

**FINAL AWARD ALLOWING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
by Supplemental Opinion)

Injury No.: 00-050269

Employee: Nelson Gibler  
Employer: A. B. Chance Company  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the parties' briefs, heard oral arguments, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 8, 2010, as supplemented herein.

**Discussion**

Both employee and employer filed Applications for Review in this matter challenging the findings and conclusions of the administrative law judge. After carefully reviewing all of the evidence, we agree with the result reached by the administrative law judge. However, because we wish to make additional findings and comments on the issue of Second Injury Fund liability, we write this supplemental opinion.

*Preexisting conditions*

On page 13 of his award, the administrative law judge disposed of the issue of Second Injury Fund liability as follows: "As Claimant had no disability preexisting the May 22, 2000 work related accident, Claimant's claim against the Second Injury Fund should be denied." The administrative law judge also made a finding that depression had no affect on employee's ability to work before the date of the primary injury, and that employee is not permanently and totally disabled due to a combination of preexisting depression and the effects of the work injury. The award lacks findings, however, as to employee's other claimed preexisting conditions, and does not address the issue of whether the Second Injury Fund is liable for enhanced permanent partial disability benefits.

The purpose of the Second Injury Fund is "to encourage the employment of individuals who are already disabled from a preexisting injury, regardless of the type or cause of that injury." *Pierson v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 126 S.W.3d 386, 390 (Mo. 2004) (citation omitted). The Second Injury Fund statute encourages such employment by ensuring that an employer is only liable for the disability caused by the work injury. Any disability attributable to the combination of the work injury with preexisting disabilities is compensated, if at all, by the Second Injury Fund.

Employee: Nelson Gibler

- 2 -

The record reveals that, in addition to depression, certain of the medical experts to testify in this matter opined that, prior to the May 2000 work injury, employee suffered from the disabling conditions of low back pain and a learning disorder. Dr. Cantrell opined employee had a 4% preexisting permanent partial disability of the body as a whole referable to low back pain caused by degenerative disc disease. Employee testified he was in a sledding accident when he was 21 years old and that he went to a chiropractor afterwards. Employee also testified that he once experienced an episode of back pain at work that was bad enough that he went to the doctor, and that he sometimes got a sore back before May 2000 if he overexerted himself. But employee also testified that he never missed work due to low back pain, that back pain didn't affect his performance, that his complaints were relieved with Ibuprofen, and that employer didn't have to accommodate him in any way for this condition. We credit Dr. Cantrell's opinion to the extent he opined that employee suffered some preexisting low back disability, but in light of employee's testimony on the matter, we are convinced that employee's preexisting low back pain condition was not very disabling. Accordingly, we find employee suffered from only a 2% preexisting permanent partial disability of the body as a whole referable to his low back condition.

There is also evidence that employee suffered a preexisting learning disorder that causes difficulty in the areas of reading, mathematics, and written expression. Dr. Peterson opined that employee suffered a 0 to 5% preexisting permanent partial disability of the body as a whole referable to this condition. Dr. Peterson's report suggests that a rating this low correlates to a "Class 1" permanent impairment, or in other words, "no impairment," and thus it appears Dr. Peterson was not of the opinion that the condition was very disabling. Dr. Hughes also identified a learning disorder as a lifelong preexisting impairment, and provided his own rating of 0 to 5% permanent partial disability.

Notably absent from employee's testimony is any mention of a learning disorder. Where both Dr. Peterson and Dr. Hughes appear to agree that employee suffered at least some minimal permanent partial disability referable to a learning disorder, we are inclined to credit their opinions. But where employee does not identify or discuss the condition at all in his testimony, we are convinced the condition could not have been very disabling as of May 2000. Accordingly, we find employee suffered from only a 2% preexisting permanent partial disability of the body as a whole referable to his learning disability.

We turn now to employee's preexisting depression. The administrative law judge found employee had no preexisting permanent partial disability referable to this condition, on a finding that employee testified he had no disability related to depression. Employee certainly testified that he didn't miss work because of depression, wasn't accommodated at work for depression, that depression didn't affect his ability to complete as much work as he did before, and that nobody at work was aware that he suffered episodes of depression. But employee also testified that he needed medication and treatment to manage this condition. Employee testified he has continuously been on antidepressant medications since 1998. The condition clearly did not interfere with employee's work, but the fact he needed treatment to manage the condition strongly suggests to us that employee's depression constituted a disability. And where the evidence shows employee needed continuous medication over the course of several years to cope with his condition, we are convinced it was a permanently disabling one as of May 2000.

Employee: Nelson Gibler

- 3 -

Accordingly, we find that employee's preexisting depression constituted a 2% permanent partial disability of the body as a whole.

Given the distinct potential for employee's low back condition, learning disability, and depression to combine with future work-related injuries to render employee more permanently disabled than in the absence of those conditions, we find that these conditions constituted hindrances or obstacles to employment as of May 22, 2000.

