

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 07-095960

Employee: Tim Young
Employer: Stoam Industries, LLC
Insurer: Uninsured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: August 29, 2007
Place and County of Accident: Taney County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated August 22, 2008.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Chief Administrative Law Judge L. Timothy Wilson, issued August 22, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of December 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Tim Young Injury No. 07-095960

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

Dependents: N/A

Employer: Stoam Industries, LLC

Additional Party: Second Injury Fund

Insurer: Uninsured

Hearing Date: May 1, 2008
June 2, 2008 record closed

Checked by:

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? YES
2. Was the injury or occupational disease compensable under Chapter 287? YES
3. Was there an accident or incident of occupational disease under the Law? YES
4. Date of accident or onset of occupational disease: AUGUST 29, 2007
5. State location where accident occurred or occupational disease contracted: TANEY COUNTY, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? YES
8. Did accident or occupational disease arise out of and in the course of the employment? YES
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? UNINSURED
11. Describe work employee was doing and how accident happened or occupational disease contracted:
ASSEMBLING A TREE HOUSE
12. Did accident or occupational disease cause death? NO

13. Parts of body injured by accident or occupational disease: FACE AND HEAD
14. Compensation paid to-date for temporary disability: -0-
15. Value necessary medical aid paid to date by employer/insurer? -0-
16. Value necessary medical aid not furnished by employer/insurer? \$33,561.00

17. Employee's average weekly wages: N/A
18. Weekly compensation rate: \$40.00
19. Method wages computation: STATUTORY

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses: \$33,561.00

10 weeks of temporary total disability (or temporary partial disability) (\$400.00)

Additional Medical: ADDITIONAL MEDICAL CARE ORDERED

Total: UNDETERMINED

Each of said payments to begin IMMEDIATELY__ and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

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:

Attorney Patrick Platter

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Tim Young

Injury No. 07-095960

Before the
DIVISION OF WORKERS'

COMPENSATION

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

Dependents: N/A

Employer: Stoam Industries, LLC

Additional Party: Second Injury Fund

Insurer: Uninsured

Hearing Date: May 1, 2008
June 2, 2008 record closed

Checked by:

AWARD ON TEMPORARY HEARING

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on May 1, 2008. The record was left open for submission of additional evidence, resulting in the evidentiary record being closed on or about June 2, 2008. Further, the parties were afforded an opportunity to submit briefs, resulting in the record being completed and submitted to the undersigned on or about July 16, 2008.

The claimant, Tim Young, appeared personally and through his attorney, Patrick J. Platter, Esq. The alleged employer, Stoam Holdings, L.L.C., successor in interest to Stoam Industries, L.L.C., appeared through its attorney, James H. Arneson, Esq. The Second Injury Fund appeared by and through its attorney, Barbara Bean, Assistant Attorney General.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about August 29, 2007 Stoam Holdings, L.L.C., successor in interest to Stoam Industries, L.L.C., was not insured under The Workers' Compensation Law for the State of Missouri.
- (2) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.

The parties further stipulated that the issues to be resolved by hearing include:

- Whether the alleged employer Stoam Holdings, L.L.C., successor in interest to Stoam Industries, L.L.C. was operating under and subject to The Workers' Compensation Law for the State of Missouri on August 29, 2007?
- Whether the claimant (Tim Young) was an employee of Stoam Holdings, L.L.C., successor in interest to Stoam Industries, L.L.C., and was working under and subject to The Workers' Compensation Law for the State of Missouri on August 29, 2007?

- Whether the claimant (Tim Young) sustained an accident on or about August 29, 2007; and, if so, whether the accident arose out of and in the course of the alleged employment between the claimant (Tim Young) and the alleged employer Stoam Holdings, L.L.C., successor in interest to Stoam Industries, L.L.C.?

