

**FINAL AWARD ALLOWING COMPENSATION**  
(Modifying Award and Decision of Administrative Law Judge)

Injury No.: 04-148860

Employee: Jonathan Sage  
Employers: Talbot Industries/Leggett & Platt, Inc.  
Insurers: Fidelity & Guaranty Insurance Company  
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. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

**Discussion**

Living employee

In *White v. Univ. of Mo.*, 375 S.W.3d 908 (Mo. App. 2012), the court held that the Commission exceeded its powers in declaring that a dependent's claim for permanent total disability benefits "qualifies for application of the *Schoemehl* case," because the employee was still living at the time the Commission issued its award. *Id.* at 910, 913. The *White* decision makes clear that the Commission is limited to making a finding of dependency where the employee is still living.

Pursuant to *White*, we must modify the award of the administrative law judge as to the issue whether employee's wife will be entitled to receive his permanent total disability benefits under *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007). Accordingly, we vacate the administrative law judge's findings that "[I]n the event of death of Claimant, Jonathan Todd Sage, that Lynne Sage shall be entitled to the benefits for permanent total disability until her death," and "[I]n the event of the death of the claimant, claimant's wife Lynn Sage shall be entitled to the benefits of permanent total disability until her death." See *Award*, page 7. Instead, we find that on June 21, 1991, employee was married to Lynn Sage, and that the two remained married through the date of hearing in this matter on February 2, 2012. We conclude that Lynn Sage was employee's "dependent," as that term is defined in § 287.240(4)(a) RSMo, at the relevant time for purposes of *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007). But because employee is still living, Lynn Sage's right to receive benefits pursuant to *Schoemehl* "remains contingent, and cannot be adjudicated at this time." *White*, 375 S.W.3d at 912.

**Award**

We modify the award of the administrative law judge as to the issue whether employee's wife will be entitled to receive permanent total disability benefits under *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007).

Employee: Jonathan Sage

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The award and decision of Administrative Law Judge Karen Wells Fisher, issued September 19, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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

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

Given at Jefferson City, State of Missouri, this 9<sup>th</sup> day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Jonathan Sage Injury No : 04-148860 & 05-127844  
Dependents: N/A  
Employer: Talbot Industries  
Additional Party: Second Injury Fund  
Insurer:  
Hearing Date: February 2, 2012 Checked by:

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

### FINDINGS OF FACT AND CONCLUSIONS 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: FEBRUARY 2004 AND DECEMBER 16, 2005
5. State location where accident occurred or occupational disease was contracted: NEWTON COUNTY, MO
6. Was the above employee in employ of above employer at the 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 insured? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted.  
PULLING WIRE PULLED HIS BACK ; FELL FOUR FEET INTO A PIT AND LANDED ON HIS BACK ON A BEAM
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease BACK AND BODY AS A WHOLE
14. Nature and extent of any permanent partial disability: N/A
15. Compensation paid to date for temporary disability : 2004 case -- \$0.00  
2005 case -- \$27,301.93
16. Value of necessary medical aid paid to date by employer/insurer? 2004 case -- \$16,322.53  
2005 case -- \$95,782.98
17. Value of necessary medical aid not furnished by employer/insurer? \$11,209.45

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18. Employee's average weekly wages: 2004 case -- \$791.13  
2005 case -- \$794.10
19. Weekly compensation rate: 2004 case -- \$527.42 / \$347.05  
2005 case -- 529.40 / \$365.08
20. Method of wage computation: STATUTORY

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$11,209.45

weeks of temporary total disability (or temporary partial disability)

N/A weeks of permanent partial disability from Employer

N/A weeks of disfigurement from Employer

22. Second Injury Fund liability: NONE

TOTAL:

23. Future requirements awarded: PERMANENT TOTAL DISABILITY

Said payments to begin SEPTEMBER 5, 2008 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 PERCENT of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

CHARLES BUCHANAN

Employee: Jonathan Sage

Injury No: 04-148860 & 05-127844

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

Employee: Jonathan Sage

Injury No : 04-148860 & 05-127844

Dependents: N/A

Employer: Talbot Industries

Additional Party: Second Injury Fund

Insurer:

Hearing Date: February 2, 2012

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by:

## **AWARD**

The above cases were presented for final hearing on February 2, 2012. The claimant, Jonathan Todd Sage, appeared in person and by his attorney, Charles Buchanan. The employer and insurer appeared by their attorney, Ronald G. Sparlin. The Second Injury Fund appeared by Assistant Attorney General Todd T. Smith.

## **STIPULATIONS**

The parties narrowed the issues presented for determination by stipulating to the following facts:

- Talbot Industries was an employer under the workers' compensation law at the time of both alleged accidents;
- The claimant was an employee of Talbot Industries on both alleged dates of injury;
- Both of claimant's alleged accidents occurred in Newton County, Missouri;
- On December 16, 2005 the claimant sustained an accident arising out of and in the course of his employment;
- The claimant gave proper notice for the alleged 2005 injury;
- Both claims for compensation were timely filed;
- For the 2004 claim the temporary total disability/permanent total disability rate is \$527.42 and the permanent partial disability rate is \$347.05;
- For the 2005 claim the temporary total disability/permanent total disability rate is \$529.40 and the permanent partial disability rate is \$365.08;
- The employer paid medical expenses on the 2004 case of \$16,322.53 and \$0 in temporary benefits;
- The employer paid medical expenses on the 2005 case of \$95,782.98 and \$27,301.93 in temporary benefits.

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### ISSUES

The issues to be determined were as follows:

- Whether, regarding the 2004 claim, the claimant sustained an injury by accident arising out of and in the course of his employment;
- Whether, regarding the 2004 claim, the claimant gave the employer notice as required by the statute;
- Whether the 2004 and/or 2005 alleged claims caused the injuries and medical conditions complained of;
- Whether the employer is liable for certain past medical expenses;
- Whether the claimant is entitled to past temporary total disability benefits;
- The nature and extent of any permanent partial disability sustained as a result of the 2004 and 2005 claims;
- Whether the claimant is permanently and totally disabled, and if he is, whether that results from the last injury alone or a combination of the last injury and prior disabilities;
- Whether the claimant is entitled to future medical treatment;
- The liability of the Second Injury Fund;
- The entitlement of claimant's spouse to benefits under the provisions of the *Schoemehl* decision.

### EVIDENCE PRESENTED

Claimant offered the following exhibits at trial which were admitted into evidence. Claimant also testified on his own behalf and called the following witnesses to testify: Eric Thurmond, Ron Bowen, Jared Sage, Toney Sage, Barry Bowen, Lynn Sage.

Exhibit A	Claims for Compensation
Exhibit B1	4/29/10 deposition of Dr. Koprivica
Exhibit B2	11/21/11 deposition of Dr. Koprivica
Exhibit C	Wilbur Swearingin deposition
Exhibit D	Dr. Parmet deposition
Exhibit E	Dr. Paul deposition
Exhibit F	Dr. Adams records
Exhibit G	Dr. Karges records
Exhibit H	Dr. Lampert records
Exhibit I	Freeman Health System (Joplin) records

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Exhibit J Freeman Health System (Neosho) records  
Exhibit K Freeman Health System (Occumed) records  
Exhibit L Dr. Harbach records  
Exhibit M Dr. Ipsen records  
Exhibit N Dr. Karshner records  
Exhibit O Dr. Knudsen records  
Exhibit P Missouri Vocational Rehabilitation records  
Exhibit Q St. John's Health Center records  
Exhibit R Dr. Yarosh records  
Exhibit S Correspondence to Ron Sparlin requesting medical care  
Exhibit T QucikMeds Pharmacy records  
Exhibit U Vocational Rehabilitation records  
Exhibit V Lakes County Resource Center records  
Exhibit W Bill Summary June 2007 -- May 2008  
Exhibit X Bill Summary September 2008 – February 1, 2012  
Exhibit Y Time Line  
Exhibit Z Time Line backup  
Exhibit AA Travel expenses  
Exhibit BB Conditional payment letter  
Exhibit CC Request for benefits  
Exhibit DD Itemized bill summary 2004

Claimant identified Exhibit CC as the itemization of benefits he is seeking. It includes \$2043.75 in past TTD for the period June 30, 2006-July 27, 2006; \$45,207.28 in past TTD for the period January 11, 2007-September 4, 2008; past permanent total disability benefits of \$93,202.50 from the date of the hearing back to September 5, 2008; past medical bills of \$11,591.71; open future medical treatment; and future permanent total disability benefits.

Employer/insurer offered the following exhibits at trial which were admitted into evidence.

Exhibit 1 Answer 04-148860  
Exhibit 2 Answer 05-127844  
Exhibit 3 Dr. Parmet deposition  
Exhibit 4 Dr. Parmet Notice of Intent 6/28/11  
Exhibit 5 Dr. Parmet Notice of Intent 3/30/11 and 6/8/11  
Exhibit 6 Dr. Woodward Notice of Intent 7/2/09  
Exhibit 7 Dr. Woodward Notice of Intent 2/22/10  
Exhibit 8 Work Evaluation and Ergonomic Records  
Exhibit 9 Dr. Harbach Notice of Intent 1/10/07  
Exhibit 10 Dr. Paul deposition

Second Injury Fund offered the following exhibits at trial which were admitted into evidence.

Exhibit I Jonathan Sage deposition 1/29/08  
Exhibit II Jonathan Sage deposition 5/22/09

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## FINDINGS OF FACT

Jonathan Todd Sage is 47 years of age and has been married to Lynn Sage for 20 years. They have two children, ages 15 and 18. Sage has a high school diploma and completed a couple of semesters of college. The claimant began his employment at Talbot Industries in March of 1987. For the most part, Sage worked on a wiredrawing machine, which would draw wire down to a smaller diameter.

Sage cannot recall the specific date of his first injury. He recalls first seeking medical care with his personal physician, Dr. Adams, on February 11, 2004. He thinks the injury occurred about a week earlier. Sage was pulling ½ inch wire and bending the “tail” of the wire when he felt a pop in his back. He immediately had pain in his back and down his buttock cheek. Sage told his supervisor of the incident, but also said “let’s wait a week and see” about any need to seek medical care.

The claimant testified that, other than strains, he had never had problems with his back in the past.

Sage’s symptoms worsened over the next week, and when he related that to his supervisor, Sage described him as “hesitant”. So the claimant went ahead and sought care on his own with his personal doctor. After a few visits to Dr. Adams, Sage was referred to Dr. Yarosh, a neurosurgeon in Joplin. She sent the claimant on to Dr. Knudsen who performed epidural injections. By June of 2004 the workers’ compensation carrier began authorizing treatment, which included further referrals and epidural injections. Sage’s symptoms included low back pain and radiating pain down the right leg.

By the summer of 2005 there were two options presented to Sage—a fusion in his low back or a less invasive procedure, called a nucleoplasty. Sage opted for the nucleoplasty, performed in October 2005, which he described as the doctor “sucking some of the fluid out of the ruptured disc”. It was an outpatient procedure and Sage was able to return quickly to work. The claimant testified that he got benefit from the procedure and afterward was doing “pretty good”. Throughout his treatment following the 2004 injury, Sage continued working his normal job at Talbot, though he was on light duty a couple of times.