Second Injury Fund liability

Section 287.220.1 RSMo creates the Second Injury Fund and provides the framework for analyzing whether the Second Injury Fund may be liable for permanent total or permanent partial disability benefits. That section provides, in relevant part:

If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund ...

We agree with the administrative law judge's determination that employee is not permanently and totally disabled. Accordingly, the question is whether employee is entitled to benefits for any enhancement of permanent partial disability resulting from a combination of his preexisting conditions of ill and the primary injury. We have found that, as of May 22, 2000, employee suffered from preexisting low back pain, a learning disorder, and depression, and that these conditions were permanent partially disabling conditions of such seriousness as to constitute hindrances or obstacles to employment.

Employee: Nelson Gibler

- 4 -

Section 287.220.1, set forth above, provides thresholds which operate to exclude liability for de minimis injuries. Here, employee's preexisting conditions did not amount to a "major extremity injury only," so the 15% threshold is inapplicable. Rather, because employee had more than a single preexisting disabling condition, we apply the 50-week "body as a whole" threshold.

We have found employee suffered a 2% permanent partial disability of the body as a whole referable to his preexisting low back condition, a 2% permanent partial disability of the body as a whole referable to his preexisting learning disability, and a 2% permanent partial disability of the body as a whole referable to his preexisting depression. When we convert these ratings into weeks of compensation under the schedule of losses set out in § 287.190 RSMo, and combine the results together, the sum is 24 weeks compensation (400 weeks x 2% = 8 weeks). This amount is insufficient to meet the 50-week threshold. It follows that employee is unable to establish Second Injury Fund liability for permanent partial disability benefits.

Given the foregoing findings and analysis, we must conclude employee failed to meet his burden of proving Second Injury Fund liability.

**Decision**

We supplement the award of the administrative law judge with the foregoing findings and conclusions. In all other respects, we affirm the award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued November 8, 2010, is attached hereto and incorporated herein to the extent not inconsistent with our findings in this supplemental opinion.

Given at Jefferson City, State of Missouri, this 16<sup>th</sup> day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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James Avery, Member

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Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Nelson Gibler

Injury No. 00-050269

Dependents:

Employer: A.B. Chance Company

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Add'l Party: Second Injury Fund

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Insurer: Self-insured

Hearing Date: August 11, 2010

Checked by: RJD/cs

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: May 22, 2000.
5. State location where accident occurred or occupational disease was contracted: Centralia, Boone County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Employer is self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was assembling a large switch gear, leaning into the tank to position a barrier board, when he injured his back.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: low back, body as a whole.
14. Nature and extent of any permanent disability: 25% permanent partial disability of the body as a whole.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$24,003.43.
17. Value necessary medical aid not furnished by employer/insurer? None.

Employee: Nelson Gibler

Injury No. 00-050269

- 18. Employee's average weekly wages: \$501.78.
- 19. Weekly compensation rate: \$334.52/\$303.01..
- 20. Method wages computation: Section 287.250.

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable from Employer:

100 weeks of permanent partial disability benefits: \$30,301.00

**TOTAL: \$30,301.00**

- 22. Second Injury Fund liability: NONE.
- 23. Future Requirements Awarded: NONE.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Truman Allen

Employee: Nelson Gibler

Injury No. 00-050269

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Nelson Gibler

Injury No: 00-050269

Dependents:

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: A.B. Chance Company

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Add'l Party: Second Injury Fund

Insurer: Self-insured

Checked by: RJD/cs

### **ISSUES DECIDED**

An evidentiary hearing was held in this case on August 11, 2010 in Columbia. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on October 22, 2010. The hearing was held to determine the following issues:

1. Claimant's average weekly wage and resultant compensation rates;
2. Whether Claimant sustained an accident arising out of and in the course of his employment with A.B. Chance Co. on or about May 22, 2000;
3. If sustained, whether the work accident was the cause of any or all of the injuries and conditions alleged by Claimant;
4. Whether Employer shall be ordered to reimburse Claimant for charges for past medical treatment;
5. Whether Employer shall be ordered to provide Claimant with additional medical treatment pursuant to Section 287.140, RSMo;
6. The nature and extent of Claimant's permanent disability, if any (Claimant alleges he is permanently and totally disabled);
7. The liability of Employer, if any, for permanent partial disability benefits or permanent total disability benefits;
8. The liability of the Second Injury Fund, if any, for permanent partial disability benefits or permanent total disability benefits; and
9. Whether attorney's fees or costs may be awarded pursuant to Section 287.560, RSMo.

Employee: Nelson Gibler

Injury No. 00-050269

### **STIPULATIONS**

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue is proper in Boone County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Employer paid \$24,003.43 in medical benefits;
6. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation herein; and
7. That A.B. Chance Co. was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times.