- Whether the claimant gave the employer proper notice of the injury?
- Whether the venue is proper?
- Whether the alleged accident of August 29, 2007 caused the injuries and disabilities for which benefits are now being claimed?
- Whether the alleged employer is obligated to pay for certain past medical care and expenses in the amount of \$33,561.00?
- Whether the claimant has sustained injuries that will require additional medical care in order to cure and relieve the claimant of the effects of the injuries?
- What is the applicable compensation rate?
- Whether the claimant is entitled to temporary disability benefits? (The claimant seeks payment of 10 weeks of past temporary disability compensation, payable for the period of August 30, 2007 through November 7, 2007.)
- Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of medical care and expenses, relative to the claim against an uninsured employer?
- Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is entitled to reimbursement against the alleged employer relative to payment of medical care and expenses because of the alleged employer not being insured under Chapter 287, RSMo.
- Whether the claimant sustained any permanent disability as a consequence of the alleged accident of August 29, 2007; and, if so, what is the nature and extent of the disability?
- Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for permanent disability compensation because of combination of injuries combining to cause additional disability greater than the simple sum?

EVIDENCE PRESENTED

The claimant testified at the hearing in support of his claim. In addition, the claimant presented at the hearing of this case the testimony of Ashley Holm. Additionally, at the hearing of May 1, 2008, the claimant offered for

admission the following exhibits:

- Exhibit A Claim for Compensation
- Exhibit B Certificate of Corporate Records from Secretary of State for Stoam Holdings, L.L.C.
- Exhibit C Records from Missouri Department of Revenue
- Exhibit D Records from J&S Automotive Regarding Stoam Industries, L.L.C.
- Exhibit E Records from Anthem Blue Cross and Blue Shield Regarding Stoam Holdings, L.L.C.
- Exhibit F Medical Records from St. John's Clinic Regarding Tim Young
- Exhibit G Medical Records from St. John's Health System Regarding Tim Young
- Exhibit H Invoice Statement from St. John's Clinic Regarding Tim Young
- Exhibit I Medical Bills from St. John's Hospital Regarding Tim Young
- Exhibit J1 Photograph of Tim Young
- Exhibit J2 Photograph of Tim Young
- Exhibit K Letter Dated October 10, 2007 from Carlos Licona to Stoam Florida, LLC (Attention: Fernando Rosales; Bob Williams; Pat Clawson; Joey Wright; & Don Wood)

Exhibits A through J2 were received and admitted into evidence. However, the undersigned received but denied admission of Exhibit K.

Subsequent to the May 1, 2008 hearing, in light of the record being left open for submission of additional evidence, the parties were afforded opportunity to submit additional evidence. In this context, and in light of evidence offered by Stoam Holdings, L.L.C., successor in interest to Stoam Industries, L.L.C., the claimant reoffered for admission Exhibit K, and offered for admission the following additional exhibits:

- Exhibit L Audio Copy of Micro-Cassette
- Exhibit M Deposition of Tim Young (Taken on June 2, 2008)
- Exhibit N Deposition of Shawn Dixon (Taken on May 27, 2008)
- Exhibit O Warranty Deed by Corporation (Saddlebrooke Property)

After consideration and review of the objections and arguments of counsel, Exhibits K, M, N and O are received and admitted into evidence. Exhibit L, as presented is received but denied admission. (Exhibit L involves a conversation of multiple individuals, and appears to include certain statements made by Russ Wright, which could be admissible as an exception to the hearsay rule as a party admission or admission against interest. However, as a whole and as offered for admission at this time, the exhibit is not admissible and is denied admission.)

The alleged employer Stoam Holdings, L.L.C., successor in interest to Stoam Industries, L.L.C. did not present any witnesses at the May 1, 2008 hearing of this case. Subsequent to the hearing, however, Stoam Holdings took several depositions and offered for admission the following exhibits:

- Exhibit 1 Edited Wage Statement from Stoam Holdings
- Exhibit 2 Records from Stoam Holdings Regarding Blue Cross Blue Shield
- Exhibit 3 Deposition of Russell Wright (Taken on June 2, 2008)
- Exhibit 4 Deposition of Russell Wright (Taken on May 27, 2008)
- Exhibit 5 Deposition of Joe Wright (Taken on June 2, 2008)
- Exhibit 6 Deposition of David Tune (Taken on June 2, 2008)

After consideration and review of the objections and arguments of counsel, Exhibits 2, 3, 4, 5 and 6 are received and admitted into evidence. Exhibit 1, which is not a business record, but a document prepared for purpose of litigation, is received but denied admission.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File, which include:

- Minute Entries
- Order (Denial of Continuance)
- Request for Continuance
- Order (Cancellation of Trial Setting & Scheduling of a New Evidentiary Hearing Date)
- Notice of Hearing
- Request for Hearing-Hardship
- Answer of Second Injury Fund to Claim for Compensation
- Answer of Stoam Holdings, LLC / Stoam Industries, LLC to Claim for Compensation
- Certified Mail Receipts
- Motion of Claimant for Temporary or Partial Award
- Letter Dated June 2, 2008 (from Attorney Platter regarding submission of Exhibits L, M, N, and O)
- Letter Dated June 3, 2008 (from Attorney Platter regarding resubmission for admission Exhibit K)
- Letter Dated June 3, 2008 (from Attorney Arneson regarding submission of Exhibits 1, 2, 3, 4, 5, and 6)
- Letter Dated June 24, 2008 (from Attorney Platter regarding submission of post-hearing briefs and/or proposed awards)

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

DISCUSSION

This claim centers upon a fall that Mr. Young suffered on August 29, 2007. He was attempting to assemble a tree house (or deer stand) in a tree that was located at a residence occupied (but not owned) by Russell Wright, who is a principal office holder with the employer Stoam Holdings. Mr. Young contends that the tree house or deer stand being erected by him was inventory demo for Stoam Holdings, while Stoam Holdings was in process of endeavoring to transition and move its business to operations in Florida. According to Mr. Young, David Tune, who is a Stoam Holdings employee, hired him to help pack production equipment and erect this stand. Stoam Holdings, however, argues that the company ceased to be engaged in business in June 2007, and Mr. Young was not engaged in any business activity of Stoam Holdings at the time of the August 29, 2007 accident. Rather, according to Stoam Holdings, Mr. Young was erecting a tree stand as an accommodation to Mr. Wright and Mr. Tune.

The Parties.

The claimant, Tim Young, is 41 years of age, having been born on February 12, 1967. Mr. Young is 6 feet, 3 inches, and in August 2007 weighed approximately 300 pounds. Mr. Young resides in Springfield, Missouri with his fiancé.

Mr. Young is presently employed with Doing Steel, working as a fabricator. Mr. Young has been engaged with his present employer since November 8, 2007. Previously, Mr. Young worked for Stoam Holdings, initially as a laborer and later as a floor supervisor. Mr. Young testified that, prior to his termination of employment with Stoam Holdings he earned \$480.00 per week, based upon an hourly wage of \$12.00 per hour with a 40 hour work week.

As a business entity, Stoam Holdings engaged in the business of manufacturing homes, utilizing foam insulated walls and beams, which the company promoted as energy efficient – cost savings method of construction. Mr. Young noted that, during his employment with Stoam Holdings, the business manufactured homes for depressed housing markets such as Louisiana and southern Mississippi following the Katrina hurricane. Stoam Holdings gained notoriety when it participated in the construction of homes for the television show “Extreme Makeover” and in connection with improvements located at Camp Barnabas, Arkansas.

In performing work for Stoam Holdings, Mr. Young would assemble Stoam Holdings brand homes in a manufacturing warehouse located on LeCompte Road in Springfield, Missouri. Two employees would operate foam cutters; two employees would operate the stud machines; and five to six employees would install components.

Homes constructed by Stoam Holdings were composed of a unique collection of steel frame, steel wall panels, and foam insulation. Steel studs were designed to be stronger than traditional lumber. Foam of approximately 5-6 inches in thickness would cover the studs. More specifically, foam would slide into the steel stud itself. There would also be foam covering over steel wall panels. A typical size of a Stoam house would be approximately 1200 square feet. This size would be appropriate for a “starter” home, or a home in a depressed area such as Louisiana or southern Mississippi.

Homes, once assembled in Springfield, would then be transported from Springfield to the location of customers. According to Mr. Young, Stoam Holdings owned at least 4 trailers that could transport homes. In this regard, records from the Missouri Department of Revenue reflect that Stoam Holdings owned several trucks and equipment trailers in 2007, including a Chevrolet 350 diesel pickup truck.