After the nucleoplasty, Sage continued working at Talbot though his duties changed to maintenance, because part of the plant was being closed down. He received no further treatment until after his second accident six weeks later. He admitted he was more careful with how he performed his work. He did have “occasional” symptoms with his back. Sage sustained his second accident on December 16, 2005, while performing maintenance duties. The claimant was injured when he fell four feet into a pit, landing on his back on the center of a beam. He sustained two fractured spinal processes but also had a return of the pain he’d had with the 2004 accident, but it was now “magnified”. Sage admitted the pain after the 2005 accident was noticeably worse and different than with the 2004 injury.

Sage continued to work for another couple of weeks until the plant closed. He underwent further diagnostics and conservative care. Ultimately, Sage was presented with options of either

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a fusion or a disk replacement. The claimant chose to pursue a disk replacement, but no Joplin doctors were performing them, so he sought the opinion of Dr. Harbach in Springfield. Dr. Harbach ultimately performed the disk replacement on October 12, 2006. Sage felt the surgery went well as the pain in his back was lessened and the pain down his leg was gone.

In June 2006 Sage opened a case with the Division of Vocational Rehabilitation with the goal of getting back to work due to the plant closing and his physical limitations. He was initially interested in a career as an x-ray tech or lab tech, but then an opportunity came along to go into business with his cousin, Tony Sage. In February 2007, the claimant and his cousin started Sage Exteriors, a guttering and vinyl siding business. The business started slowly, but soon built up customers and jobs. Initially, Sage would work only 2-6 hours a day, but became basically full time as they built up customers. Sage denied ever injuring himself in the new business, but testified that the longer he worked the greater pain he developed. He began having trouble sleeping and had to take additional pain medication.

In July of 2007, Sage quit working with Sage Exteriors. He continued working with the Department of Vocational Rehabilitation and Alternative Opportunities to find other employment. He filled out some applications and made inquiries, but also continued getting medical care. He underwent a series of injections with Dr. Lampert as well as injections with Dr. Knudsen, all of which provided some relief.

Following his disk replacement, Sage was released by Dr. Harbach in January 2007 with no restrictions, but with a strong recommendation to go into other areas of work where he does not have to do repetitive, heavy bending or lifting or factory-type work. It was at that point that the claimant went into the guttering and siding business with his cousin. Upon further questioning, Sage admitted that he was involved in all aspects of the business including measuring houses, unloading parts and equipment, measuring and cutting siding and guttering, screwing on the guttering, and climbing up and down ladders. The claimant was paid on an hourly basis for the five months he worked in the business.

When Sage returned to Dr. Harbach in October 2007, the doctor noted that his pain had “tremendously resolved,” but that the claimant now had low back pain “that is different but still present status post total disc arthroplasty at L5-S1.” Dr. Harbach then recommended he go to a pain clinic to go through a workup for a pain generator and then possibly to physiatry for chronic pain management and treatment of muscle pain as well as facet blocks at the level of the disc replacement as well as other levels above.

Sage lives on a 15 acre tract of land and has additional land leased for cows. The claimant’s son “pretty much” takes care of all the livestock. Typically, Sage does little throughout the day though he tries to be as active as possible. On good days he is able “be normal”, and can walk, stand and bend. He takes daily medication including effexor, baclofen, tramadol, and tizadine, and hydrocodone.

Sage does not believe he can work because of his pain, lack of sleep, and lack of endurance. He feels he has developed psychological problems since he can’t do what he used to or provide for his family.

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Eric Thurmond is a neighbor of the claimant and has known him for 20 years. Thurmond described cutting hay with Sage before 2004 observing him to be mechanically inclined and able to weld and do home repairs. He noticed a change in Sage thereafter—when he goes by Sage's house he is usually inside being very inactive. The claimant will occasionally drive his tractor to Thurmond's place if help is needed.

Ron Bowen is Todd Sage's father in law and has been in close contact with the claimant for many years. He has noticed changes in Todd since his injury, particular that he is far less active than he used to be.

Jared Sage is the claimant's son and is 18 years old. He is a student at Crowder College in Neosho. The claimant's son described the various activities he would engage in with his father before February 2004. He described his father as far less active now since his injury. Jared does all of the work in taking care of the cattle and cutting wood to burn in the Sage home.

Tony Sage is the claimant's cousin. He described the claimant as being physically active before he was hurt at Talbot. Todd Sage went to work with Tony in the guttering and siding business because he thought the work would be physically light enough for him. Tony described the job as requiring the claimant to perform tasks such as rolling out the guttering, moving ladders and equipment, and climbing ladders. The two were the only employees of Sage Exteriors so they had to perform every aspect of each job. The witness remembered that his cousin was able to hold his own at first but as they got busier and put in more hours, the claimant began having trouble. It was ultimately the claimant's decision to quit, he was not fired. Tony had to hire another employee full time to replace what the claimant was doing.

Barry Bowen is Todd Sage's brother in law and has known him since high school. Bowen testified about the difference he has seen in the claimant's level of activity since his injury at Talbot. Bowen described remodeling the bathroom at the claimant's home. The claimant did not participate in any of the work.

Lynn Sage is the claimant's wife of twenty years. They have two children, ages 18 and 15. She likewise described the decrease in her husband's activity level after his 2004 accident at Talbot.

I found the testimony of these witnesses to be credible and persuasive.

The parties offered the depositions and/or reports of various medical experts. That included opinions from Dr. Harbach, Dr. Koprivica, Dr. Paul, Dr. Woodward, and Dr. Parmet.

Dr. Todd J. Harbach is the spine surgeon who performed Todd Sage's disk replacement surgery. He issued a report on January 10, 2007 (Exhibit 9) in which he stated that the claimant had reached maximum medical improvement and was released from his care. He also rated Sage's disability as 8% of the body as a whole.

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Dr. Koprivica was retained by the claimant for purposes of an independent medical evaluation, which was in October 2009. Dr. Koprivica's opinions were introduced via two depositions (Exhibits B1 and B2). Dr. Koprivica's diagnosis is failed back syndrome following a disk arthroplasty at the L5-S1 level, and he attributes that to the February of 2004 injury. He felt that Sage additionally suffered transverse process fractures at L2 and L3 from the December 2005 injury. It is Dr. Koprivica's opinion that February 2004 accident was the prevailing factor in causing the claimant's herniated disk, his surgeries, and discogenic pain at L5-S1. He believes that Sage is permanently and totally disabled due to the February 2004 injury in isolation, though he found 10% of the body as a whole disability from the December 2005 injury. In Dr. Koprivica's opinion, MMI for the 2004 injury was not reached until sometime in the summer of 2008. He suggested that future treatment would be needed in terms of at least chronic pain management.

When cross-examined, Dr. Koprivica agreed that the claimant's medical records reflected a history of chronic low back pain prior to February 2004, even though the doctor rated no prior disability. He also felt that, before the December 2005 injury occurred, Sage would have had 20-25% of the body disability from the 2004 injury. Finally, Dr. Koprivica opined that if the claimant was not found to be permanently and totally disabled from the 2004 injury alone, then he believed he was permanently and totally disabled from a combination of the 2004 and 2005 injuries.

Dr. Robert Paul performed an independent medical evaluation of the claimant at the request of his attorney on November 11, 2008. Portions of the deposition of Dr. Paul were offered by both the employee and the employer/insurer. (Exhibits E and 10)

Dr. Paul rated Mr. Sage as having permanent partial disability from the 2004 injury of 15% of the body as a whole. He found an additional disability of 20% of the body as a whole as a result of the December 2005 injury. But he ultimately believed that the claimant is permanently and totally disabled due to the combined effects of the December 2005 injury and his prior disabilities.

On behalf of employer Dr. Jeffrey Woodward performed an independent medical evaluation of the claimant on July 2, 2009. His 2009 and 2010 reports were offered into evidence via a notice under Section 287.210, RSMo., as Exhibits 6 and 7.

Dr. Woodward opined that there are three factors contributing to the claimant's lumbar spine condition: (1) the 2005 work injury fall that led to L5 disk replacement surgery, (2) the 2004 work injury strain with L5 pain and radicular symptoms that led to the nucleoplasty procedure, and (3) chronic preexisting L5 disk degenerative disease prior to the 2004 work injury. He felt the claimant was at maximum medical improvement when he saw him and was in need of no new or additional testing or treatment as a result of his lumbar condition. He did believe Sage should continue on the medication he was taking at the time.

Dr. Woodward rated Sage's disability as 10% of the body for the 2005 injury, 5% of the body for the 2004 injury, and 4% of the body for preexisting disability. He believed the claimant was capable of performing full time work duties with modifications including continuous

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lift/push/pull 0-30 pounds and occasional bending and squatting. Dr. Woodward had a follow up visit with Sage on February 22, 2010 (Exhibit 7). In his report of that visit, Dr. Woodward noted that Sage displayed “ongoing lumbar symptom magnification findings on exam again today”. With regard to additional treatment the claimant had been seeking, Dr Woodward stated: “Any additional lumbar injection/radiofrequency procedures are not medical necessary directly related to the remote work related spine injury.”

Dr. Allen Parmet was the last of the physicians to evaluate the claimant. He is board certified in both occupational medicine and aerospace medicine. His deposition was received as Exhibit 3. Dr. Parmet evaluated Todd Sage on March 29, 2011. He noted on his examination of the claimant that there were multiple signs of symptom magnification. Dr. Parmet found that Sage had a disability of 8% of the body as a whole that existed prior to the December 2005 injury based on a history of long, ongoing low back problems. He rated Sage’s disability as 8% of the body as a whole for the December 2005 injury. It was Dr. Parmet’s assessment that the claimant had reached maximum medical improvement in January of 2007 when he was released by Dr. Harbach.

Dr. Parmet opined that the heavy work Sage did in the guttering and siding business after January 2007 was the proximate cause of the recurrence of back pain he had. Dr. Parmet consequently found that all the treatment the claimant received after he was released by Dr. Harbach (nine injections or ablations) was unrelated to any injury at Talbot, and was the result of his new work activity in the guttering business.

With regard to the issue of Sage’s employability, Dr. Parmet suggested that the claimant undergo a functional capacity evaluation (FCE), which was performed.

Dr. Parmet stated that the FCE results reflected two things: (1) the claimant self-limited his behavior meaning he was capable of more than he was willing to do in the testing and the results; and (2) Sage was able to work at the medium level of labor. He was asked, hypothetically, if the claimant were found to be permanently and totally disabled what the reason would be. His response was that it would require a combination of his longstanding back problems before 2004, his 2005 work injury, and his subsequent aggravation from his 2007 guttering business work.

