shall be the "weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36. The statute defines "weekly earnings" as

gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed . . . rounded to the nearest dollar.

Id. The term "gross earnings" is defined as "recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits." Id. § 85.61. Weekly earnings for employees paid on an hourly basis

shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Id. § 85.36(6). Thus under the statute, overtime is counted hour for hour, and shift differential, vacation, and holiday pay are also included.

The parties produced competing rate calculations. (Exs. 5:124; H:105) Schmidt avers the weeks ending August 11, 2018, August 18, 2018, September 22, 2018, September 29, 2018, and October 6, 2018, should be excluded because the weeks are not representative. (Ex. 5:124) Agri Star and Great American did not include the weeks ending August 11, 2018, September 22, 2018, and October 6, 2018 in the rate calculation, but included the weeks ending August 18, 2018 and September 29, 2018.



The parties did not produce Schmidt's wage records for all of 2018. Schmidt did not provide 13 weeks in his rate calculation. Agri Star and Great American included the weeks he earned overtime in their rate calculation, and argued the weeks ending September 29, 2018, where he worked 39.67 hours, August 18, 2018, where he worked 34.67 hours, and July 28, 2018, where he worked 36.42 hours are representative. I find these three weeks Defendants included weeks representative, just as the weeks he worked overtime are representative and adopt Defendants' rate calculation. Schmidt's average weekly wage is \$865.92 and his rate based on married status with two exemptions is \$567.98.<sup>1</sup>

### III. Extent of Disability

Compensation for an unscheduled injury through the industrial method is determined by evaluating the employee's earning capacity. Westling v. Hormel Foods, 810 N.W.2d 247, 251 (Iowa 2012); Pease, 807 N.W.2d at 852. In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 370 (Iowa 2016).

The Iowa Supreme Court has held, "it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury." Evenson, 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)). Schmidt avers he is permanently and totally disabled under the statute and under the odd-lot doctrine. Agri Star and Great American allege he is not.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained

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<sup>1</sup> <http://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/2018ratebook.pdf>.

something less than 100 percent disability, but is so injured that the claimant is “unable to perform services other than ‘those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.’” Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

“Total disability does not mean a state of absolute helplessness.” Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability “occurs when the injury wholly disables the employee from performing work that the employee’s experience, training, intelligence, and physical capacities would otherwise permit the employee to perform.” IBP, Inc., 604 N.W.2d at 633.

As analyzed above, I rejected many of Dr. Segal’s opinions finding his opinions not credible or consistent with the other evidence I believe. I also reject his permanent restrictions. No treating provider, including Schmidt’s treating providers at the Mayo Clinic have imposed any permanent restrictions for Schmidt. I did not find Schmidt met his burden of proof he sustained a permanent cognitive impairment independent from his mental health conditions, a permanent sleep disorder or permanent impairments to his right hip, cervical spine, or vestibular system caused by the work injury. I did find he met his burden of proof the work injury caused him to develop permanent headaches and tinnitus, and permanently aggravated his preexisting depression and anxiety.

Schmidt is a high school graduate. Following high school he completed an electrician certification and a massage therapist program. (Ex. J:111; Tr.:10, 65-66) Schmidt continues to be a certified electrician, a licensed massage therapist, and he is a master plumber. Schmidt holds certificates as a green builder, boiler technician, home inspector, and he holds various solar and wind site assessment certifications. (Tr.:10) He also has a valid driver’s license, a chauffeur’s license, and a motorcycle license. (Tr.:65)

I rejected Dr. Segal’s opinion Schmidt has a cognitive impairment independent from his depression and anxiety caused by the work injury, relying on Dr. Brennscheidt’s credible opinion. I also reject Schmidt’s testimony that he has difficulty reading and has a cognitive impairment independent from his mental health conditions. I did not observe Schmidt struggling with word finding, that he had any problems with short-term or long-term memory, or any difficulty testifying during the hearing. I believe Schmidt is capable of retraining.

Neither party presented a vocational rehabilitation opinion concerning Schmidt’s employability. Schmidt operated his own businesses for many years. He also has experience working in sales. I believe he is capable of working more than two days per week, contrary to his testimony. I do not find Schmidt is motivated to work. I do not find Schmidt is permanently and totally disabled under the statute or odd-lot doctrine. Considering all the factors of industrial disability, I find Schmidt has sustained a 40 percent industrial disability, entitling him to 200 weeks of permanent partial disability benefits.

The parties disagree on the commencement date for permanency. Schmidt avers the commencement date is September 11, 2019. Agri Star and Great American aver the commencement date is either June 19, 2019 or June 20, 2019. Under the statute, “[c]ompensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined” using the AMA Guides. Iowa Code § 85.34(2). Schmidt continued to receive treatment for his headaches after June 19, 2019 and June 20, 2019. I do not find he was at maximum medical improvement at that time. On September 25, 2021, Dr. Segal conducted his independent medical examination and agreed Schmidt had reached maximum medical improvement. Under the statute, I find September 25, 2021, to be the commencement date for permanency. Schmidt is entitled to 200 weeks of permanent partial disability benefits at the rate of \$567.98, commencing on September 25, 2021.

