

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

Injury No.: 06-048468

Employee: Danny E. Bell  
Employer: Stanley Muffler Company, Incorporated (Settled)  
Insurer: Hawkeye Security Insurance (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled 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 and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 3, 2011. The award and decision of Administrative Law Judge Gary L. Robbins, issued May 3, 2011, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 1<sup>st</sup> day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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James Avery, Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Danny E. Bell Injury No. 06-048468  
Dependents: N/A  
Employer: Stanley Muffler Company Incorporated  
Additional Party: Second Injury Fund  
Insurer: Hawkeye Security Insurance  
Hearing Date: February 7, 2011 Checked by: GLR/rf

**SUMMARY OF FINDINGS**

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? May 30, 2006.
5. State location where accident occurred or occupational disease contracted: Mississippi County, Missouri.
6. Was above employee in employ of above employers at time of alleged accident or occupational disease? Yes.
7. Did the employers receive proper notice? Yes.
8. Did the accidents or occupational diseases arise out of and in the course of the employment? Yes.
9. Were the claims for compensation filed within time required by law? Yes.
10. Were the employers insured by above insurers? Yes.

11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee injured his left thumb/hand when it was caught in a machine he was operating.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left thumb/hand.
14. Nature and extent of any permanent disability: Permanent Total Disability. See Award.
15. Compensation paid to date for temporary total disability: \$9,158.60.
16. Value necessary medical aid paid to date by employer-insurer: \$28,999.07.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$312.22.
19. Weekly compensation rate: \$208.15 per week for all purposes.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: Permanent Total Disability. See Award.
23. Future requirements awarded: None.

The Compensation awarded to the employee shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: D. Andrew Weigley.

## **FINDINGS OF FACT AND RULINGS OF LAW**

On February 7, 2011, the employee, Danny E. Bell, appeared in person and by his attorney, D. Andrew Weigley, for a hearing for a final award. The employer-insurer was not represented at the hearing as they had already settled their case with the employee. Assistant Attorney General Frank A. Rodman represented the Second Injury Fund at the trial. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS**

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Hawkeye Security Insurance.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Stanley Muffler Company Incorporated and was working under the Workers' Compensation Act.
3. On or about May 30, 2006 the employee sustained an accident or occupational disease that arose out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$312.22. His rate for all purposes is \$208.15 per week.
7. The employee's injury was medically causally related to his accident or occupational disease.
8. The parties agreed that the employer-insurer paid \$28,999.07 in medical aid.
9. The parties agreed that the employer-insurer paid \$9,158.60 in temporary disability benefits.
10. The employee has no claim for previously incurred medical bills.
11. The employee has no claim for mileage.
12. The employee has no claim for future medical care.
13. The employee had no claim for any temporary disability benefits.
14. The employee has no claim for permanent partial or total disability in this case as to the employer-insurer.
15. The parties agree that the employee reached maximum medical employment on May 2, 2007.

### **ISSUES**

1. Liability of the Second Injury Fund for permanent partial disability or permanent total disability.

## **EXHIBITS**

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

- A. Deposition of Thomas F. Musich, M.D.
- B. Deposition of Wayne A. Stillings, M.D.
- C. Deposition of Ms. Delores Gonzalez.
- D. Medical records from Washington University Department of Orthopedic Surgery, 8/25/06.
- E. Medical records from Washington University Department of Orthopedic Surgery, 6/7/07.
- F. Medical records of Richard F. Howard, D.O.
- G. Records from Mid America Rehab.
- H. Division of Workers' Compensation records.
- I. Medical records from Community Counseling Center, 7/2/08.
- J. Medical records from Community Care Center, 6/20/08.
- K. Medical records of Allen L. Spitler, M.D./Cardiovascular Consultants.
- L. Medical records from Orthopaedic Associates.
- M. Medical records of Riyadh J. Tellow, M.D.

Second Injury Fund Exhibits

The Second Injury Fund submitted no exhibits/evidence.

## **STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:**

### **STATEMENT OF THE FINDINGS OF FACT-**

Danny E. Bell, the employee, was the only witness to provide live testimony in this case. All other evidence was presented in the form of written reports, medical records or deposition testimony.

This is another case where the Second Injury Fund presented absolutely no evidence or exhibits. Specifically they offered no evidence to question, challenge or confirm, or attack the credibility of the medical/professional opinions presented by Dr. Musich, Dr. Stillings or Delores Gonzalez. They chose not to retain a physician to conduct a "records review" which is allowed by statute.