### **EVIDENCE**

The evidence consisted of the testimony of Claimant, Nelson Gibler; the testimony of John Ogden; the deposition testimony of Claimant; wage statement; production log; medical bills; medical records; medical cost summary; Claimant's claim for compensation; Employer's answer to claim; Employer's first report of injury; a video prepared by Employer; the narrative report and deposition testimony of Dr. David Volarich; the report and deposition testimony of Gregory Markway, Ph.D.; the narrative report and deposition testimony of Dr. Stephen Peterson; and the narrative report and deposition testimony of Dr. Patrick Hughes. Additionally, the November 14, 2005 narrative report of Dr. Russell Cantrell was admitted into evidence as to Claimant's claim against Employer only (i.e., it was not admitted as to Claimant's claim against the Second Injury Fund).

### **DISCUSSION**

Nelson Gibler ("Claimant") was born on May 10, 1951. He has a tenth grade education, no GED, and no vocational training of any kind. After leaving school, Claimant worked for a moving company for three months, then worked as a pit truck driver for a rock quarry for four or five years. In 1972, he began working for Employer. Claimant worked continuously for Employer for almost 30 years.

Employee: Nelson Gibler

Injury No. 00-050269

Claimant's primary job was assembling a "switch gear box" also sometimes referred to as a "tank". The metal "box" or "tank" in which the 15kv switch gear mechanism is enclosed is approximately 6'x5'x4', although there is a larger, heavier box for the 25 kv switch gear mechanism.

Claimant testified that prior to May 2000 he had very little problem with his back, with the exception of a sledding incident at age 21 which resulted in a few chiropractic visits. The medical records (or lack thereof) prior to May 2000 would corroborate Claimant's testimony in this regard.<sup>1</sup> Claimant testified that, the week prior to May 22, 2000<sup>2</sup> he was assembling a lot of 25 kv switches, and had been experiencing some back pain. His supervisor had given him a back brace to use while working. He testified that he went home and mowed, which didn't help his back any, but rested the remainder of the weekend. Claimant testified that, while assembling a switch gear box on May 22, 2000, he was "leaning into" the box at a 45 degree angle, holding onto a large fiberglass barrier board, reaching out with both arms to position the barrier board, when he felt a sharp pain in his lower back, an "electrical" sensation, which he reported immediately to his supervisor. Claimant testified that Employer sent him immediately to see Dr. Kurt Bracke.

Dr. Bracke's note from May 22, 2000 gives this history:

He complains of low back pain worsening over the last 24 hours. He initially suffered pain early Thursday morning. He denies any back injury on Wednesday or any excessive activity. Thursday night he mowed his yard riding a mower and Friday morning he had severe low back pain. He hardly got out of bed. He did manage to go to work. He found a back brace. He has been working at A.B. Chance as a factory worker and, over the last several shifts he has been working over some large pieces of material and found himself over-bent and over-stretched doing some mild lifting and suffered an acute low back pain.

Claimant was seen the following day by Dr. Glenn Cooper of Columbia Occupational Medicine. Dr. Cooper's history of May 23, 2000 is as follows:

This 49 year old male employee of A.B. Change was referred to the clinic for evaluation of low back pain that was not associated with lower extremity symptoms or bowel or bladder involvement. He states that he is a switch gear assembler and works in department 4025. He reports that on Thursday, 5/18/00, he awakened with back pain. He states that he was unable to put on his shoes and socks and then he got better and reported to work. He states on 5/17 he was working on the bigger switches that weigh about 50 pounds. He describes by demonstrating to me that he was required to lift these with extended reach and slight forward bending. He states he feels this probably caused his back to become sore. He did not describe any particular injury while at work but rather awakened the next day in pain. He states that on Monday, 5/22/00, he was lifting at work and he had a "electric feeling" in his back. He reported his symptoms and

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<sup>1</sup> There is a record from Dr. Kurt Bracke dated 03/20/02 which states in part: "(t)he patient has had chronic back pain off and on for the last ten years". In the voluminous medical records in evidence, this is the only mention of back problems prior to May 2000, and appears to be an anomaly.

<sup>2</sup> May 22, 2000 was a Monday.

Employee: Nelson Gibler

Injury No. 00-050269

called the doctor. He was evaluated by Dr. Bracke. No x-rays were taken and he was given Ibuprofen 800 mg and Soma for the muscle spasm. He took off 5/22/00. He returned to light duty lifting no more than 20 pounds on 5/23. His employer, A.B. Chance, asked that the patient be evaluated on an urgent basis. The patient was given an opportunity to come to the office for evaluation.

The Employer's First Report of Injury in this case was received electronically by the Missouri Division of Workers' Compensation on May 27, 2000. The report of injury lists "5/17/00" as Claimant's date of injury. It lists "5/22/00" as the date Employer was notified. It lists "5/17/00" as "last work date". The report of injury lists the injury as follows: "EMPLOYEE WOKE UP ON THURSDAY 5/18/00 WITH LOWER BACK PAIN AFTER PERFORMING REGULAR DUTIES THE DAY BEFORE".

Employer's position in this case is that no work-related accident occurred on May 22, 2000. Employer argues that, as the report of injury makes no mention of a work-related accident on May 22, 2000, none occurred. Claimant testified that he did report the accident promptly (and, indeed, the report of injury indicates "5/22/00" as the date Employer was notified). While it is impossible to know exactly what Claimant reported to Employer, it is clear that Claimant told Dr. Bracke about the accident the same day, and told Dr. Cooper about it the following day.