In the Spring of 2007, Stoam Holdings utilized and paid its employees to build a barn at a residence occupied (but not owned) by Russell Wright, who is a principal office holder with the employer Stoam Holdings. Notably, this barn is located in a field downslope from the Wright home. It was located about 200 yards away from the residence. Production employees who worked at the Stoam shop would travel to the home and barn, which was located in the Saddlebrooke subdivision in Christian County, Missouri. Some employees would travel to the barn site, while others would stay in the shop to manufacture homes. Employees who traveled to Saddlebrooke during the day however would arrive home in time to clock out from work. The typical work day at the Stoam production shop was 7:00 a.m. to 4:30 p.m. Stoam Holdings completed construction of this barn in April 2007. Additionally, it is noted that the draftsman employed by Stoam Holdings drafted the plans for the barn.

In addition, Stoam Holdings employed individuals to build components for erection of a large dog house, measuring approximately 12 feet by 6 feet, with a height of approximately 6 feet. The components of this dog house was constructed on the premises of Stoam Holdings. (The frame of the stand was built in the shop, with the exception of the floor.) Mr. Young indicated that the dog house was built the same way as the houses were built, only “a smaller version of it.” In addition, as with the houses, a draftsman secured by Stoam Holdings drafted the plans for construction of the dog house. And, in constructing the dog house, Stoam Holdings utilized the same style of steel and insulation as used in the construction of residential homes.

Stoam Holdings Operations.

Russell Wright was the “manager” of Stoam Holdings until he became ill with cancer in early 2007. His brother, Joseph Wright had been chief operations officer until then and then served as the interim “manager” from early 2007 until the end of that calendar year. He testified that the company “technically” operated until the end of the year. He typically lived in Oklahoma City, but spent about 12-14 days in Springfield. He claimed that he only needed to spend that many days in Springfield because operations were already in place. He either stayed at a rental home that the company owned or at a hotel.

Following Russell Wright’s illness, Stoam Holdings revenues fell and the company laid off employees through mid June 2007. Some employees, like Shawn Dixon, left in anticipation of the layoff. Others, like Mr. Young, stayed until the plant stopped production in or around June 2007.

During or subsequent to the aforementioned layoffs, Stoam Holdings began to negotiate with another company, known as Ornamental Worldwide, to start a joint venture. The venture contemplated that Stoam Holdings would provide “intellectual property” and Worldwide Ornamental would provide a production plant in southern Florida. The term “intellectual property” meant the style of composition of Stoam Holdings homes. Those homes would be manufactured at the Worldwide Ornamental plant, which would be located in southern Florida.

Mr. Wright testified that a number of Stoam Holdings employees and investors were engaged in talks with Ornamental Worldwide during the fall of 2007 to start production in southern Florida. Those officials included Bob Williams, Fernando Rosales, Pat Clauser, and Don Wood. Mr. Wood was an employee of Stoam Holdings, who lived, like Joseph Wright, in Oklahoma City. An email communication received from the principal of Worldwide

Ornamental, Carlos Licone, corroborated this testimony.

Ashley Holm was initially a receptionist then eventually a bookkeeper for Stoam Holdings. She was employed with Stoam Holdings from October 2006 until September 30, 2007. She started her work as a bookkeeper at approximately June 1, 2007, when the previous bookkeeper changed jobs. Her job as a bookkeeper included writing checks and preparing payroll records, though she did not have signature authorization. All checks written for business operations were on the Stoam Holdings checking account rather than the account of any individual. All records, payroll and checks were prepared at the direction of the owner Russell Wright or the Chief Financial Officer Bob Feeney. When she prepared the payroll, there were approximately 20 employees in July 2007. This number gradually decreased to three (not including Joe Wright or Russell Wright) by the time her employment ended on September 30, 2007. She testified, in particular, that David Tune was an employee of Stoam Holdings in September 2007.

Stoam Holdings maintained health insurance coverage for some of its employees through Anthem Blue Cross/Blue Shield. Blue Cross billed Stoam Holdings for health insurance coverage from August 1 through August 31, 2007, for nine employees under health insurance coverage and eight employees for dental insurance coverage. Russ Wright, at his second deposition taken on June 2, 2008, produced a billing statement, which indicates that Anthem Blue Cross/Blue Shield amended its billing to reflect three employees (Ashley Holm, Russell Wright, and Joseph Wright) rather than eight or nine.