The deposition of Wilbur Swearingin was the only vocational opinion received into evidence. Mr. Swearingin is a certified rehabilitation counselor who conducted an evaluation of the claimant on April 20, 2009. His opinion is that, based on Sage’s medical restrictions, chronic pain issues, and his past work experience, the claimant is not employable in the open labor market. Swearingin relied on the restrictions given by Dr. Koprivica in coming to his opinion. He conceded, however, that if you analyzed the issue based on Dr. Harbach’s restrictions (no repetitive heavy bending or lifting and no factory type work), Sage would be employable. Finally, I note that Swearingin gave his deposition before the claimant or the Second Injury Fund was provided with Dr. Woodward’s report by the employer/insurer and before claimant was evaluated by Dr. Parmet, and so Mr. Swearingin’s opinions were given without the benefit of Dr. Parmet’s or Dr. Woodward’s findings. I still find Mr. Swearingin’s opinions to be credible and persuasive.

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When asked if he had an opinion about to what he would attribute the claimant's inability to work (the last injury or a combination), Swearingin agreed that he had no opinion and would defer that issue to the physicians.

### **CONCLUSIONS OF LAW**

After hearing all the testimony and reviewing all the documentary evidence I reach the following conclusions on the issues presented.

The claimant's own testimony about the date of his alleged 2004 injury was somewhat vague as to the specific date it occurred. But upon reviewing the totality of the evidence, including contemporaneous medical records, I find that he did sustain an injury to his back on the job in early February 2004. I find credible the claimant's testimony that he sustained the injury while pulling on a roll of wire and that he notified his supervisor of the incident that same day. Therefore, I find that the claimant sustained an injury to his back that arose out of and in the course of his employment, and that proper notice of the injury was given to the employer.

### **PERMANENT TOTAL DISABILITY**

The claimant seeks a finding that he is permanently and totally disabled. As set out in Section 287.020.6, RSMo, "total disability as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident". The critical question that must be addressed is whether the claimant is competent to compete in the open labor market. See *Rector v. Gary's Heating & Cooling*, 293 S.W.3d 143 (Mo. App. 2009).

The Claimant had extensive medical treatment after his last surgery including epidural steroid injections, nerve root ablations and neurotomies. There were ten of these procedures designed for pain relief. Some of these procedures provided temporary relief but no long-term help. Dr. Koprivica did an Independent Medical Examination at the request of the Claimant. He testified and the medical records show that Claimant had a large right sided herniated disc at L5-S1 as a result of the February 2004 accident. After extensive medical care, Claimant continued to have limitations and, in the opinion of Dr. Koprivica, caused him to be permanently and totally disabled. Dr. Koprivica described the Claimant's condition as a "Failed Back Syndrome" with extensive diagnostic procedures and treatment for pain relief. He had severe low back pain and pain into the buttocks. Dr. Koprivica testified that the accident of February 2004 damaged the L5-S1 disc and caused the collapse of the disc space. This resulted in the change of structure of the L5-S1 disc space and adjacent structures including adjacent discs and facet joints and changes to the function of the back. (See Dr. Koprivica Deposition April 29, 2010 p. 36-37). Also Dr. Parmet, who did an Independent Medical Examination for the Employer/Insurer, corroborated this when he testified that in his opinion the pain is generated by facet joints which are primarily in the L5-S1 area of the spine, where the surgery was done and the disc replaced. (Parmet Deposition p. 70)

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Dr. Koprivica testified that considering the accident of February, 2004 alone, the Claimant would have limitations including occasional lifting or carrying of 20 pounds as a maximum, he should not frequently or constantly lift or carry, he should not lift at all from the floor level, he should only occasionally bend at the waist or push, pull or twist and should avoid awkward positions of the lumbar spine. He should avoid activities where jarring of the back or the whole body or vibration is likely, and he would need ability to change positions and to lie down at least every couple of hours for pain relief because of his failed back syndrome. The need to lie down is also contributed to by fatigue issues, from his lack of restorative sleep at night because of pain. If he exceeds these limitations his pain level will escalate, and he will require increased pain management with more narcotic pain medication and greater psychological dysfunction in response to the greater disabling pain (Koprivica Deposition April 29, 2010 p. 45-47). Dr. Koprivica also testified that the Claimant is not going to be able to sit and concentrate for a prolonged period of time and this limits the retraining options and eliminates hands on activity in the work place requiring long standing. The doctor was of the opinion that these limitations disabled Claimant from employment.

Wilbur Swearingin, a vocational specialist, testified that with these restrictions Claimant is unemployable in the competitive work force. The most severe limitation is the need to lie down periodically through the day for pain relief. Some of Claimant's disabilities could be accommodated; however, he believed it is unrealistic that an employer would accommodate this severe limitation. (Swearingin Deposition p. 28)

Dr. Parmet agreed that Claimant had significant medical problems that required extensive medical care after the disc replacement. He believed the medical care was necessary (Parmet Deposition p.82) but that it was caused by aging, tobacco, and the normal strain from Claimant's attempt to return to work in the guttering business. (Parmet Deposition p. 82). Dr. Parmet testified that he did not doubt the medical problems and complaints that Claimant reported but that he believed they were caused as described above, rather than the work related accident. (Parmet Deposition p. 82).

I had an opportunity to observe Claimant as he testified, and I find Dr. Koprivica's testimony that Mr. Sage must lie down through the day for pain relief to be credible. This limitation alone, according to Wilbur Swearingin, vocational expert, will disqualify Claimant from working in the competitive workforce. I find this testimony to be credible and determinative.

I have considered the testimony of Dr. Parmet who testified that it was his opinion that Mr. Sage could be employed operating a cash register or similar light duty or even medium duty jobs. For the reasons stated above, I find that this line of employment and similar employment would not be possible for Mr. Sage.

After weighing the credibility of the medical testimony and the testimony of Claimant and other witnesses, I find that Mr. Sage is permanently and totally disabled from participation in the competitive workforce.

Employee: Jonathan Sage

Injury No: 04-148860 & 05-127844

As a result of this finding I also conclude that no additional disability arose as a result of the 2005 injury.

### **LIABILITY FOR PERMANENT TOTAL DISABILITY**

The next issue is whether the permanent total disability is the responsibility of the Employer or the Second Injury Fund. Although, Mr. Sage did have some prior back complaints, he did not have an industrially disabling disability before the accident of February 2004. The issue is therefore whether the permanent total disability is the result of the combination of the two injuries that are the subject of these claims of February 2004 and December 2005 or whether it is the result of only one of the two accidents. It should be noted that the first accident was before the statutory change in the definition of accident effective in August 2005 (§287.020 RSMo) and the second accident was after that change.

Mr. Sage developed a large herniated disc as a result of the accident of February 2004. Claimant testified and the medical records show that he was offered the alternative of a surgical fusion or a nucleoplasty. In consultation with his doctors, he chose the nucleoplasty and after the nucleoplasty he got significant but temporary relief.

The second accident involving the fall was approximately six weeks after the nucleoplasty and Mr. Sage had almost immediate recurrence of the same symptoms that he had before the nucleoplasty. The second accident occurred after the statutory change in the definition of accident in August, 2005. It is clear that the first accident caused the large herniated disc. The symptoms of the herniated disc began almost immediately after the first accident and were diagnosed by MRI. The MRI following the second accident showed no change at the level of the first injury. With regard to the second accident, the issue is whether the fall was the prevailing factor in causing the recurrence of symptoms and resulting permanent total disability or was the first accident the prevailing factor.

Both Dr. Koprivica and Dr. Parmet, both of whom I find to be credible, testified that it was likely the nucleoplasty after the first accident would fail even without subsequent trauma. When Dr. Koprivica was asked about his experience with nucleoplasty, he testified as follows:

My experience has been that it's not - not successful. The procedure, when it's done, it's common that that fails in giving sustained relief. They may get temporary relief but not sustained relief. And then that leaves subsequently to a procedure for discogenic pain, that commonly is discectomy and fusion or disc replacement. (Koprivica Deposition April 29, 2010 p. 15).

Dr. Parmet had a similar opinion regarding nucleoplasty and when asked whether he thought nucleoplasty was appropriate he testified:

I have to say that my personal opinion based upon statistical analysis of a series of cases demonstrates that nucleoplasty has no long-term benefit. (Parmet Deposition p. 53 – 54).

Employee: Jonathan Sage

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When asked if this was particularly true with a large herniated disc such as the one Mr. Sage had, Dr. Parmet testified:

Yes, as I commented earlier on, I don't know why he would do a nucleoplasty for an extruded disk. Because the concept is to shrink the nucleus, that jelly-filled material. And you can shrink what's still attached. But the extruded fragment isn't going to be affected. So I was puzzled by the decision to do the nucleoplasty. (Parmet Deposition p. 54).

Dr. Parmet continued:

I known by analysis of a fairly large series of cases that 95% of the people do not have long-term benefits. (Parmet Deposition p. 54).

And when asked whether the lack of long-term benefit meant that the old symptoms would recur he testified:

That's correct. (Parmet Deposition p. 54).

When Dr. Parmet was asked whether Mr. Sage would have probably had a recurrence of his symptoms even if the second accident had not occurred, he testified:

There was a probability that he was going to have a recurrence if nothing intervened, but now we have this intervening event that's fairly major. (Parmet Deposition p. 75).

Dr. Koprivica testified regarding his opinions on nucleoplasty and referred to literature to support his opinion which was marked as Exhibit 4 and entered into evidence. Dr. Koprivica referenced a research article, included in Exhibit 4, which concluded that nucleoplasty was not an effective long-term treatment for lumbar radiculopathy. Dr. Koprivica also testified that Mr. Sage was particularly unsuited for the procedure because he had a large disc herniation, without an intact annulus, and he had a loss of disc height. Dr. Koprivica also testified that if you do a nucleoplasty and it fails:

Then the next step is discectomy and fusion or disc replacement. That's the approach." (Koprivica Deposition April 29, 2010 p. 42 - 44).

The deposition of both Dr. Koprivica and Dr. Parmet makes it clear that it was predictable that the ruptured disc caused by the first accident could not be repaired by the nucleoplasty. It was more likely than not that it would have failed and the symptoms would have recurred even if Mr. Sage had not had the second accident.

This opinion, upon which Dr. Koprivica and Dr. Parmet agree, is critical in deciding which accident was the prevailing factor in causing the permanent total disability. Both doctors testified that the symptoms were likely to recur, and Dr. Parmet even opined that the likelihood of recurrence was in the neighborhood of 95%.

Employee: Jonathan Sage

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This case is analogous to the case of *Gordon v. City of Ellisville*, 268 S.W.3d 454 (Mo App 2008). In the *Gordon* case, on October 21, 2005, the employee was climbing out of a tub grinder at work when he slipped and fell on his right arm with his arm extended. He was treated by an orthopedic surgeon who performed an MRI, initially read as a massive rotator cuff tear. The employee had a prior rotator cuff repair in 1993. The orthopedic surgeon did the rotator cuff surgery. The doctor testified he expected to see a re-tear of the claimant's previous rotator cuff repair from a 1993 injury, but instead found no evidence of acute changes. After the surgery, he concluded that claimant's work related accident was not the prevailing factor in causing the injury that required surgery and found that the work injury was a strain of the right shoulder that had no effect on the structure of the shoulder or the extent of permanent disability. The Commission found that there was no compensable injury and the claimant appealed. The Court of Appeals noted the changes to §287.020 RSMo effective in 2005 and affirmed the finding of the Commission that the work accident of 2005 was not the prevailing factor in causing the shoulder disability. The Appellate Court noted that even though the fall caused a strain and inflammation of the shoulder, it was not the prevailing factor in the need for surgery and the permanent disability.