Claimant was placed on light duty with Employer immediately, and remained on light duty continuously thereafter until March 18, 2002, which was Claimant's last actual working day.

The claim for compensation, filed on May 22, 2002, lists "DATE OF ACCIDENT/OCCUPATIONAL DISEASE" as "On or about May 22, 2000"; it lists "PART(S) OF BODY INJURED" as: "Low back and BAW". In the section entitled: "DESCRIBE WHAT EMPLOYEE WAS DOING AND HOW THE INJURY OCCURRED", the claim states: "While in the course and scope of employment Claimant was assembling tanks and inserting a barrier board when he felt pain in his low back, causing the above injury." The May 22, 2002 claim for compensation also posits a claim against the Second Injury Fund for permanent total disability, and lists as previous injuries: "Depression; Right thumb".

The evidence was clear that Claimant began treating for depression in 1995. At this time, Claimant was feeling stress from his mother's serious extended illness and family conflict engendered thereby. In January 1997, Claimant was prescribed Paxil for "feeling blah and withdrawn from life, no interest in anything, and increased irritability." He was switched to Zoloft shortly thereafter, then switched to Prozac. In June 1997, Claimant's medication was switched to Serzone, due to sexual side effects from the Prozac. In January 1999, his dosage of Serzone was increased. Claimant continued on Serzone through May 22, 2000.

Dr. Cooper prescribed physical therapy and other conservative measures for Claimant's back symptoms. On July 10, 2000, a lumbar MRI was performed which showed mild posterior element degenerative changes, and questionable presence of spondylosis. On September 20, 2000, Dr. Cooper noted that Claimant's low back had improved, with decreased stiffness and increased flexibility. On October 11, 2000, Dr. Bader noted that Claimant's low back was

Employee: Nelson Gibler

Injury No. 00-050269

“feeling good”, with little pain and occasional discomfort. Dr. Cooper was hopeful that Claimant could be released from care in a month.

However, Claimant returned to Dr. Cooper on November 4, 2000, reporting another flare-up in his back pain. Dr. Cooper recommended that Claimant be seen at Columbia Orthopaedic Group for a surgical consult.

On November 14, 2000, Claimant was evaluated by Dr. Abernathie at Columbia Orthopaedic Group. Dr. Abernathie felt Claimant had stiffness of his lower back and maybe an overuse of the muscles causing his problem. He recommended that Claimant make lifestyle changes including maintenance of flexibility, strength, and endurance exercises, rest, proper diet, and restriction of nicotine.

On February 7, 2001, Claimant underwent a lumbar spine CT spine without contrast at Columbia Regional Hospital. This demonstrated fairly symmetric facet arthropathy at each level; mild posterolateral sac encroachment with no focal soft tissue disc protrusion; minimal anular bulging into the anterior epidural space at 4-5 and 5-1; mild sacroiliac degenerative joint disease with slight sclerosis and small anterior juxta-articular osteophytes; no pars defects. An impression was given of:

- a. Negative for pars defect and spondylosis;
- b. Moderate diffuse facet arthropathy;
- c. Negative for central canal or neuroforaminal stenosis;
- d. Mild increased uptake in the facets and SI joints but no uptake in occult pars.

Claimant also underwent a bone scan with SPECT imaging in the lumbar spine on that same date, February 7, 2001. The impressions were:

- e. Negative for spondylosis but positive for facet and sacroiliac degenerative joint disease;
- f. Negative for abnormal uptake in the pars-no radiographically occult spondylosis;
- g. Mild uptake in the facets consistent with facet arthropathy;
- h. Mild increased uptake in the sacroiliac joints;
- i. No other abnormal skeletal uptake.

On February 19, 2001, Claimant reported to Columbia Orthopaedic Group that he was having pain in his upper sacroiliac joint area and lower lumbar joint bilaterally. Dr. Abernathie stated that his CAT scan did not show a specific lesion, but just a little bit of degenerative arthritis so his probable diagnosis is just a strain of the back. Dr. Abernathie recommended keeping him on the Roman Chair and the flexibility, strength, and endurance exercises. Dr. Abernathie stated that he did not believe surgery would be helpful and prescribed anti-inflammatory medications. On March 20, 2001, Claimant reported to Columbia Orthopaedic Group that the anti-inflammatory medication was not helping. Dr. Abernathie did not have anything else to offer Mr. Gibler.

Employee: Nelson Gibler

Injury No. 00-050269

Employer had Claimant see Dr. David Raskas, a St. Louis orthopedic surgeon, on June 13, 2001. Dr. Raskas opined that Claimant's pain was unlikely from discs or spine, he was not in need of surgery, and recommended diagnostic bilateral sacroiliac joint blocks.