Recall to Work.

According to Mr. Young, he received a telephone call from Mr. Tune on Sunday, August 26, 2007, and Mr. Tune asked him if he was ready to return to work. (Mr. Young noted that, at or near the time of the company layoffs, he and other employees were given expectation or hope of the business enjoying a restart of business operation with a move of the business to Florida.) Further, according to Mr. Young, upon indicating to Mr. Tune that he was available and ready to return to work, Mr. Tune advised him that they would begin work on the following day.

On August 27, 2007, Mr. Tune picked-up Mr. Young and the two men drove to Saddlebrooke residence and began pulling trailers situated in the barn previously built by Stoam Holdings. (Mr. Young noted that, prior to the layoffs in June 2007, production supplies and equipment of Stoam Holdings were moved to the barn by the employees of Stoam Holdings.) Upon pulling the trailers, Mr. Tune and Mr. Young began loading the trailers with supplies and equipment of Stoam Holdings. According to Mr. Young, he and Mr. Tuner were preparing equipment and supplies to be sent to Florida, as part of the company's plan to move its operations to Florida. Mr. Tune and Mr. Young engaged in this work over a three-day period (August 27, 2007 through August 29, 2007). Additionally, over this three day period, the two men worked on the construction of a tree house (or deer stand), which involved a modification of the previously Stoam Holdings designed Dog House.

Notably, during this three-day period, Mr. Tune was unable to start the Stoam Holdings Chevrolet 350 diesel pickup truck, which required Mr. Tune and Mr. Young to pull the Chevrolet pickup with a Dodge pickup truck to J & S Automotive located in Springfield, Missouri. Business records from J & S Automotive indicate that the fuel filter malfunctioned. (The records of J & S Automotive indicate that Stoam Holdings was the responsible party for payment of the automotive repair expenses.)

Work during week of August 27, 2007.

Mr. Tune and Mr. Young spent Monday (27th) and Tuesday (28th) loading company equipment from the barn onto Stoam Holdings trailers. Notably, during these days, Mr. Tune would call Russell Wright on his cell phone for instructions. And, on August 28, 2008, Mr. Tune and Mr. Young traveled to the Lowes hardware store located in Ozark, Missouri to buy certain materials for the decking of the tree house (converted dog house). These materials included ten sheets of 4 x 8-chipboard subflooring.

[Mr. Tune denies this work involved employment with Stoam Holdings, stating that he was doing this work as a favor for Russell Wright. Mr. Tune does not explain or identify the presence work of Mr. Young as a favor to Russell Wright. Similarly, Russell Wright states that Stoam Holdings was not an active business on August 29, 2007,

and he did not employ Mr. Young to work for him or Stoam Holdings on August 29, 2007. Further, Russell Wright states that, on August 29, 2007, Stoam Holdings had not employed Mr. Tune; and he did not authorize Mr. Tune to employ Mr. Young. Rather, according to Russell Wright, he personally hired Mr. Tune to perform handyman work for him, and he did not know that Mr. Tune had secured Mr. Young to do some work with him on his home.]

August 29, 2007 Accident.

On August 29, 2007, while engaged in the erection of the tree house (or deer stand) and construction of the floor, Mr. Tune and Mr. Young proceeded to place the tree house into a tree located on the Wright property. This tree overlooked a pond located on the property. Mr. Young was approximately 12-15 feet from ground level when he was attempting to place the subflooring securely in the tree. Without the subfloor being sufficiently supported for his weight, Mr. Young fell through the subflooring to the ground, landing upon his face and head. A photograph of his injuries was taken shortly after the accident and is reflected in Exhibits J-1. Additionally, the facial scars, after they have healed, are reflected in Exhibit J-2.

Medical Treatment.