The case at bar is also closely analogous to *Johnson v. Indiana Western Express, Inc.*, 281 S.W.3d 885 (Mo S.D. 2009). In this case, the employee alleged an injury in February, 2006. The Claimant had an injury and disability prior to the February, 2006 incident, and the new incident was not the prevailing factor in causing the injury. The evidence showed that the Claimant was treated for the preexisting injury in 2004 when he received epidural steroid injections for pain and underwent a two level disc resection in April, 2005 at the L4-5 and L5-S1 levels. The Claimant was last seen by a doctor in June, 2005, before his February, 2006 accident. Benefits were denied based in large part on the testimony of Dr. Jeffrey MacMillan who examined Claimant prior to the hearing. Dr. MacMillan was of the opinion that Claimant's medical condition and need for ongoing treatment was not related to the February, 2006 incident. He found no evidence that Claimant ever recovered from the August, 2004 injury, or that Claimant suffered a new injury. Dr. MacMillan found that the MRI performed in 2004 and the MRI performed after the 2006 accident did not support that further injury had occurred. Dr. MacMillan explained, "So you have MRIs bracketing the alleged injury but there's really no significant change between those two studies. So, on the second study there is no evidence of a new injury and, typically, there has to be some objective evidence that something happened or something changed."

The *Gordon* and *Johnson* cases are dispositive. Specifically, Claimant had a preexisting injury in which he suffered a large herniated disc. He was initially treated with a nucleoplasty, and both Dr. Koprivica and Dr. Parmet agreed that the procedure would not provide long term relief. Dr. Parmet, who testified on behalf of Employer, stated: "I know by analysis of a fairly large series of case that 95% of the people do not have long term benefits." The second accident of December 16, 2005 caused a fracture of the L2, L3 spinal processes of, and the records of Dr. Park at Occumed show that he recovered from this injury by February 15, 2006. The balance of the problems, that causes Claimant's long-term disability, is associated with the February, 2004 L5-S1 injury. Dr. Koprivica testified that after the second fall, there was no change in the L5-S1

Employee: Jonathan Sage

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disc space: "I don't see any new injury at the L5-S1 motion segment." (Koprivica Deposition April 29, 2010 p. 21). Later in his testimony, Dr. Koprivica continues his testimony:

I do not believe that that subsequent fall, in December of 2005, caused any substantial change at L5-S1. It's the February, 2004 injury that has precipitated the development of discogenic - the disc herniation, the discogenic pain, and all the surgeries that have failed in relieving the pain at the L5-S1 motion segment. (Koprivica Deposition April 29, 2010 p. 38)

...

Now the - the real issue in this case, as I look at it, was: What about L5-S1. If you look at the MRI scan that's done after - the CT and the MRI afterwards, the L5-S1 disc space, there's not a significant change . . . (Koprivica Deposition April 29, 2010 at p. 39-40).

The Doctor further stated:

The fall, in my opinion, is inconsequential about the progression of the disability at the L5-S1 level. (Koprivica Deposition April 29, 2010 p. 41).

These facts form a close analogy to the *Gordon* and Johnson cases in which a second injury causes a recurrence of symptoms but without an identifiable injury. The logic in the case at bar is even more compelling. In the *Gordon* case, the employee returned to work without difficulty for several years before his second injury. In the case at bar, Claimant returned to work for only approximately six weeks before his second accident and recurrence of symptoms which, according to Dr. Parmet and Dr. Koprivica, were likely to recur even in the absence of trauma.

Based upon the testimony of these doctors, I find that the first accident of February, 2004 was the prevailing factor in causing the permanent total disability. Therefore I find the employer/insurer liable for payment of these benefits.

### **PAST MEDICAL EXPENSE**

Claimant requests reimbursement for past medical expense. The testimony shows that during three separate time intervals, Claimant provided for his own medical care. For each interval Claimant, or Claimant's attorney requested the care, and care was denied. The medical bill summaries for each of the three time periods are attached.

I find that the medical services as requested in Exhibit CC were necessary to treat the Claimant for injuries suffered in the accident of February 2004 and that the charges are reasonable. Applying the law that Claimant cannot recover for charges that were adjusted, not paid, or no longer due, I find that Claimant is entitled to compensation for past medical expenses and order the employer/insurer to reimburse the claimant for those medical bills as follows:

Employee: Jonathan Sage	Injury No: 04-148860 & 05-127844
February 2004 – June 28, 2004	\$970.78 <sup>1</sup>
June 2007 – May 2008	\$4,232.64
September 2008 – February 1, 2012 (Excludes payments made by Medicare of \$382.26)	\$6,006.03
	<b>TOTAL \$11,209.45</b>

**PAST MILEAGE**

Claimant also claims a right for unpaid mileage for travel to necessary medical care as shown on Claimant’s Exhibit AA. I find that Claimant is entitled to mileage reimbursement in the amount of \$1,318.94.

**PAST TTD and PTD DUE**

Claimant also claims past temporary total disability benefits. I find that Claimant has been disabled from December 31, 2005 until the present and that Claimant is permanently and totally disabled. TTD payments were made by Employer from December 31, 2005 through June 29, 2006 and for a second period from July 28, 2006 through January 10, 2007. I find that Claimant reached maximum medical improvement on September 4, 2008. (Koprivica Deposition April 29, 2010 p. 48). I, therefore, find that past temporary total disability benefits are due as follows:

June 30, 2006 – July 27, 2006 3 6/7 weeks @ \$527.42	\$ 2,043.75
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I find that this is a period during which the claimant was being actively treated for the compensable December 2005 injury. The medical records seem to indicate the claimant may have been released to modified duty with restrictions during this time period. But there is no evidence that the employer provided the claimant with work within the pertinent restrictions. So I find Todd Sage is entitled to past temporary total disability benefits of \$2043.75 for the period June 30, 2006-July 27, 2006.

July 7, 2007 – September 4, 2008 60.43 weeks @ \$527.42	\$31,871.94
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In regard to the period of requested temporary total disability from January 11, 2007 through September 4, 2008, I find the following: The records of the authorized surgeon, Dr. Harbach, reflect that he released Sage from his care and pronounced him at maximum medical improvement on January 10, 2007. Dr. Harbach released Sage to return to “full duty” though he gave restrictions of avoiding repetitive heavy bending or lifting or factory type work. The claimant’s testimony was that he then began working in the guttering business with his cousin on February 2, 2007. There is no evidence that Sage was taken off work between when Dr. Harbach

<sup>1</sup> The total medical bills were \$9,796.00 before discounts and adjustments. Claimant's medical insurance through his employment paid the bulk of these bills. The insurance carrier has waived its right to reimbursement, therefore, no award is made for this amount. The award includes only out of pocket payments by Claimant.

Employee: Jonathan Sage

Injury No: 04-148860 & 05-127844

released him and the date he started working with his cousin. The testimony from the claimant and his cousin was that Sage continued working in the guttering business until July 7, 2007. So the claimant is clearly not entitled to temporary total disability benefits from January 11, 2007, through July 7, 2007, since he was released to work, and spent the vast majority of that period working. I find Sage is not entitled to temporary total disability benefits from January 11, 2007, through July 7, 2007.

The question then is whether Sage would be entitled to TTD for any period after July 7, 2007. The evidence which I find most compelling is that even though the claimant attempted to work for approximately five months after being released by Dr. Harbach, two doctors believed he had not reached maximum medical improvement and but for this brief attempt at employment claimant was temporarily and totally disabled up to 2008. Therefore, claimant is entitled to temporary total disability from July 7, 2007, to September 4, 2008, for a period of 60.43 weeks of temporary total disability for this period for a total of \$31,871.99.

I further find that past weekly benefits for permanent total disability are past due from: September 5, 2008 through February 2, 2012 (the date of the hearing).

178 weeks @ \$527.42

\$93,880.76

Claimant is further entitled to a benefit of \$527.42 per week from the employer/insurer as permanent total disability in accordance with the Missouri Worker's Compensation Law.

### **FUTURE MEDICAL CARE**

I find that Claimant will need future medical care to treat the injuries from the February, 2004 accident. Dr. Koprivica testified that Claimant will need chronic pain management, to include a pain specialist who is well versed in dealing with chronic pain issues, including medication management and psychological responses to chronic pain. (Koprivica Deposition April 29, 2010 p. 49 – 50).

### **RIGHTS OF DEPENDENT WIFE**

Lynn Sage, the wife of Employee, has intervened and filed a request for benefits pursuant to the holding in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo 2007) (DECIDED January 9, 2007), that a dependent of an employee is entitled to permanent total disability benefits in the event of the death of the employee from causes unrelated to the injury. The Missouri legislature abrogated the holding in the *Schoemehl* case by §287.230.3 RSMo which became effective June 26, 2008. The Court's have held that the abrogation is not retroactive but will apply only to claims initiated after the effective date of the Amendment. See *Bennett v. Treasurer of State*, 271 S.W.3d 49, 53 (Mo App W.D. 2008). Thus, recovery under *Schoemehl* is limited to claims for permanent total disability benefits that were pending between January 9, 2007, the date of the Supreme Court decision in *Schoemehl*, and June 26, 2008, the effective date of the Amendment to §287.230.3. The original claim by the Employee was filed on March 26, 2007 and the Amended Claim joining the wife was filed on April 17, 2009. Thus, the original claim was pending between January 9, 2007 and June 26, 2008. The case of *Gervich*

Employee: Jonathan Sage

Injury No: 04-148860 & 05-127844

*v. Condaire, Inc.*, 2011 WL 794996 (Missouri Eastern District) held that the rights of the employee's spouse:

. . . as a dependent vested on the date that her husband suffered his work related injury. Mr. Gervich's workers' compensation claim was pending when our Supreme Court decided *Schoemehl*. Thus, the 2008 statutory amendments abrogating *Schoemehl* do not apply to Mrs. Gervich . . .

The case was ordered transferred to the Missouri Supreme Court on June 28, 2011 and remains pending. I find that the opinion of the Appellate Court in Gervich is well reasoned. The evidence shows that Lynne Sage was married to the Employee at the time of the injury and that she was a dependent of the Employee. I therefore find that in the event of death of Claimant, Jonathan Todd Sage, that Lynne Sage shall be entitled to the benefits for permanent total disability until her death.

### SUMMARY FINDINGS AND CONCLUSIONS

Based on the substantial and competent evidence presented, I make the following findings and awards with regard to the accident in February, 2004:

1. That the accident of this date is the prevailing factor in causing the injury of the herniated disc at L5-S1 and that Claimant is permanently and totally disabled by reason of the accident. I find that Claimant reached maximum medical improvement on September 4, 2008 and that weekly benefits for permanent total disability are past due from that date through the date of the hearing, February 2, 2012 consisting of 178 at a rate of \$527.42 for a total of \$93,880.76 and that a weekly payment in this amount is due from that date forward for permanent total disability.
2. Temporary total disability benefits are due for the periods described above totaling \$35,959.49.
3. Past medical is due in the amount of \$11,209.45.
4. Mileage for travel to and from necessary medical care is due in the amount of \$1,318.94.
5. I order that future medical care will be paid in accordance with the medical opinion of Dr. Brent Koprivica.
6. In the event of the death of the claimant, claimant's wife Lynn Sage shall be entitled to the benefits of permanent total disability until her death.