Claimant next came under the care of Larry Bader, D.O.. Dr. Bader saw him on October 15, 2001, and felt that Mr. Gibler had a 51 degree lumbosacral angle (30 to 45 degrees considered normal) which is quite steep and creates a deep lumbar lordotic curve. Dr. Bader stated this gives Mr. Gibler a lot of weight bearing down through the facets rather than down through the discs and into the body of the vertebrae causing his facets to "light up". Dr. Bader stated this produces tremendous strain on the iliolumbar ligaments and strain on the posterior ligaments of the sacrum due to the steep angle of the sacral base and the hyper-lordotic curve. Dr. Bader began treatment to take strain off of the low back. He stated that it will take quite a lot to get the facet irritation to settle down simply because Mr. Gibler has a back that has been compensating for over 50 years for a short leg and a hyperlordosis. Dr. Bader then stated that the May 22, 2000 injury was a triggering mechanism that started decompensation. Dr. Bader stated that there is no danger of worsening his situation unless he would go back to his old job of leaning forward and working.

On February 5, 2002, Claimant began treating with Mitchell Guthrie, a counselor at Boone Hospital Center. Claimant reported that he could only sit or walk for 10 to 15 minutes before needing to change position, and expressed doubt that his company could continue to make accommodations for him. He stated that he felt guilty that because he cannot do much physical labor, he is a burden to his family and not contributing. On March 6, 2002, Claimant returned to Mr. Guthrie. The note indicates that Claimant had a meeting at AB Chance prior to this appointment and was shocked to learn that he will have to give up his level 7 rating to be placed in a job that is rated at level 1 and will be reduced by \$216.00 per month. He was upset he would be moved from his level 7 job rating to a level 1 job, causing a reduction in pay of \$216.00 per month. He did not know if his family could accommodate the financial hit, was skeptical about his ability to perform the job adequately because while he believed he could perform the tasks okay, he could not perform them rapidly without breaks.

On April 19, 2002, Claimant returned to see Dr. Glenn Cooper. Dr. Cooper noted that Claimant's forward bending was at the hip rather than at the lumbosacral junction. Dr. Cooper diagnosed Claimant with chronic lumbosacral pain of undetermined origin, and mild degenerative changes of the lumbar spine including facets and sacroiliac joints. Dr. Cooper noted that there were no objective findings to explain Claimant's pain. Dr. Cooper felt that Claimant had lost range of motion and flexibility in the lumbar spine as a result of sedentary activities for an extended period of time and that Claimant's self perceived disability is problematic. Dr. Cooper believed that there was a psychogenic component to Claimant's low back pain.

On May 29, 2002, Claimant returned to Columbia Occupational Medicine. He reported that he would return to work on June 10, 2002 in the fused link department. Claimant expressed concern that the fused link workstation would not be the proper size for him. Dr. Cooper discussed Claimant returning to his original department with some slight modification to the

Employee: Nelson Gibler

Injury No. 00-050269

work area. Claimant responded that he heard that it would be too expensive to modify the work area so that he could return.

On August 23, 2002 Claimant underwent a functional capacity evaluation at The Work Center. The evaluation concluded that Claimant had abilities consistent with a sedentary job, but noted that Claimant exhibited self limiting behavior. On September 18, 2002, Aaron Dement of The Work Center provided a letter stating that Claimant did not provide his best effort on the August 23, 2002 functional capacity evaluation. He stated that Claimant's heart rate demonstrated no significant change that would indicate exertion, his muscles did not tense up or recruit together in such a manner that would indicate exertion, his breathing and sweating did not change in such a manner that would indicate exertion, and his lifting method did not gradually break down or deteriorate as what normally happens when a person is giving his best effort.

On September 4, 2002, Claimant returned to Dr. Cooper for his final visit. Dr. Cooper released Claimant at maximum medical improvement on that date indicating Claimant was able to return to full unrestricted duty. It was Dr. Cooper's opinion that Claimant had not sustained any permanent partial disability to his lumbar spine or body as a whole as a result of his reported onset of low back pain in May 2000. Dr. Cooper did not relate an injury to any specific incident at work.

On June 13, 2002, Claimant saw Ruth Moccia at the request of Social Security Administration for a psychological evaluation. Her conclusions are as follows:

Summary and Medical Source Statement: Nelson is alert but somewhat disoriented. His time disorientation is felt to be due to a lack of structure in his current life. He lacked concentration today for mental status tasks requiring working memory but his immediate memory and short term memory are intact. His ability to follow directions is unimpaired when working memory is not involved. He has been depressed for several years and his recent inability to work has accentuated his mood and symptoms. Though he is proud of his wife's accomplishments he assesses himself poorly in comparison. Nelson is socially appropriate in today's interaction and his physical presentation is an asset. He would be a good candidate for vocational rehabilitation with a focus on diagnosing his academic difficulty and remediating his literacy skills. He appears capable of managing funds independently.

Diagnostic Impressions:

Axis I: 296.21 major depressive disorder, single episode, mild, chronic. 309.28 adjustment disorder with mixed anxiety and depressed mood. 315.9 learning disorder NOS.