The employee testified that he was forty-nine years of age and that his last employer was Stanley Muffler. He began working there in May of 2000. He worked initially as a painter and later as a machine operator.

The employee testified that he sustained an injury to his left thumb and hand on May 30, 2006. He was operating a machine when it apparently malfunctioned, causing severe injury to his

thumb. He was seen by a physician in East Prairie, Missouri and then by Dr. Trueblood in Cape Girardeau, Missouri. The initial diagnosis was a comminuted fracture of the proximal phalanx of the thumb with vascular insufficiency. According to the employee, Dr. Trueblood recommended that he travel to St. Louis to be seen by Dr. Boyer, a hand specialist.

The employee underwent his first surgery on May 31, 2006 at Barnes Hospital. Dr. Boyer performed a closed reduction and percutaneous pinning of the left thumb relative to a proximal phalanx fracture with irrigation and debridement. The employee continued to treat with Dr. Boyer and on January 31, 2007 underwent additional surgery. Dr. Boyer performed a bone grafting of the left thumb proximal phalanx nonunion. The employee underwent a functional capacity evaluation/FCE at Mid America Rehab on April 19, 2007.

The employee settled his claim against the employer-insurer on February 19, 2008 for 20% permanent partial disability of the left hand.

The employee had long standing, pre-existing physical and psychiatric injuries/conditions. On November 19, 2001, the employee sustained an injury to his right shoulder while working for Stanley Muffler. He was working at that time as a painter. He was pushing a 55 gallon drum off a paint pallet when he felt a sudden onset of pain in his right shoulder. He treated with Dr. Ritter at Orthopaedic Associates in Cape Girardeau, Missouri. The employee underwent an MRI and injection into the shoulder in January of 2002. When his symptoms failed to improve, he underwent surgery on March 1, 2002 at Southeast Missouri Hospital.

The employee settled his right shoulder claim with the employer-insurer on December 7, 2002 for 20% permanent partial disability of the right shoulder. The employee testified that after he was released by Dr. Ritter, he did not go back to the painting department at Stanley Muffler. He indicated that he became a machine operator because painting with his right arm was too painful due to the injuries to his right shoulder in 2001.

The employee testified that he had a heart condition and other cardiovascular issues which predated the primary injury of May 30, 2006. Treatment records were submitted into evidence from Dr. Spitler, the employee's cardiologist. The employee testified that he began seeing Dr. Spitler in 1997. Treatment records from Dr. Spitler from 1998 revealed physical complaints of sharp chest pain, mid sternal, non-radiating. Dr. Spitler treated the symptoms with medication. On September 2002, the claimant underwent a quadruple bypass at Southeast Missouri Hospital. Dr. Spitler's office records of January 6, 2003 states in part: "Mr. Bell is a patient of Dr. Douglas who was seen for a follow-up stress echo. Interestingly, he had mild disease five or six years ago. February of last year he had a negative stress echo, but in September underwent CABG including LIMA to LAD/LADD, vein graft to marginal and vein graft to right by Dr. Ramsey because of multi-vessel disease with increasing chest pain".

The employee testified that since the primary injury, he underwent additional heart surgery in 2008 and 2009. Mr. Bell takes a number of medications for coronary artery disease and complains of regular chest pain.

The employee testified that he has had a long history of depression. Treatment records were submitted from Community Counseling Center corroborating his testimony. He has treated since 1996 with Dr. Rohatgi. A report from Dr. Rohatgi dated November 4, 1996 diagnosed major depressive disorder recurrent, moderate, partner relations problems, alcohol dependency by history. The employee testified that he has treated at Community Counseling Center three or four times a year since the 1990s. He has taken medication for depression and anxiety since the mid 1990s.

The employee also testified that in the 1980s he underwent inpatient treatment for alcoholism.

The employee has a high school education. His employment history dating back to the early 1980s is limited to machine operator, assistant pressman and some construction. He testified that he has not worked since he left Stanley Muffler, and that due to a combination of the problems related to his heart, his depression, his right shoulder and his left thumb/hand, he cannot work.