With respect to the accident of December 16, 2005 I find that Claimant sustained no additional permanent disability as I determined him to be permanently and totally disabled from the prior 2004 injury.

Employee: Jonathan Sage

Injury No: 04-148860 & 05-127844

I order payments made in accordance with the award and I order that attorney's fees incurred by attorney, Charles Buchanan, will be paid in the amount of 25% of all benefits awarded herein.

Date: 9-19-12

Made by: /s/ Karen Wells Fisher

Karen Wells Fisher  
*Administrative Law Judge*  
*Division of Workers' Compensation*

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

Injury No.: 05-127844

Employee: Jonathan Sage  
Employer: Talbot Industries  
Insurer: Fidelity & Guaranty Insurance Company  
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 briefs, 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.

The award and decision of Administrative Law Judge Karen Wells Fisher, issued September 19, 2012, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 9<sup>th</sup> day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Jonathan Sage Injury No : 04-148860 & 05-127844  
Dependents: N/A  
Employer: Talbot Industries  
Additional Party: Second Injury Fund  
Insurer:  
Hearing Date: February 2, 2012 Checked by:

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

### FINDINGS OF FACT AND CONCLUSIONS 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: FEBRUARY 2004 AND DECEMBER 16, 2005
5. State location where accident occurred or occupational disease was contracted: NEWTON COUNTY, MO
6. Was the above employee in employ of above employer at the 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 insured? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted.  
PULLING WIRE PULLED HIS BACK ; FELL FOUR FEET INTO A PIT AND LANDED ON HIS BACK ON A BEAM
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease BACK AND BODY AS A WHOLE
14. Nature and extent of any permanent partial disability: N/A
15. Compensation paid to date for temporary disability : 2004 case -- \$0.00  
2005 case -- \$27,301.93
16. Value of necessary medical aid paid to date by employer/insurer? 2004 case -- \$16,322.53  
2005 case -- \$95,782.98
17. Value of necessary medical aid not furnished by employer/insurer? \$11,209.45

Employee: Jonathan Sage

Injury No: 04-148860 & 05-127844

18. Employee's average weekly wages: 2004 case -- \$791.13  
2005 case -- \$794.10
19. Weekly compensation rate: 2004 case -- \$527.42 / \$347.05  
2005 case -- 529.40 / \$365.08
20. Method of wage computation: STATUTORY

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$11,209.45

weeks of temporary total disability (or temporary partial disability)

N/A weeks of permanent partial disability from Employer

N/A weeks of disfigurement from Employer

22. Second Injury Fund liability: NONE

TOTAL:

23. Future requirements awarded: PERMANENT TOTAL DISABILITY

Said payments to begin SEPTEMBER 5, 2008 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 PERCENT of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

CHARLES BUCHANAN

Employee: Jonathan Sage

Injury No: 04-148860 & 05-127844

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

Employee: Jonathan Sage

Injury No : 04-148860 & 05-127844

Dependents: N/A

Employer: Talbot Industries

Additional Party: Second Injury Fund

Insurer:

Hearing Date: February 2, 2012

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by:

## **AWARD**

The above cases were presented for final hearing on February 2, 2012. The claimant, Jonathan Todd Sage, appeared in person and by his attorney, Charles Buchanan. The employer and insurer appeared by their attorney, Ronald G. Sparlin. The Second Injury Fund appeared by Assistant Attorney General Todd T. Smith.

## **STIPULATIONS**

The parties narrowed the issues presented for determination by stipulating to the following facts:

- Talbot Industries was an employer under the workers' compensation law at the time of both alleged accidents;
- The claimant was an employee of Talbot Industries on both alleged dates of injury;
- Both of claimant's alleged accidents occurred in Newton County, Missouri;
- On December 16, 2005 the claimant sustained an accident arising out of and in the course of his employment;
- The claimant gave proper notice for the alleged 2005 injury;
- Both claims for compensation were timely filed;
- For the 2004 claim the temporary total disability/permanent total disability rate is \$527.42 and the permanent partial disability rate is \$347.05;
- For the 2005 claim the temporary total disability/permanent total disability rate is \$529.40 and the permanent partial disability rate is \$365.08;
- The employer paid medical expenses on the 2004 case of \$16,322.53 and \$0 in temporary benefits;
- The employer paid medical expenses on the 2005 case of \$95,782.98 and \$27,301.93 in temporary benefits.

Employee: Jonathan Sage

Injury No: 04-148860 & 05-127844

### ISSUES

The issues to be determined were as follows:

- Whether, regarding the 2004 claim, the claimant sustained an injury by accident arising out of and in the course of his employment;
- Whether, regarding the 2004 claim, the claimant gave the employer notice as required by the statute;
- Whether the 2004 and/or 2005 alleged claims caused the injuries and medical conditions complained of;
- Whether the employer is liable for certain past medical expenses;
- Whether the claimant is entitled to past temporary total disability benefits;
- The nature and extent of any permanent partial disability sustained as a result of the 2004 and 2005 claims;
- Whether the claimant is permanently and totally disabled, and if he is, whether that results from the last injury alone or a combination of the last injury and prior disabilities;
- Whether the claimant is entitled to future medical treatment;
- The liability of the Second Injury Fund;
- The entitlement of claimant's spouse to benefits under the provisions of the *Schoemehl* decision.

### EVIDENCE PRESENTED

Claimant offered the following exhibits at trial which were admitted into evidence. Claimant also testified on his own behalf and called the following witnesses to testify: Eric Thurmond, Ron Bowen, Jared Sage, Toney Sage, Barry Bowen, Lynn Sage.

Exhibit A	Claims for Compensation
Exhibit B1	4/29/10 deposition of Dr. Koprivica
Exhibit B2	11/21/11 deposition of Dr. Koprivica
Exhibit C	Wilbur Swearingin deposition
Exhibit D	Dr. Parmet deposition
Exhibit E	Dr. Paul deposition
Exhibit F	Dr. Adams records
Exhibit G	Dr. Karges records
Exhibit H	Dr. Lampert records
Exhibit I	Freeman Health System (Joplin) records

Employee: Jonathan Sage Injury No: 04-148860 & 05-127844

Exhibit J Freeman Health System (Neosho) records  
Exhibit K Freeman Health System (Occumed) records  
Exhibit L Dr. Harbach records  
Exhibit M Dr. Ipsen records  
Exhibit N Dr. Karshner records  
Exhibit O Dr. Knudsen records  
Exhibit P Missouri Vocational Rehabilitation records  
Exhibit Q St. John's Health Center records  
Exhibit R Dr. Yarosh records  
Exhibit S Correspondence to Ron Sparlin requesting medical care  
Exhibit T QucikMeds Pharmacy records  
Exhibit U Vocational Rehabilitation records  
Exhibit V Lakes County Resource Center records  
Exhibit W Bill Summary June 2007 -- May 2008  
Exhibit X Bill Summary September 2008 – February 1, 2012  
Exhibit Y Time Line  
Exhibit Z Time Line backup  
Exhibit AA Travel expenses  
Exhibit BB Conditional payment letter  
Exhibit CC Request for benefits  
Exhibit DD Itemized bill summary 2004

Claimant identified Exhibit CC as the itemization of benefits he is seeking. It includes \$2043.75 in past TTD for the period June 30, 2006-July 27, 2006; \$45,207.28 in past TTD for the period January 11, 2007-September 4, 2008; past permanent total disability benefits of \$93,202.50 from the date of the hearing back to September 5, 2008; past medical bills of \$11,591.71; open future medical treatment; and future permanent total disability benefits.

Employer/insurer offered the following exhibits at trial which were admitted into evidence.

Exhibit 1 Answer 04-148860  
Exhibit 2 Answer 05-127844  
Exhibit 3 Dr. Parmet deposition  
Exhibit 4 Dr. Parmet Notice of Intent 6/28/11  
Exhibit 5 Dr. Parmet Notice of Intent 3/30/11 and 6/8/11  
Exhibit 6 Dr. Woodward Notice of Intent 7/2/09  
Exhibit 7 Dr. Woodward Notice of Intent 2/22/10  
Exhibit 8 Work Evaluation and Ergonomic Records  
Exhibit 9 Dr. Harbach Notice of Intent 1/10/07  
Exhibit 10 Dr. Paul deposition

Second Injury Fund offered the following exhibits at trial which were admitted into evidence.

Exhibit I Jonathan Sage deposition 1/29/08  
Exhibit II Jonathan Sage deposition 5/22/09

Employee: Jonathan Sage

Injury No: 04-148860 & 05-127844

## FINDINGS OF FACT

Jonathan Todd Sage is 47 years of age and has been married to Lynn Sage for 20 years. They have two children, ages 15 and 18. Sage has a high school diploma and completed a couple of semesters of college. The claimant began his employment at Talbot Industries in March of 1987. For the most part, Sage worked on a wiredrawing machine, which would draw wire down to a smaller diameter.

Sage cannot recall the specific date of his first injury. He recalls first seeking medical care with his personal physician, Dr. Adams, on February 11, 2004. He thinks the injury occurred about a week earlier. Sage was pulling ½ inch wire and bending the “tail” of the wire when he felt a pop in his back. He immediately had pain in his back and down his buttock cheek. Sage told his supervisor of the incident, but also said “let’s wait a week and see” about any need to seek medical care.

The claimant testified that, other than strains, he had never had problems with his back in the past.

Sage’s symptoms worsened over the next week, and when he related that to his supervisor, Sage described him as “hesitant”. So the claimant went ahead and sought care on his own with his personal doctor. After a few visits to Dr. Adams, Sage was referred to Dr. Yarosh, a neurosurgeon in Joplin. She sent the claimant on to Dr. Knudsen who performed epidural injections. By June of 2004 the workers’ compensation carrier began authorizing treatment, which included further referrals and epidural injections. Sage’s symptoms included low back pain and radiating pain down the right leg.

By the summer of 2005 there were two options presented to Sage—a fusion in his low back or a less invasive procedure, called a nucleoplasty. Sage opted for the nucleoplasty, performed in October 2005, which he described as the doctor “sucking some of the fluid out of the ruptured disc”. It was an outpatient procedure and Sage was able to return quickly to work. The claimant testified that he got benefit from the procedure and afterward was doing “pretty good”. Throughout his treatment following the 2004 injury, Sage continued working his normal job at Talbot, though he was on light duty a couple of times.

After the nucleoplasty, Sage continued working at Talbot though his duties changed to maintenance, because part of the plant was being closed down. He received no further treatment until after his second accident six weeks later. He admitted he was more careful with how he performed his work. He did have “occasional” symptoms with his back. Sage sustained his second accident on December 16, 2005, while performing maintenance duties. The claimant was injured when he fell four feet into a pit, landing on his back on the center of a beam. He sustained two fractured spinal processes but also had a return of the pain he’d had with the 2004 accident, but it was now “magnified”. Sage admitted the pain after the 2005 accident was noticeably worse and different than with the 2004 injury.