On January 30, 2003, Claimant underwent a psychological evaluation by Betty Acree. Ms. Acree indicated that Claimant had a learning disability which caused him to give up on finishing high school. Claimant's cognitive abilities test scored in the average to low average range, and he scored borderline on mathematics and memory for names. According to Ms. Acree, his limited score and ability in academic achievement interferes with his ability to have gainful employment, and retraining is not possible based on his low intellectual ability which

Employee: Nelson Gibler

Injury No. 00-050269

also contributes to his depression and low self-esteem. The diagnoses were depressive disorder, mathematics disorder & disorder of written expression.

Gregory Markway, Ph.D. did a psychological evaluation at the request of Claimant's attorney in May 2005. Dr. Markway opined that the May 22, 2000 incident was a substantial contributing factor to his current psychiatric disability and related functional impairments and that there was no pre-existing disability despite the fact Claimant was taking anti-depressant medication prior to the May 22, 2000. Dr. Markway assessed Claimant's psychiatric disability as 50% permanent partial disability of the body as a whole.

Claimant was evaluated, at Employer's request, for depression or psychiatric illness by Dr. Stephen Peterson on May 1, 2006. Claimant reported to Dr. Peterson that he did not obtain his GED in the past because he did not think he could pass it and didn't want to humiliate himself trying. Claimant reported that he lies down about six times per day for 15 to 30 minutes. Dr. Peterson noted that Claimant sat easily for 55 minutes during testing without evidence of discomfort.

Dr. Peterson diagnosed Claimant as follows: (1) Major Depressive Disorder, single episode in partial remission; this episode began in June 1997 and pre-existed May 22, 2000; (2) Pain Disorder associated with psychological factors and medical condition; this pertains to loss of masculinity due to lack of financial contribution, loss of contribution to chores, and loss of sexual functioning; (3) Borderline Intellectual Functioning and Learning Disorders. Dr. Peterson recommended light-duty employment such as Bass Pro Shops or Cabela's as long as Claimant thought it was valuable to him.

Dr. Peterson assessed the following impairment ratings: (1) Mild impairment of 10% to 20% for aggravation of Major Depressive Disorder; (2) Moderate impairment of 25% to 50% for Lumbar back pain associated with lumbar facet arthropathy; (3) No impairment of 0% to 5% for sleep apnea; (4) An overall permanent impairment of 49%; In his deposition Dr. Peterson testified that this was half due to depression and half due to his back injury.

Dr. Peterson also assessed pre-existing impairment as follows: (1) 10% to 20% for low back pain; (2) 0% to 5% for learning disorder; (3) 10% for depression. Dr. Peterson testified that the rating for depression could change if Mr. Gibler returned to work or doing something productive.

Dr. Patrick Hughes conducted a medical record review at the request of Employer and Insurer on March 27, 2009. Claimant was not willing to submit to an examination by Dr. Hughes. Based on his review of the medical records, Dr. Hughes made the following observations:

- a. Claimant developed Major Depression in January 1997.
- b. Psychologist Markway discounted the preexisting depression as "family related" despite the extensive pharmacotherapeutic treatment.
- c. The Beck Depressive Inventory administered by psychologist Markway is invalid as Claimant's score of 39 would indicate a non-functioning, vegetative, life-threatening depressive state.

Employee: Nelson Gibler

Injury No. 00-050269

- d. Dr. Peterson's opinion that the Major Depression was worsened by the back injury is invalid as the DSM-IV requires that for a mood disorder to be attributable to a general medical condition there must be a relationship through a physiological mechanism. Dr. Hughes states that the DSM-IV does not include back injuries as a mechanism that can effect Major Depression.
- e. Claimant has 0-5% psychiatric impairment due to a preexisting learning disorder.
- f. Claimant has 10% psychiatric impairment due to adjustment disorder with depressed mood related to his back problems (rather than disability related to Major Depressive Disorder).

Dr. Hughes testified in his deposition that Claimant's pain complaints were partially orthopedic and partially psychological given the subjective complaints versus objective findings. Dr. Hughes testified that a 50% disability due to psychiatrics, as assessed by Mr. Markway, would normally be reserved for those whom are institutionalized or nonfunctional from mental illness.

On November 14, 2005, Claimant saw Dr. Russell C. Cantrell for an Independent Medical Examination at the request of Employer. Dr. Cantrell obtained x-rays on that date that showed mild degenerative joint disease at L5-S1, with no progression or change in severity since the May 23, 2000, x-rays. Dr. Cantrell diagnosed mechanical lumbar back pain due to preexisting degenerative changes in the facet joints that were not caused or aggravated by the May 2000 injury. He supports this opinion with the following observations:

- a. There is no indication on the x-rays, CT scan, or bone scan of any acute bony or discogenic pathology that would be attributable to a specific event or work in general;
- b. The diagnostic injections at L5-S1 did not alleviate complaints, suggesting that facet degeneration is not the source of his complaints;
- c. His complaints have persisted despite the avoidance of even light duty activities;
- d. The degenerative conditions in the back are very mild and age appropriate.