### **MEDICAL, PHYSICHIATRIC AND VOCATIONAL TESTIMONY:**

Dr. Musich in his deposition dated September 27, 2010 concluded:

“It is my medical opinion based upon a reasonable degree of medical certainty that Danny Bell suffered acute left hand trauma on or about May 30, 2006, during the course and scope of his employment by Stanley Muffler. It is my medical opinion that the work trauma of May, 2006 is the prevailing factor in the development of acute left-hand pathology which resulted in an open, comminuted fracture of the proximal left thumb. It is my medical opinion that the work trauma of May, 2006 is causally related to this patient’s left hand and wrist complaints which in my medical opinion have resulted from an acute crush injury that required two surgical interventions. It is my medical opinion that the patient suffers a permanent partial disability, 30 percent of the left upper extremity at the wrist level for the injury suffered on May 30, 2006. Prior to May, 2006, Mr. Bell suffered a work-related right shoulder trauma which necessitated surgical intervention performed by Dr. Ritter in March 2002. This patient suffers ongoing symptoms referable to his right shoulder, status post shoulder impingement. It is my medical opinion that the patient’s right shoulder pathology pre-existed the May, 2006 and has resulted in a permanent partial disability of 25 percent of the right upper extremity at the shoulder level. It is also my medical opinion that before May, 2006, Danny Bell suffered severe coronary artery disease which necessitated a quadruple coronary artery bypass. Subsequent to treatment, Mr. Bell has been placed on Imdur which produces daily headaches, and if he misses his Imdur, which is a long-acting nitroglycerin, he develops coronary angina symptoms. It is my medical opinion that this patient’s cardiovascular disease has resulted in a permanent partial disability of 35 % of the man as a whole. It is also noted from the patient’s history that Mr. Bell has suffered long standing psychiatric disease which was addressed by Dr. Wayne Stillings. Dr. Stillings’ psychiatric report of August 6, 2008 will speak for itself. It is my medical opinion that the combination of this patient’s past and present disabilities, including psychiatric disability have rendered this patient totally and permanently disabled.”

Dr. Stillings also testified on behalf of the employee. He concluded that the employee's psychiatric conditions and disabilities due to his primary injury combines synergistically with his pre-existing psychiatric conditions and disabilities which were a hindrance or obstacle to employment/re-employment creating a total disability greater than the simple sum and rendering him permanently and totally disabled from gainful employment on a psychiatric basis. He indicated as well that the employee has the following psychiatric disorders and disabilities pre-existing the May 30, 2006 primary work injury:

- A. Dysfunctional family of origin with an associated 10 percent permanent partial psychiatric disability.
- B. Parent/child relational problems with an associated 10 percent permanent partial psychiatric disability.
- C. Alcohol abuse and dependency with associated 10 percent permanent partial psychiatric disability.
- D. Major depressive disorder, chronic with psychotic features with an associated 20 percent permanent partial psychiatric disability.
- E. Personality disorder with an associated 10 percent permanent partial psychiatric disability.

Vocational expert Delores Gonzalez testified by way of deposition on January 3, 2011. She testified that it was her vocational opinion that the employee could no longer perform the duties of any of his previous jobs or any other job in the national economy because of his limitations.

## **RULINGS OF LAW**

**The only medical, psychiatric or vocational evidence that is present in this case is that presented by the employee. Therefore, the credibility and accuracy of the opinions of the employee's evaluating experts has not been tested, attacked, lessened or commented on by any other expert testimony or opinion.**

At trial, as the Court does in every trial, the employee's presentation and physical demeanor is observed by the Court in an effort to determine the accuracy and overall credibility of the employee. Immediately after every trial the Court makes an assessment of the evidence presented with an initial determination of believability and credibility. This initial determination is again reviewed after the Court has read and evaluated all of the evidence in the case, in an effort to determine if in fact the initial assessments were accurate and remain accurate when judged against all of the evidence in the case.

After trial on February 7, 2011 the Court noted that "there is no reason not to believe the employee". The employee's evaluating expert opinions are not challenged.

Based on a review of all of the evidence described supra, including the employee's credible testimony, the expert medical opinions and depositions, the medical records, the vocational opinion and deposition, and the Stipulation for Compromise Settlement, as well as my personal

observations of the employee at the hearing, and based on the applicable statutes of the State of Missouri, the Court evaluated and assessed the evidence in this case and the Court makes the rulings as outlined below.