An ambulance from Cox Medical Center transported Mr. Young to the Emergency Department of St. John's Regional Health Center. Cox Medical Center received the call for ambulance assistance at 11:35 a.m. and arrived at St. John's with Mr. Young at 12:35 p.m. The staff noted from the ambulance crew that Mr. Young had fallen face first off a "tree stand." The fall caused Mr. Young to suffer a laceration vertical midline from the hairline to his nose. Additionally, Mr. Young suffered a nose deformity with blood from both nostrils and upper lip. (The attending paramedics suctioned blood from Mr. Young's mouth four times while he was in route from the scene of the accident to the hospital.) Also, the Emergency Department noted that Mr. Young suffered multiple lacerations to the face and neck. Mr. Young reported his pain at the level of a 10 and reported this pain on his face and neck.

The attending physician in the emergency room sought consultation from Dr. Joel Waxman, who diagnosed Mr. Young with facial lacerations and a comminuted nasal fracture, and determined that Mr. Young required immediate surgery. On the same day, the attending physicians took Mr. Young from the Emergency Department to the operating room for surgery, resulting in Dr. Waxman surgically closing the laceration and reducing the nasal fracture.

In his operative notes, Dr. Waxman noted that Mr. Young suffered a complex laceration of approximately nine centimeters that extended from the mid-line of the forehead down through the brow area and over the nasal dorsum. Dr. Waxman further noted several bone fragments over the nasal dorsum, which were realigned. The upper lip had a complex 3 x 2 centimeter laceration, which included an avulsion of about a one centimeter pedicle. There were two one-centimeter lacerations in the gingival sulcus. There was a 1/8 centimeter laceration full of skin and blood debris extending down to the symphyseal segment of about eight centimeters within the mandible.

Mr. Young followed-up with Dr. Waxman upon an outpatient basis from September 4, 2007, through October 16, 2007. Dr. Waxman referred Mr. Young to the Back and Spine Center on October 3, 2007, because of headaches, back pain and neck pain.

The medical care and expenses incurred by Mr. Young are in the amounts and as follows:

Jay Woodring, M.D. (Outpatient - Anesthesia)	\$ 1,870.00
Joel E. Waxman, M.D. (Outpatient Emergency)	\$ 3,137.00
Joel E. Waxman, M.D. (Inpatient Emergency)	\$ 176.00
James M. Sauer, M.D. (Emergency Room)	\$ 777.00
Kenneth B. Synder, M.D. (Emergency Room)	\$ 87.00
G. Jeff Ondr, M.D. (Emergency Room)	\$ 581.00
Jamie S. Myers, M.D. (Inpatient Emergency)	\$ 189.00
St. John's Hospital (September 5, 2007)	\$ 2,821.00
St. John's Hospital (August 29, 2007)	<u>\$23,923.00</u>
Total:	\$33,561.00

Post-Accident.

Mr. Young testified that he did not work from August 30, 2007, until November 8, 2007 (10 weeks).

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial amendment on or about August 28, 2005. This change governs the underlying workers' compensation case, which involves an accident date of December 12, 2005.

I. Employment

[Whether Tim Young was an employee of Stoam Holdings and operating under and subject to the Missouri Workers' Compensation Law at the time of the claimed accident?]

The parties do not argue or dispute that, at the time of the claimed accident, Mr. Young was engaged in work associated with the building of a tree house (or deer stand). Stoam Holdings asserts that Mr. Young was building the tree house for him personally, for the use of his children, and not for Stoam Holdings. Further, Stoam Holdings asserts that Mr. Young engaged in the building of the tree house, gratuitously, as a favor to him and Mr. Tune.

The term employee is defined in Section 287.020, RSMo, which, in pertinent part, states:

The word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations.

Section 287.020.1

In context of Section 287.020, there need be no payment of wages to trigger an employment relationship. *Stegeman v. St. Francis Xavier Parish*, 611 S.W.2d 204 (Mo. Banc. 1981). Instead, the alleged employer need only be able to have the right of control over the employee's activities for the employment relationship to be engaged by either employment or election. *Howard v. Winebrenner*, 499 S.W.2d 389 (Mo. 1973); *Ceradsky v. MidAmerica Dairyman, Inc.*, 583 S.W.2 193 (Mo. App. W.D. 1979); *Cope v. House of Maret*, 729 S.W.2d 641 (Mo. App. E.D. 1987).