Dr. Cantrell opined that Claimant may have sustained a strain on May 22, 2000, but the medical records suggest otherwise indicating that Claimant had back pain even prior to this date. Dr. Cantrell assessed 4% permanent partial disability to the body as a whole due to preexisting degeneration and 3% due to the strain that may or may not have occurred on May 22, 2000. Dr. Cantrell opined that Claimant is employable in the open labor market, and any restrictions would appear to be self-imposed and due to subjective pain complaints not corroborated by any objective pathology in the lumbar spine.

Claimant was evaluated on December 3, 2003 by Dr. David Volarich at the request of his (Claimant's) attorney. Dr. Volarich concluded that, as a result of the May 22, 2000 accident, Claimant sustained a disc bulge at L2-3 to the right without radiculopathy, severe strain/sprain injury, and aggravation of degenerative disc disease and degenerative joint disease. Dr. Volarich opined that Claimant sustained a 30% permanent partial disability of the body as a whole rated at the lumbosacral spine as a result of the 5/22/2000 accident. Dr. Volarich testified that Claimant had a disability, preexisting the 5/22/2000 accident, due to depression. Dr. Volarich testified that he deferred to psychiatry for that evaluation. Dr. Volarich did not find that Claimant had depression due to the 5/22/2000 accident. Dr. Volarich testified that if vocational assessment was

Employee: Nelson Gibler

Injury No. 00-050269

unable to identify a job for which Claimant was suited, then Claimant was permanently and totally disabled as a result of the work related injuries of May 22, 2000, in combination with the pre-existing depression.

Gary Weimholt is a vocational rehabilitation consultant who evaluated Claimant in February 2004 at the request of Claimant's attorney. Weimholt concluded that Claimant was permanently and totally disabled as a result of the back injury he sustained on May 22, 2000, in combination with the preexisting depression, which continues. However, on cross-examination, Weimholt testified that, even absent depression, Claimant would be permanently and totally disabled as a result of his back injury alone.

Regarding the threshold issue of whether Claimant sustained a work accident on May 22, 2000, the evidence shows that Claimant had some general back complaints for a few days prior to that date, due to a heavy work load. There is no question that Claimant reported a work injury to Employer on May 22, 2000 (as Employer's report of injury states), and there is no question that Employer sent Claimant to Dr. Bracke on that date, and to Dr. Cooper the following day. The fact that the report of injury does not mention a specific work accident occurring on May 22, 2000 appears to me to be overshadowed by the mention of same in the near-contemporaneous records of Dr. Bracke and Dr. Cooper. Therefore, I do believe that Claimant sustained an accident and injury to his back on May 22, 2000 while assembling a switch gear box and was leaning into the box at a 45 degree angle, holding onto a large fiberglass barrier, and reaching out with both arms to position the barrier board, when he felt a sharp pain in his lower back like an "electrical" sensation.

While it is clear to me that Claimant sustained a work-related accident on May 22, 2000 that caused injury to his low back, the nature and extent of that injury is certainly less than clear. Claimant reports unrelenting, debilitating back pain. He has seen multiple physicians and has had every imaginable test done for his back, yet there is no rational medical explanation for his complaints. Neither is there an explanation for Claimant's apparent ability to sit comfortably at the hearing despite unrelenting, debilitating back pain.

Claimant's claims of depression are equally unclear. Claimant alleges in his claim that he is permanently and totally disabled due to a combination of the 5/22/2000 back injury combined with *preexisting* depression, and the testimony of Dr. Volarich and Gary Weimholt support that allegation; yet Claimant was clear in his testimony that he had *no* disability as a result of the preexisting depression. Dr. Markway agrees that Claimant had no disability as a result of the preexisting depression, but found that Claimant had significantly disabling depression as a result of the 5/22/2000 accident and its *sequelae*. Dr. Peterson believes that Claimant had preexisting disabling depression, and that the 5/22/2000 back injury caused a disabling escalation of the preexisting depression. Dr. Hughes felt that Claimant had preexisting depression and developed a partially disabling *adjustment disorder* (not depression) as a result of the 5/22/2000 back injury.

Despite the confusing array of professional opinions regarding Claimant's psychological state and causation thereof, I find that Claimant's preexisting depression was well-controlled and clearly not disabling, as evidenced by Claimant's testimony that it had no effect whatsoever on his ability to work. Dr. Hughes' assessment of adjustment disorder appears to

Employee: Nelson Gibler

Injury No. 00-050269

most accurately characterize Claimant's post-accident psychiatric condition. Claimant has strongly reacted (or overreacted) to his back injury and his perceived inability to perform even the simplest of work tasks.

What is clear in this case is that Employer provided Claimant with prompt and appropriate medical treatment and diagnostic testing. What is also clear is that Employer made every attempt to accommodate Claimant and allowed Claimant to continue to work for almost two years post-accident, despite the fact that Claimant basically was a non-productive employee during that time, due to Claimant's subjective reporting of a declining physical condition with ever-increasing self-imposed restrictions.