The employee sustained a compensable injury to his left hand as a result of his accident of May 30, 2006 while working for Stanley Muffler. As a result of the May 30, 2006 accident at work, the Court finds that the employee sustained a comminuted fracture of the proximal phalanx of the thumb which required two surgical procedures.

Under Missouri Revised Statutes Section 287.020.7 (2000), “total disability” is defined as the “inability to return to any employment and not merely the inability to return to the employment in which the employer was engaged at the time of the accident.” The test for permanent total disability is claimant’s ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ Claimant in his present physical condition. **Searcy v. McDonnell Douglas Aircraft Co.**, 894 S.W.2d 173 (Mo. App. E.D. 1995). In cases such as this one where the Second Injury Fund is involved and there is an allegation of permanent total disability, we must also look to Section 287.220 RSMo., for a determination of benefits under the statute. The analysis of the case essentially takes on a three-step process:

- First, is the employee permanently and totally disabled?;
- Second, what is the extent of the employer’s liability for that disability from the last injury alone?; and
- Finally, is the permanent total disability caused by a combination of the disability from the last injury and any pre-existing disabilities?

Considering the competent and substantial evidence listed above, the Court finds that the employee is permanently and totally disabled. The employee credibly described the continuing pain and problems he has with his left hand, his right shoulder, his heart, and his long standing psychological/psychiatric issues. He takes a number of medications for pain, anxiety and depression, and his heart condition. In addition to the employee’s testimony, also in evidence are the reports and testimony of Dr. Musich, a medical doctor, Dr. Wayne Stillings, a psychiatrist, and Ms. Delores Gonzalez, a vocational rehabilitation counselor. All of these experts were retained by the employee. They all agree that the employee is permanently and totally disabled when considering all of the problems and physical and psychiatric/psychological complaints he currently has.

Again, the Second Injury Fund did not retain any evaluating experts and offered no contrary medical or vocational opinions to dispute the ultimate findings of Dr. Musich, Dr. Stillings or Ms. Gonzalez.

Based on the reports in evidence and the testimony, the Court finds that there are significant restrictions on the employee’s ability to function in the workplace. Dr. Musich opined that based on his medical assessment, the employee was permanently and totally disabled. Dr. Musich’s opinion, and the employee’s allegation of permanent total disability, was further bolstered by the testimony of Dr. Wayne Stillings, who concluded that the employee’s psychiatric conditions and

disabilities due to his primary injury combined synergistically with his pre-existing psychiatric conditions and disabilities, which were a hindrance or obstacle to employment/re-employment, creating a total disability greater than the simple sum and rendering the claimant permanently and totally disabled from gainful employment on a psychiatric basis. Dr. Stillings had his personal opinions as well as a review of a substantial body of psychiatric/psychological records that existed prior to May 30, 2006. Finally, the employee offered the testimony of Vocational Rehabilitation Counselor Delores Gonzalez, who concluded that it was her vocational opinion that the employee could no longer perform the duties of any of his previous jobs or any other jobs in the national economy because of his limitations.

Based on the totality of the evidence submitted at the hearing, the Court finds the opinions of Dr. Musich, Dr. Stillings and Ms. Gonzalez to be credible and properly supported by the rest of the medical evidence in this case. The Court found no credible evidence in the record, either medical or vocational, to support the proposition that the employee was only permanently partially disabled and able to work, when the totality of his physical and mental condition and his continuing complaints of problems, were considered.

Based on a review of the competent and substantial evidence, the Court does not believe the last injury alone caused the employee to be permanently and totally disabled. While the last injury to the left hand/thumb was significant and resulted in a substantial amount of medical treatment and some significant functional restrictions and disability, the Court does not believe that the last injury alone was enough to render the employee permanently and totally disabled in and of itself. The Court does not find any credible medical or vocational evidence in the records to suggest that the employee's permanent total disability is a result of the last injury of May 30, 2006 alone.

Instead, the three experts who provided evidence on the employee's disabilities and ability to function in the open labor market all agreed it was the combination of all of his problems and disabilities, leading up to and including the injury of May 30, 2006 that rendered him permanently and totally disabled, not just the last injury alone.

The employee has had a long history of physical and psychiatric/psychological injuries and disabilities dating back to the 1980s. He had received significant treatment for these matters. These pre-existing injuries and disabilities to the right shoulder, heart, and body as a whole (psychiatric/psychological) has caused the employee to miss time from work, alter the way he performs his jobs, take different jobs and take medication for his complaints. No credible evidence disputes the employee's testimony when he testified to the problems he experienced with the right shoulder, heart and body as a whole (psychiatric/psychological) conditions leading up to May 30, 2006.