Sage continued to work for another couple of weeks until the plant closed. He underwent further diagnostics and conservative care. Ultimately, Sage was presented with options of either

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a fusion or a disk replacement. The claimant chose to pursue a disk replacement, but no Joplin doctors were performing them, so he sought the opinion of Dr. Harbach in Springfield. Dr. Harbach ultimately performed the disk replacement on October 12, 2006. Sage felt the surgery went well as the pain in his back was lessened and the pain down his leg was gone.

In June 2006 Sage opened a case with the Division of Vocational Rehabilitation with the goal of getting back to work due to the plant closing and his physical limitations. He was initially interested in a career as an x-ray tech or lab tech, but then an opportunity came along to go into business with his cousin, Tony Sage. In February 2007, the claimant and his cousin started Sage Exteriors, a guttering and vinyl siding business. The business started slowly, but soon built up customers and jobs. Initially, Sage would work only 2-6 hours a day, but became basically full time as they built up customers. Sage denied ever injuring himself in the new business, but testified that the longer he worked the greater pain he developed. He began having trouble sleeping and had to take additional pain medication.

In July of 2007, Sage quit working with Sage Exteriors. He continued working with the Department of Vocational Rehabilitation and Alternative Opportunities to find other employment. He filled out some applications and made inquiries, but also continued getting medical care. He underwent a series of injections with Dr. Lampert as well as injections with Dr. Knudsen, all of which provided some relief.

Following his disk replacement, Sage was released by Dr. Harbach in January 2007 with no restrictions, but with a strong recommendation to go into other areas of work where he does not have to do repetitive, heavy bending or lifting or factory-type work. It was at that point that the claimant went into the guttering and siding business with his cousin. Upon further questioning, Sage admitted that he was involved in all aspects of the business including measuring houses, unloading parts and equipment, measuring and cutting siding and guttering, screwing on the guttering, and climbing up and down ladders. The claimant was paid on an hourly basis for the five months he worked in the business.

When Sage returned to Dr. Harbach in October 2007, the doctor noted that his pain had “tremendously resolved,” but that the claimant now had low back pain “that is different but still present status post total disc arthroplasty at L5-S1.” Dr. Harbach then recommended he go to a pain clinic to go through a workup for a pain generator and then possibly to physiatry for chronic pain management and treatment of muscle pain as well as facet blocks at the level of the disc replacement as well as other levels above.

Sage lives on a 15 acre tract of land and has additional land leased for cows. The claimant’s son “pretty much” takes care of all the livestock. Typically, Sage does little throughout the day though he tries to be as active as possible. On good days he is able “be normal”, and can walk, stand and bend. He takes daily medication including effexor, baclofen, tramadol, and tizadine, and hydrocodone.

Sage does not believe he can work because of his pain, lack of sleep, and lack of endurance. He feels he has developed psychological problems since he can’t do what he used to or provide for his family.

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Eric Thurmond is a neighbor of the claimant and has known him for 20 years. Thurmond described cutting hay with Sage before 2004 observing him to be mechanically inclined and able to weld and do home repairs. He noticed a change in Sage thereafter—when he goes by Sage's house he is usually inside being very inactive. The claimant will occasionally drive his tractor to Thurmond's place if help is needed.

Ron Bowen is Todd Sage's father in law and has been in close contact with the claimant for many years. He has noticed changes in Todd since his injury, particular that he is far less active than he used to be.

Jared Sage is the claimant's son and is 18 years old. He is a student at Crowder College in Neosho. The claimant's son described the various activities he would engage in with his father before February 2004. He described his father as far less active now since his injury. Jared does all of the work in taking care of the cattle and cutting wood to burn in the Sage home.

Tony Sage is the claimant's cousin. He described the claimant as being physically active before he was hurt at Talbot. Todd Sage went to work with Tony in the guttering and siding business because he thought the work would be physically light enough for him. Tony described the job as requiring the claimant to perform tasks such as rolling out the guttering, moving ladders and equipment, and climbing ladders. The two were the only employees of Sage Exteriors so they had to perform every aspect of each job. The witness remembered that his cousin was able to hold his own at first but as they got busier and put in more hours, the claimant began having trouble. It was ultimately the claimant's decision to quit, he was not fired. Tony had to hire another employee full time to replace what the claimant was doing.

Barry Bowen is Todd Sage's brother in law and has known him since high school. Bowen testified about the difference he has seen in the claimant's level of activity since his injury at Talbot. Bowen described remodeling the bathroom at the claimant's home. The claimant did not participate in any of the work.

Lynn Sage is the claimant's wife of twenty years. They have two children, ages 18 and 15. She likewise described the decrease in her husband's activity level after his 2004 accident at Talbot.

I found the testimony of these witnesses to be credible and persuasive.

The parties offered the depositions and/or reports of various medical experts. That included opinions from Dr. Harbach, Dr. Koprivica, Dr. Paul, Dr. Woodward, and Dr. Parmet.

Dr. Todd J. Harbach is the spine surgeon who performed Todd Sage's disk replacement surgery. He issued a report on January 10, 2007 (Exhibit 9) in which he stated that the claimant had reached maximum medical improvement and was released from his care. He also rated Sage's disability as 8% of the body as a whole.

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Dr. Koprivica was retained by the claimant for purposes of an independent medical evaluation, which was in October 2009. Dr. Koprivica's opinions were introduced via two depositions (Exhibits B1 and B2). Dr. Koprivica's diagnosis is failed back syndrome following a disk arthroplasty at the L5-S1 level, and he attributes that to the February of 2004 injury. He felt that Sage additionally suffered transverse process fractures at L2 and L3 from the December 2005 injury. It is Dr. Koprivica's opinion that February 2004 accident was the prevailing factor in causing the claimant's herniated disk, his surgeries, and discogenic pain at L5-S1. He believes that Sage is permanently and totally disabled due to the February 2004 injury in isolation, though he found 10% of the body as a whole disability from the December 2005 injury. In Dr. Koprivica's opinion, MMI for the 2004 injury was not reached until sometime in the summer of 2008. He suggested that future treatment would be needed in terms of at least chronic pain management.

When cross-examined, Dr. Koprivica agreed that the claimant's medical records reflected a history of chronic low back pain prior to February 2004, even though the doctor rated no prior disability. He also felt that, before the December 2005 injury occurred, Sage would have had 20-25% of the body disability from the 2004 injury. Finally, Dr. Koprivica opined that if the claimant was not found to be permanently and totally disabled from the 2004 injury alone, then he believed he was permanently and totally disabled from a combination of the 2004 and 2005 injuries.

Dr. Robert Paul performed an independent medical evaluation of the claimant at the request of his attorney on November 11, 2008. Portions of the deposition of Dr. Paul were offered by both the employee and the employer/insurer. (Exhibits E and 10)

Dr. Paul rated Mr. Sage as having permanent partial disability from the 2004 injury of 15% of the body as a whole. He found an additional disability of 20% of the body as a whole as a result of the December 2005 injury. But he ultimately believed that the claimant is permanently and totally disabled due to the combined effects of the December 2005 injury and his prior disabilities.

On behalf of employer Dr. Jeffrey Woodward performed an independent medical evaluation of the claimant on July 2, 2009. His 2009 and 2010 reports were offered into evidence via a notice under Section 287.210, RSMo., as Exhibits 6 and 7.

Dr. Woodward opined that there are three factors contributing to the claimant's lumbar spine condition: (1) the 2005 work injury fall that led to L5 disk replacement surgery, (2) the 2004 work injury strain with L5 pain and radicular symptoms that led to the nucleoplasty procedure, and (3) chronic preexisting L5 disk degenerative disease prior to the 2004 work injury. He felt the claimant was at maximum medical improvement when he saw him and was in need of no new or additional testing or treatment as a result of his lumbar condition. He did believe Sage should continue on the medication he was taking at the time.

Dr. Woodward rated Sage's disability as 10% of the body for the 2005 injury, 5% of the body for the 2004 injury, and 4% of the body for preexisting disability. He believed the claimant was capable of performing full time work duties with modifications including continuous

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lift/push/pull 0-30 pounds and occasional bending and squatting. Dr. Woodward had a follow up visit with Sage on February 22, 2010 (Exhibit 7). In his report of that visit, Dr. Woodward noted that Sage displayed “ongoing lumbar symptom magnification findings on exam again today”. With regard to additional treatment the claimant had been seeking, Dr Woodward stated: “Any additional lumbar injection/radiofrequency procedures are not medical necessary directly related to the remote work related spine injury.”

Dr. Allen Parmet was the last of the physicians to evaluate the claimant. He is board certified in both occupational medicine and aerospace medicine. His deposition was received as Exhibit 3. Dr. Parmet evaluated Todd Sage on March 29, 2011. He noted on his examination of the claimant that there were multiple signs of symptom magnification. Dr. Parmet found that Sage had a disability of 8% of the body as a whole that existed prior to the December 2005 injury based on a history of long, ongoing low back problems. He rated Sage’s disability as 8% of the body as a whole for the December 2005 injury. It was Dr. Parmet’s assessment that the claimant had reached maximum medical improvement in January of 2007 when he was released by Dr. Harbach.

Dr. Parmet opined that the heavy work Sage did in the guttering and siding business after January 2007 was the proximate cause of the recurrence of back pain he had. Dr. Parmet consequently found that all the treatment the claimant received after he was released by Dr. Harbach (nine injections or ablations) was unrelated to any injury at Talbot, and was the result of his new work activity in the guttering business.

With regard to the issue of Sage’s employability, Dr. Parmet suggested that the claimant undergo a functional capacity evaluation (FCE), which was performed.

Dr. Parmet stated that the FCE results reflected two things: (1) the claimant self-limited his behavior meaning he was capable of more than he was willing to do in the testing and the results; and (2) Sage was able to work at the medium level of labor. He was asked, hypothetically, if the claimant were found to be permanently and totally disabled what the reason would be. His response was that it would require a combination of his longstanding back problems before 2004, his 2005 work injury, and his subsequent aggravation from his 2007 guttering business work.

The deposition of Wilbur Swearingin was the only vocational opinion received into evidence. Mr. Swearingin is a certified rehabilitation counselor who conducted an evaluation of the claimant on April 20, 2009. His opinion is that, based on Sage’s medical restrictions, chronic pain issues, and his past work experience, the claimant is not employable in the open labor market. Swearingin relied on the restrictions given by Dr. Koprivica in coming to his opinion. He conceded, however, that if you analyzed the issue based on Dr. Harbach’s restrictions (no repetitive heavy bending or lifting and no factory type work), Sage would be employable. Finally, I note that Swearingin gave his deposition before the claimant or the Second Injury Fund was provided with Dr. Woodward’s report by the employer/insurer and before claimant was evaluated by Dr. Parmet, and so Mr. Swearingin’s opinions were given without the benefit of Dr. Parmet’s or Dr. Woodward’s findings. I still find Mr. Swearingin’s opinions to be credible and persuasive.