What is also clear is that Claimant's physical condition (i.e., his back condition) does not prevent him from competing in the open market for employment. While I have no doubt that Claimant has back pain, his subjective reaction thereto (which I believe to be accurately summarized as follows: "I don't want to do anything because it might hurt my back") can only be characterized as wholly disproportionate to Claimant's actual physical injuries, i.e., chronic back sprain superimposed on mild degenerative disc and facet disease. I find that Claimant is not totally disabled. I believe he can clearly compete in the open market for employment if he were to exhibit the desire to do so. I find that Claimant has sustained a permanent partial disability of 15% of the body as a whole as a result of his chronic back strain due to the May 22, 2000 work related accident (based almost entirely on his subjective pain complaints); I also find that Claimant has sustained an additional 10% permanent partial disability of the body as a whole as a result of adjustment disorder due to the May 22, 2000 work accident, as assessed by Dr. Hughes.

Claimant is seeking reimbursement for treatment he sought on his own. As stated above, I find that Employer has provided Claimant with appropriate medical treatment. Claimant has clearly chosen to seek his own medical treatment at his own expense, as is his right under Section 287.140.1, RSMo.

I find that Claimant's condition has achieved maximum medical improvement and no order of future medical treatment is appropriate.

As Claimant had no disability preexisting the May 22, 2000 work related accident, Claimant's claim against the Second Injury Fund should be denied.

Based upon the wage information in evidence, I find that Claimant's average weekly wage, pursuant to Section 287.250.1(4), is \$501.78, and his compensation rates are \$334.52/\$303.01.

I find no grounds for an award of attorney's fees and expenses against Employer.

Employee: Nelson Gibler

Injury No. 00-050269

### **FINDINGS OF FACT**

In addition to those facts to which the parties stipulated, I find the following facts:

1. On May 22, 2000, Claimant Nelson Gibler sustained an accident and injury to his back while assembling a switch gear box and was leaning into the box at a 45 degree angle, holding onto a large fiberglass barrier, and reaching out with both arms to position the barrier board, when he felt a sharp pain in his lower back like an “electrical” sensation;
2. Claimant reported the accident to Employer on May 22, 2000 and was sent by Employer for medical treatment;
3. Claimant has complained of significant low back pain since the accident;
4. Claimant has had no complaints of pain into his lower extremities;
5. Claimant worked for Employer on a light duty basis for twenty-two months after the accident;
6. Claimant has not worked since March 2002, and has not sought work;
7. Employer has provided Claimant with prompt and appropriate medical treatment and diagnostic testing;
8. In 1997, Claimant began taking medication for depression during his mother’s extended illness;
9. Claimant’s depression had no effect on Claimant’s ability to work prior to May 22, 2000;
10. For the thirteen weeks prior to the week of May 22, 2000, Claimant’s average weekly earnings, before taxes and other payroll deductions, was \$501.78;
11. Claimant can compete in the open market for employment;
12. Claimant has sustained a chronic back strain as a result of the May 22, 2000 accident;
13. Claimant has developed an adjustment disorder as a result of the May 22, 2000 accident;
14. Claimant’s conditions have reached maximum medical improvement;
15. Claimant has sustained a permanent and partial disability as a result of the chronic back strain; and
16. Claimant has sustained a permanent and partial disability as a result of the adjustment disorder.

### **RULINGS OF LAW**

In addition to those legal conclusions to which the parties stipulated, I make the following rulings of law:

1. Claimant sustained an accident arising out of and in the course of his employment with A.B. Chance Company on May 22, 2000;
2. The accident of May 22, 2000 resulted in a chronic back strain and an adjustment disorder;

Employee: Nelson Gibler

Injury No. 00-050269

3. Claimant had no preexisting disabling conditions at the time of his May 22, 2000 accident;
4. Claimant is not permanently and totally disabled;
5. Claimant sustained a permanent partial disability of 15% of the body as a whole as a result of his chronic back strain due to the May 22, 2000 work related accident;
6. Claimant sustained an additional 10% permanent partial disability of the body as a whole as a result of adjustment disorder due to the May 22, 2000 work accident;
7. Claimant's weekly compensation rate for permanent partial disability benefits is \$303.01;
8. Employer has no liability under Section 287.140 for future medical benefits;
9. Employer is not required to reimburse Claimant for charges for medical care Claimant sought on his own;
10. There are no grounds for an award of attorney's fees and costs;
11. Claimant is entitled to 100 weeks of permanent partial disability benefits at the weekly rate of \$303.01; and
12. Claimant's claim against the Second Injury Fund is denied.

**ORDER**

Employer, A.B. Chance Co. is ordered to pay Claimant the sum of \$30,301.00 for permanent partial disability benefits.

Claimant's attorney, Truman Allen, is allowed 25% of all benefits awarded as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon.

Date: November 8, 2010

Made by: /s/Robert J. Dierkes

ROBERT J. DIERKES  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/Naomi Pearson  
Naomi Pearson  
*Division of Workers' Compensation*