Under Missouri Revised Statute Section 287.190.6 (2000) "permanent partial disability means a disability that is permanent in nature and partial in degree. The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. **Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund**, 138 S.W.2d 697, 703 (Mo banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. **Griggs v. A.B. Chance Co.**, 503 S.W. 2d 697, 703 (Mo App. 1973). Expert testimony may be required when there are complicated medical issues. *Id.* at 704. Extent and

percentage of disability is a finding of fact within the special province of the fact finding body, which is not bound by the medical testimony but may consider all the evidence, including the testimony of the claimant, and draw all reasonable inferences from other testimony and arriving at percentage of disability. **Fogelsong v. Banquet Foods Corp.**, 526 S.W.2d 886, 892 (Mo App. 1975).

Based upon all of these findings, as well as based on the employee's testimony, the Stipulation of Compromise Settlement between the employee and employer-insurer in this case, the medical evidence and the unrebutted, credible testimony of Dr. Musich, I find that claimant has a 20% permanent partial disability of the left hand related to the 2006 work injury.

The final step of the inquiry, then, is whether the permanent total disability is the result of the combination of the primary (last) injury and pre-existing disabilities so that the Second Injury Fund would have liability for the permanent total disability. As alluded to above, the medical opinions of Dr. Musich and Dr. Stillings, as well as the vocational opinion of Ms. Gonzalez, as well as the credible testimony of the employee, all support the finding that the employee is permanently and totally disabled as a result of the combination of his primary and pre-existing disabilities, and, thus, the Second Injury Fund has liability for that disability.

With regard to the pre-existing injuries and disabilities the employee has alleged, the Court finds that the employee has provided credible testimony and/or medical evidence to explain the nature of the injuries to his right shoulder and body as a whole (heart, psychiatric /psychological injuries/disabilities). The Court also finds credible testimony to explain the various ways in which these disabilities impacted his ability to work. The Court also notes that although the employee had additional heart surgery after the primary injury of May 30, 2006, he also had significant treatment for heart-related medical issues pre-dating the work injury. The employee's permanent total disability was established prior to his problems post dating May 30, 2006. The records submitted into evidence reflect treatment with Dr. Spitler in the 1990s with tests finding thirty to forty percent vessel disease. The records also reflect cardiac surgery in 2002, (quadruple bypass). Finally, the treatment records from Community Counseling Center clearly corroborate the employee's testimony at the hearing that he has received regular treatment dating back to the 1990s for anxiety and depression.

Accordingly, based on all of this evidence, the Court finds that the employee has met his burden of proof to show that he is permanently and totally disabled as a result of the combination of his primary, left hand/thumb, disability with his pre-existing disability to his right shoulder and body as a whole (heart, depression/anxiety). Since the permanent total disability is a result of the combination of his disabilities, the Second Injury Fund has liability for this disability.

Having established the responsibility of the Second Injury Fund for the permanent total disability exposure in this claim, there is yet one issue regarding the amount and timing of the payments under the Statute. The parties stipulated that the employee reached maximum medical improvement on May 2, 2007. The employer would have had responsibility for temporary total disability benefits up until the date of maximum medical improvement.

Since the employee reached maximum medical improvement on May 2, 2007, the Court finds that the employee is permanently and totally disabled as of May 3, 2007. By the terms of this award, employer-insurer was responsible for 35 weeks of permanent partial disability at a rate of \$208.15 per week. Therefore, from May 3, 2007 till January 3, 2008 (35 weeks) the employer-insurer had liability for \$208.15 per week, which the employee and the employer-insurer settled by the terms of the Stipulation of Compromise Settlement that extinguished the employer-insurer's liability for this case. Because the permanent total and permanent partial disability rates are the same, there is no differential due from the Second Injury Fund during this period of time. Therefore, starting January 4, 2008, the Second Injury Fund is to pay \$208.15 per week for the employee's lifetime, subject to review and modifications by law.

**ATTORNEY'S FEE**

D. Andrew Weigley, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

**INTEREST**

Interest on all sums awarded hereunder shall be paid as provided by law.

Date: \_\_\_\_\_ Made by:

\_\_\_\_\_  
Gary L. Robbins  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*