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When asked if he had an opinion about to what he would attribute the claimant's inability to work (the last injury or a combination), Swearingin agreed that he had no opinion and would defer that issue to the physicians.

### **CONCLUSIONS OF LAW**

After hearing all the testimony and reviewing all the documentary evidence I reach the following conclusions on the issues presented.

The claimant's own testimony about the date of his alleged 2004 injury was somewhat vague as to the specific date it occurred. But upon reviewing the totality of the evidence, including contemporaneous medical records, I find that he did sustain an injury to his back on the job in early February 2004. I find credible the claimant's testimony that he sustained the injury while pulling on a roll of wire and that he notified his supervisor of the incident that same day. Therefore, I find that the claimant sustained an injury to his back that arose out of and in the course of his employment, and that proper notice of the injury was given to the employer.

### **PERMANENT TOTAL DISABILITY**

The claimant seeks a finding that he is permanently and totally disabled. As set out in Section 287.020.6, RSMo, "total disability as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident". The critical question that must be addressed is whether the claimant is competent to compete in the open labor market. See *Rector v. Gary's Heating & Cooling*, 293 S.W.3d 143 (Mo. App. 2009).

The Claimant had extensive medical treatment after his last surgery including epidural steroid injections, nerve root ablations and neurotomies. There were ten of these procedures designed for pain relief. Some of these procedures provided temporary relief but no long-term help. Dr. Koprivica did an Independent Medical Examination at the request of the Claimant. He testified and the medical records show that Claimant had a large right sided herniated disc at L5-S1 as a result of the February 2004 accident. After extensive medical care, Claimant continued to have limitations and, in the opinion of Dr. Koprivica, caused him to be permanently and totally disabled. Dr. Koprivica described the Claimant's condition as a "Failed Back Syndrome" with extensive diagnostic procedures and treatment for pain relief. He had severe low back pain and pain into the buttocks. Dr. Koprivica testified that the accident of February 2004 damaged the L5-S1 disc and caused the collapse of the disc space. This resulted in the change of structure of the L5-S1 disc space and adjacent structures including adjacent discs and facet joints and changes to the function of the back. (See Dr. Koprivica Deposition April 29, 2010 p. 36-37). Also Dr. Parmet, who did an Independent Medical Examination for the Employer/Insurer, corroborated this when he testified that in his opinion the pain is generated by facet joints which are primarily in the L5-S1 area of the spine, where the surgery was done and the disc replaced. (Parmet Deposition p. 70)

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Dr. Koprivica testified that considering the accident of February, 2004 alone, the Claimant would have limitations including occasional lifting or carrying of 20 pounds as a maximum, he should not frequently or constantly lift or carry, he should not lift at all from the floor level, he should only occasionally bend at the waist or push, pull or twist and should avoid awkward positions of the lumbar spine. He should avoid activities where jarring of the back or the whole body or vibration is likely, and he would need ability to change positions and to lie down at least every couple of hours for pain relief because of his failed back syndrome. The need to lie down is also contributed to by fatigue issues, from his lack of restorative sleep at night because of pain. If he exceeds these limitations his pain level will escalate, and he will require increased pain management with more narcotic pain medication and greater psychological dysfunction in response to the greater disabling pain (Koprivica Deposition April 29, 2010 p. 45-47). Dr. Koprivica also testified that the Claimant is not going to be able to sit and concentrate for a prolonged period of time and this limits the retraining options and eliminates hands on activity in the work place requiring long standing. The doctor was of the opinion that these limitations disabled Claimant from employment.

Wilbur Swearingin, a vocational specialist, testified that with these restrictions Claimant is unemployable in the competitive work force. The most severe limitation is the need to lie down periodically through the day for pain relief. Some of Claimant's disabilities could be accommodated; however, he believed it is unrealistic that an employer would accommodate this severe limitation. (Swearingin Deposition p. 28)

Dr. Parmet agreed that Claimant had significant medical problems that required extensive medical care after the disc replacement. He believed the medical care was necessary (Parmet Deposition p.82) but that it was caused by aging, tobacco, and the normal strain from Claimant's attempt to return to work in the guttering business. (Parmet Deposition p. 82). Dr. Parmet testified that he did not doubt the medical problems and complaints that Claimant reported but that he believed they were caused as described above, rather than the work related accident. (Parmet Deposition p. 82).

I had an opportunity to observe Claimant as he testified, and I find Dr. Koprivica's testimony that Mr. Sage must lie down through the day for pain relief to be credible. This limitation alone, according to Wilbur Swearingin, vocational expert, will disqualify Claimant from working in the competitive workforce. I find this testimony to be credible and determinative.

I have considered the testimony of Dr. Parmet who testified that it was his opinion that Mr. Sage could be employed operating a cash register or similar light duty or even medium duty jobs. For the reasons stated above, I find that this line of employment and similar employment would not be possible for Mr. Sage.

After weighing the credibility of the medical testimony and the testimony of Claimant and other witnesses, I find that Mr. Sage is permanently and totally disabled from participation in the competitive workforce.

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As a result of this finding I also conclude that no additional disability arose as a result of the 2005 injury.

### **LIABILITY FOR PERMANENT TOTAL DISABILITY**

The next issue is whether the permanent total disability is the responsibility of the Employer or the Second Injury Fund. Although, Mr. Sage did have some prior back complaints, he did not have an industrially disabling disability before the accident of February 2004. The issue is therefore whether the permanent total disability is the result of the combination of the two injuries that are the subject of these claims of February 2004 and December 2005 or whether it is the result of only one of the two accidents. It should be noted that the first accident was before the statutory change in the definition of accident effective in August 2005 (§287.020 RSMo) and the second accident was after that change.

Mr. Sage developed a large herniated disc as a result of the accident of February 2004. Claimant testified and the medical records show that he was offered the alternative of a surgical fusion or a nucleoplasty. In consultation with his doctors, he chose the nucleoplasty and after the nucleoplasty he got significant but temporary relief.

The second accident involving the fall was approximately six weeks after the nucleoplasty and Mr. Sage had almost immediate recurrence of the same symptoms that he had before the nucleoplasty. The second accident occurred after the statutory change in the definition of accident in August, 2005. It is clear that the first accident caused the large herniated disc. The symptoms of the herniated disc began almost immediately after the first accident and were diagnosed by MRI. The MRI following the second accident showed no change at the level of the first injury. With regard to the second accident, the issue is whether the fall was the prevailing factor in causing the recurrence of symptoms and resulting permanent total disability or was the first accident the prevailing factor.

Both Dr. Koprivica and Dr. Parmet, both of whom I find to be credible, testified that it was likely the nucleoplasty after the first accident would fail even without subsequent trauma. When Dr. Koprivica was asked about his experience with nucleoplasty, he testified as follows:

My experience has been that it's not - not successful. The procedure, when it's done, it's common that that fails in giving sustained relief. They may get temporary relief but not sustained relief. And then that leaves subsequently to a procedure for discogenic pain, that commonly is discectomy and fusion or disc replacement. (Koprivica Deposition April 29, 2010 p. 15).

Dr. Parmet had a similar opinion regarding nucleoplasty and when asked whether he thought nucleoplasty was appropriate he testified:

I have to say that my personal opinion based upon statistical analysis of a series of cases demonstrates that nucleoplasty has no long-term benefit. (Parmet Deposition p. 53 – 54).

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When asked if this was particularly true with a large herniated disc such as the one Mr. Sage had, Dr. Parmet testified:

Yes, as I commented earlier on, I don't know why he would do a nucleoplasty for an extruded disk. Because the concept is to shrink the nucleus, that jelly-filled material. And you can shrink what's still attached. But the extruded fragment isn't going to be affected. So I was puzzled by the decision to do the nucleoplasty. (Parmet Deposition p. 54).

Dr. Parmet continued:

I known by analysis of a fairly large series of cases that 95% of the people do not have long-term benefits. (Parmet Deposition p. 54).

And when asked whether the lack of long-term benefit meant that the old symptoms would recur he testified:

That's correct. (Parmet Deposition p. 54).

When Dr. Parmet was asked whether Mr. Sage would have probably had a recurrence of his symptoms even if the second accident had not occurred, he testified:

There was a probability that he was going to have a recurrence if nothing intervened, but now we have this intervening event that's fairly major. (Parmet Deposition p. 75).

Dr. Koprivica testified regarding his opinions on nucleoplasty and referred to literature to support his opinion which was marked as Exhibit 4 and entered into evidence. Dr. Koprivica referenced a research article, included in Exhibit 4, which concluded that nucleoplasty was not an effective long-term treatment for lumbar radiculopathy. Dr. Koprivica also testified that Mr. Sage was particularly unsuited for the procedure because he had a large disc herniation, without an intact annulus, and he had a loss of disc height. Dr. Koprivica also testified that if you do a nucleoplasty and it fails:

Then the next step is discectomy and fusion or disc replacement. That's the approach." (Koprivica Deposition April 29, 2010 p. 42 - 44).

The deposition of both Dr. Koprivica and Dr. Parmet makes it clear that it was predictable that the ruptured disc caused by the first accident could not be repaired by the nucleoplasty. It was more likely than not that it would have failed and the symptoms would have recurred even if Mr. Sage had not had the second accident.

This opinion, upon which Dr. Koprivica and Dr. Parmet agree, is critical in deciding which accident was the prevailing factor in causing the permanent total disability. Both doctors testified that the symptoms were likely to recur, and Dr. Parmet even opined that the likelihood of recurrence was in the neighborhood of 95%.

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This case is analogous to the case of *Gordon v. City of Ellisville*, 268 S.W.3d 454 (Mo App 2008). In the *Gordon* case, on October 21, 2005, the employee was climbing out of a tub grinder at work when he slipped and fell on his right arm with his arm extended. He was treated by an orthopedic surgeon who performed an MRI, initially read as a massive rotator cuff tear. The employee had a prior rotator cuff repair in 1993. The orthopedic surgeon did the rotator cuff surgery. The doctor testified he expected to see a re-tear of the claimant's previous rotator cuff repair from a 1993 injury, but instead found no evidence of acute changes. After the surgery, he concluded that claimant's work related accident was not the prevailing factor in causing the injury that required surgery and found that the work injury was a strain of the right shoulder that had no effect on the structure of the shoulder or the extent of permanent disability. The Commission found that there was no compensable injury and the claimant appealed. The Court of Appeals noted the changes to §287.020 RSMo effective in 2005 and affirmed the finding of the Commission that the work accident of 2005 was not the prevailing factor in causing the shoulder disability. The Appellate Court noted that even though the fall caused a strain and inflammation of the shoulder, it was not the prevailing factor in the need for surgery and the permanent disability.