#### **IV. Medical Mileage**

Schmidt seeks to recover medical expenses and medical mileage set forth in Exhibits 9 and 10. Agri Star and Great American aver they did not authorize the treatment and are not responsible for paying for the cost of the treatment and mileage.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers’ compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. “The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee.” Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner “may, upon application and reasonable proofs of the necessity therefor, allow and order other care.” Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting “[t]he employer’s obligation under the statute turns on the question of reasonable necessity, not desirability”). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

As discussed above, I found Schmidt established he sustained permanent headaches caused by the work injury and the work injury permanently aggravated his preexisting anxiety and depression. Agri Star and Great American are responsible for all causally related medical bills, including medical mileage, related to his headaches, anxiety, and depression. I find the treatment Schmidt received set forth in Exhibits 9 and 10 for his headaches, depression, and anxiety that while not authorized, the treatment was reasonable and beneficial. Bell Bros. Heating & Air Conditioning, 779 N.W.2d at 206; Brewer-Strong v. HNI Corp. 913 N.W.2d 235 (Iowa 2018). Agri Star and Great American are responsible for all causally related medical bills, including medical mileage, set forth in Exhibits 9 and 10. Agri Star and Great American are not

responsible for any other medical conditions Schmidt received treatment for in Exhibits 9 and 10.

## **V. Penalty Benefits**

On the Hearing Report Schmidt alleged he was entitled to penalty benefits. Schmidt did not address his penalty claim in his post-hearing brief. Agri Star and Great American aver Schmidt is not entitled to penalty benefits.

Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the

employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of the delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

I find Schmidt waived his penalty claim by failing to address it in his post-hearing brief. Even assuming Schmidt did not waive his claim by failing to address it, I find his claim was fairly debatable initially, based on the opinions of Drs. McMains, Fields, and Abernathey. After Dr. Fields received additional evidence and changed his opinion, Agri Star and Great American paid Schmidt his rating. Schmidt is not entitled to an award of penalty benefits.

#### **VI. Independent Medical Examination**

Schmidt seeks to recover the \$4,500.00 cost of Dr. Segal's independent medical examination and the \$3,375.00 cost of Dr. Brennscheidt's neuropsychological evaluation and report. (Ex. 11)

Iowa Code section 85.39(2) provides:

2. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Drs. McMains and Abernathey, and Dr. Fields, in his initial evaluation, found Schmidt did not sustain a permanent impairment. Schmidt disagreed with their opinions and sought an independent medical examination with Dr. Segal.

The Iowa Court of Appeals recently addressed this issue in Kern v. Fenchel, Doster & Buck, P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa Ct. App. Sept. 1, 2021). In Kern, the defendants' expert found there was no causation. Kern disagreed with the opinion and sought an independent medical examination at the defendants' expense. The Commissioner found Kern was not entitled to recover the cost of an independent medical examination. The Court of Appeals reversed, finding the "opinion on lack of causation was tantamount to a zero percent impairment rating," which is reimbursable under Iowa Code section 85.39. Under Kern, I find Schmidt is entitled to recover the \$4,500.00 cost of Dr. Segal's independent medical examination.

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers' compensation commissioner for: (1) the attendance of a certificated shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors' and practitioner's deposition testimony; (6) the reasonable cost of obtaining no more than two doctors' or practitioners' reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes. The rule allows for the recovery of an expert report. Dr. Brennscheidt's bill is itemized. She charged \$1,750.00 for the evaluation, and \$1,625.00 for the report. Under the rule Schmidt is entitled to recover the cost of her report, or \$1,625.00, but not the cost of the evaluation.

### **ORDER**

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay Claimant two hundred (200) weeks of permanent partial disability benefits at the stipulated rate of five hundred sixty-seven and 98/100 dollars (\$567.98) per week, commencing on September 25, 2021.

Defendants are entitled to a credit for all benefits paid to date.

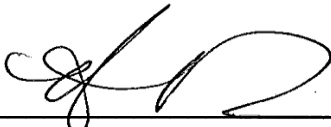
Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants are responsible for all causally connected medical bills, including medical mileage, related to treatment Claimant received for his headaches, anxiety, and depression set forth in Exhibits 9 and 10.

Defendants shall reimburse Claimant four thousand five hundred and 00/100 dollars (\$4,500.00) for the cost of Dr. Segal's independent medical examination, and one thousand six hundred twenty-five and 00/100 dollars (\$1,625.00) for the cost of Dr. Brennscheidt's report.

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

Signed and filed this 28<sup>th</sup> day of April, 2022.



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HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served as follows:

Benjamin Roth (via WCES)

Lori Scardina Utsinger (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.