The case at bar is also closely analogous to *Johnson v. Indiana Western Express, Inc.*, 281 S.W.3d 885 (Mo S.D. 2009). In this case, the employee alleged an injury in February, 2006. The Claimant had an injury and disability prior to the February, 2006 incident, and the new incident was not the prevailing factor in causing the injury. The evidence showed that the Claimant was treated for the preexisting injury in 2004 when he received epidural steroid injections for pain and underwent a two level disc resection in April, 2005 at the L4-5 and L5-S1 levels. The Claimant was last seen by a doctor in June, 2005, before his February, 2006 accident. Benefits were denied based in large part on the testimony of Dr. Jeffrey MacMillan who examined Claimant prior to the hearing. Dr. MacMillan was of the opinion that Claimant's medical condition and need for ongoing treatment was not related to the February, 2006 incident. He found no evidence that Claimant ever recovered from the August, 2004 injury, or that Claimant suffered a new injury. Dr. MacMillan found that the MRI performed in 2004 and the MRI performed after the 2006 accident did not support that further injury had occurred. Dr. MacMillan explained, "So you have MRIs bracketing the alleged injury but there's really no significant change between those two studies. So, on the second study there is no evidence of a new injury and, typically, there has to be some objective evidence that something happened or something changed."

The *Gordon* and *Johnson* cases are dispositive. Specifically, Claimant had a preexisting injury in which he suffered a large herniated disc. He was initially treated with a nucleoplasty, and both Dr. Koprivica and Dr. Parmet agreed that the procedure would not provide long term relief. Dr. Parmet, who testified on behalf of Employer, stated: "I know by analysis of a fairly large series of case that 95% of the people do not have long term benefits." The second accident of December 16, 2005 caused a fracture of the L2, L3 spinal processes of, and the records of Dr. Park at Occumed show that he recovered from this injury by February 15, 2006. The balance of the problems, that causes Claimant's long-term disability, is associated with the February, 2004 L5-S1 injury. Dr. Koprivica testified that after the second fall, there was no change in the L5-S1

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disc space: "I don't see any new injury at the L5-S1 motion segment." (Koprivica Deposition April 29, 2010 p. 21). Later in his testimony, Dr. Koprivica continues his testimony:

I do not believe that that subsequent fall, in December of 2005, caused any substantial change at L5-S1. It's the February, 2004 injury that has precipitated the development of discogenic - the disc herniation, the discogenic pain, and all the surgeries that have failed in relieving the pain at the L5-S1 motion segment. (Koprivica Deposition April 29, 2010 p. 38)

...

Now the - the real issue in this case, as I look at it, was: What about L5-S1. If you look at the MRI scan that's done after - the CT and the MRI afterwards, the L5-S1 disc space, there's not a significant change . . . (Koprivica Deposition April 29, 2010 at p. 39-40).

The Doctor further stated:

The fall, in my opinion, is inconsequential about the progression of the disability at the L5-S1 level. (Koprivica Deposition April 29, 2010 p. 41).

These facts form a close analogy to the *Gordon* and Johnson cases in which a second injury causes a recurrence of symptoms but without an identifiable injury. The logic in the case at bar is even more compelling. In the *Gordon* case, the employee returned to work without difficulty for several years before his second injury. In the case at bar, Claimant returned to work for only approximately six weeks before his second accident and recurrence of symptoms which, according to Dr. Parmet and Dr. Koprivica, were likely to recur even in the absence of trauma.

Based upon the testimony of these doctors, I find that the first accident of February, 2004 was the prevailing factor in causing the permanent total disability. Therefore I find the employer/insurer liable for payment of these benefits.

### **PAST MEDICAL EXPENSE**

Claimant requests reimbursement for past medical expense. The testimony shows that during three separate time intervals, Claimant provided for his own medical care. For each interval Claimant, or Claimant's attorney requested the care, and care was denied. The medical bill summaries for each of the three time periods are attached.

I find that the medical services as requested in Exhibit CC were necessary to treat the Claimant for injuries suffered in the accident of February 2004 and that the charges are reasonable. Applying the law that Claimant cannot recover for charges that were adjusted, not paid, or no longer due, I find that Claimant is entitled to compensation for past medical expenses and order the employer/insurer to reimburse the claimant for those medical bills as follows:

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February 2004 – June 28, 2004	\$970.78 <sup>1</sup>
June 2007 – May 2008	\$4,232.64
September 2008 – February 1, 2012 (Excludes payments made by Medicare of \$382.26)	\$6,006.03
	TOTAL \$11,209.45

**PAST MILEAGE**

Claimant also claims a right for unpaid mileage for travel to necessary medical care as shown on Claimant’s Exhibit AA. I find that Claimant is entitled to mileage reimbursement in the amount of \$1,318.94.

**PAST TTD and PTD DUE**

Claimant also claims past temporary total disability benefits. I find that Claimant has been disabled from December 31, 2005 until the present and that Claimant is permanently and totally disabled. TTD payments were made by Employer from December 31, 2005 through June 29, 2006 and for a second period from July 28, 2006 through January 10, 2007. I find that Claimant reached maximum medical improvement on September 4, 2008. (Koprivica Deposition April 29, 2010 p. 48). I, therefore, find that past temporary total disability benefits are due as follows:

June 30, 2006 – July 27, 2006 3 6/7 weeks @ \$527.42	\$ 2,043.75
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I find that this is a period during which the claimant was being actively treated for the compensable December 2005 injury. The medical records seem to indicate the claimant may have been released to modified duty with restrictions during this time period. But there is no evidence that the employer provided the claimant with work within the pertinent restrictions. So I find Todd Sage is entitled to past temporary total disability benefits of \$2043.75 for the period June 30, 2006-July 27, 2006.

July 7, 2007 – September 4, 2008 60.43 weeks @ \$527.42	\$31,871.94
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In regard to the period of requested temporary total disability from January 11, 2007 through September 4, 2008, I find the following: The records of the authorized surgeon, Dr. Harbach, reflect that he released Sage from his care and pronounced him at maximum medical improvement on January 10, 2007. Dr. Harbach released Sage to return to “full duty” though he gave restrictions of avoiding repetitive heavy bending or lifting or factory type work. The claimant’s testimony was that he then began working in the guttering business with his cousin on February 2, 2007. There is no evidence that Sage was taken off work between when Dr. Harbach

<sup>1</sup> The total medical bills were \$9,796.00 before discounts and adjustments. Claimant's medical insurance through his employment paid the bulk of these bills. The insurance carrier has waived its right to reimbursement, therefore, no award is made for this amount. The award includes only out of pocket payments by Claimant.

Employee: Jonathan Sage

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released him and the date he started working with his cousin. The testimony from the claimant and his cousin was that Sage continued working in the guttering business until July 7, 2007. So the claimant is clearly not entitled to temporary total disability benefits from January 11, 2007, through July 7, 2007, since he was released to work, and spent the vast majority of that period working. I find Sage is not entitled to temporary total disability benefits from January 11, 2007, through July 7, 2007.

The question then is whether Sage would be entitled to TTD for any period after July 7, 2007. The evidence which I find most compelling is that even though the claimant attempted to work for approximately five months after being released by Dr. Harbach, two doctors believed he had not reached maximum medical improvement and but for this brief attempt at employment claimant was temporarily and totally disabled up to 2008. Therefore, claimant is entitled to temporary total disability from July 7, 2007, to September 4, 2008, for a period of 60.43 weeks of temporary total disability for this period for a total of \$31,871.99.

I further find that past weekly benefits for permanent total disability are past due from: September 5, 2008 through February 2, 2012 (the date of the hearing).

178 weeks @ \$527.42

\$93,880.76

Claimant is further entitled to a benefit of \$527.42 per week from the employer/insurer as permanent total disability in accordance with the Missouri Worker's Compensation Law.

### **FUTURE MEDICAL CARE**

I find that Claimant will need future medical care to treat the injuries from the February, 2004 accident. Dr. Koprivica testified that Claimant will need chronic pain management, to include a pain specialist who is well versed in dealing with chronic pain issues, including medication management and psychological responses to chronic pain. (Koprivica Deposition April 29, 2010 p. 49 – 50).

### **RIGHTS OF DEPENDENT WIFE**

Lynn Sage, the wife of Employee, has intervened and filed a request for benefits pursuant to the holding in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo 2007) (DECIDED January 9, 2007), that a dependent of an employee is entitled to permanent total disability benefits in the event of the death of the employee from causes unrelated to the injury. The Missouri legislature abrogated the holding in the *Schoemehl* case by §287.230.3 RSMo which became effective June 26, 2008. The Court's have held that the abrogation is not retroactive but will apply only to claims initiated after the effective date of the Amendment. See *Bennett v. Treasurer of State*, 271 S.W.3d 49, 53 (Mo App W.D. 2008). Thus, recovery under *Schoemehl* is limited to claims for permanent total disability benefits that were pending between January 9, 2007, the date of the Supreme Court decision in *Schoemehl*, and June 26, 2008, the effective date of the Amendment to §287.230.3. The original claim by the Employee was filed on March 26, 2007 and the Amended Claim joining the wife was filed on April 17, 2009. Thus, the original claim was pending between January 9, 2007 and June 26, 2008. The case of *Gervich*

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*v. Condaire, Inc.*, 2011 WL 794996 (Missouri Eastern District) held that the rights of the employee's spouse:

. . . as a dependent vested on the date that her husband suffered his work related injury. Mr. Gervich's workers' compensation claim was pending when our Supreme Court decided *Schoemehl*. Thus, the 2008 statutory amendments abrogating *Schoemehl* do not apply to Mrs. Gervich . . .

The case was ordered transferred to the Missouri Supreme Court on June 28, 2011 and remains pending. I find that the opinion of the Appellate Court in Gervich is well reasoned. The evidence shows that Lynne Sage was married to the Employee at the time of the injury and that she was a dependent of the Employee. I therefore find that in the event of death of Claimant, Jonathan Todd Sage, that Lynne Sage shall be entitled to the benefits for permanent total disability until her death.

### SUMMARY FINDINGS AND CONCLUSIONS

Based on the substantial and competent evidence presented, I make the following findings and awards with regard to the accident in February, 2004:

1. That the accident of this date is the prevailing factor in causing the injury of the herniated disc at L5-S1 and that Claimant is permanently and totally disabled by reason of the accident. I find that Claimant reached maximum medical improvement on September 4, 2008 and that weekly benefits for permanent total disability are past due from that date through the date of the hearing, February 2, 2012 consisting of 178 at a rate of \$527.42 for a total of \$93,880.76 and that a weekly payment in this amount is due from that date forward for permanent total disability.
2. Temporary total disability benefits are due for the periods described above totaling \$35,959.49.
3. Past medical is due in the amount of \$11,209.45.
4. Mileage for travel to and from necessary medical care is due in the amount of \$1,318.94.
5. I order that future medical care will be paid in accordance with the medical opinion of Dr. Brent Koprivica.
6. In the event of the death of the claimant, claimant's wife Lynn Sage shall be entitled to the benefits of permanent total disability until her death.

With respect to the accident of December 16, 2005 I find that Claimant sustained no additional permanent disability as I determined him to be permanently and totally disabled from the prior 2004 injury.

Employee: Jonathan Sage

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I order payments made in accordance with the award and I order that attorney's fees incurred by attorney, Charles Buchanan, will be paid in the amount of 25% of all benefits awarded herein.

Date: 9-19-12

Made by: /s/ Karen Wells Fisher

Karen Wells Fisher  
*Administrative Law Judge*  
*Division of Workers' Compensation*