The evidence is supportive of a finding that, at the time of the claimed accident, Mr. Young was an employee of Stoam Holdings. The work being performed by Mr. Young on August 29, 2007 is part of a three-day work activity, associated with Mr. Young's prior employment relationship with Stoam Holdings, and not a personal relationship with Mr. Tune or Mr. Wright. Notably, at or near the time of the company layoffs in June 2007, Mr. Young and other employees were given expectation or hope of the business enjoying a restart of business operation with a move of the business to Florida. Further, upon receiving a telephone call from Mr. Tune on Sunday, August 26, 2007, and upon being questioned by Mr. Tune if he was ready to return to work, Mr. Young said yes and began performing work for Stoam Holdings.

The work initially performed by Mr. Young and Mr. Tune began on August 27, 2007, and included pulling trailers situated in the barn previously built by Stoam Holdings. (Prior to the layoffs in June 2007, the employees of Stoam Holdings moved production supplies and equipment of Stoam Holdings to the barn.) Upon pulling the trailers, Mr. Tune and Mr. Young began loading the trailers with supplies and equipment of Stoam Holdings. According to Mr. Young, he and Mr. Tuner were preparing equipment and supplies to be sent to Florida, as part of the company's plan to move its operations to Florida. Mr. Tune and Mr. Young engaged in this work over a three-day period (August 27, 2007 through August 29, 2007). Additionally, over this three-day period, the two men utilized a Stoam Holdings truck, and towed another Stoam Holdings truck to J & S Automotive for servicing and repair. Later, on August 31, 2007, the repairs were completed and paid for by or in behalf of Stoam Holdings.

In addition, the construction of the tree house (or deer stand) by Mr. Tune and Mr. Young did not involve a

simple and small tree house (or deer stand) design. Rather, the walls of the tree house (or deer stand) were the walls previously manufactured by Stoam Holdings (steel and foam insulation style), and involved a modification of the previously Stoam Holdings designed Dog House measuring approximately 12 feet by 6 feet, with a height of approximately 6 feet. As previously noted, the components of this dog house design was built in the Stoam Holdings shop, with the exception of the floor, similar to the method of building residential houses. The accident occurred while the two men were building the floor for this building.

Although Mr. Tune denies this work involved employment with Stoam Holdings, stating that he was doing this work as a favor for Russell Wright. Mr. Tune does not explain or identify the presence of Mr. Young on the project, or reasons why Mr. Young would be doing a favor for Russell Wright. Nor is there any evidence of a social / personal friendship existing between Mr. Young and Mr. Tune, or Mr. Young and Mr. Wright. Rather, there is evidence of Mr. Young having a business relationship with Stoam Holdings, and an expectation or hope of returning to work for Stoam Holdings as part of a relocation to Florida.

Accordingly, after consideration and review of the evidence, I find and conclude that, on August 29, 2007, Mr. Young engaged in employment with Stoam Holdings. Mr. Tune enjoyed certain authority to act for and in behalf of the Stoam Holdings, including operating and using an automobile owned by Stoam Holdings, and securing automotive repair services for trucks owned by Stoam Holdings. Mr. Tune invited Mr. Young to engage in work for Stoam Holdings, and Mr. Young accepted this invitation. Even if Mr. Tune did not possess actual authority, he was clothed in authority by Stoam Holdings, and enjoyed apparent authority.

Further, Stoam Holdings benefited from the work performed by Mr. Young, including the construction of a tree house (or deer stand). Initially, Mr. Young moved and prepared supplies and equipment of Stoam Holdings in preparation of the company moving to the State of Florida. Later, Mr. Young engaged in the construction of a tree house (or deer stand). And, even if the project is construed as a tree house, as opposed to a deer stand, Stoam Holdings is a beneficiary of the construction of a tree house. The tree house encompasses Stoam Holdings style of steel and foam insulation walls, which would assist the company in demonstrating new inventory to customers.

Finally, to the extent there is a conflict in the parties' testimony, I resolve the conflict in favor of Mr. Young. I find Mr. Young credible and accept as true his testimony.

II.

Arising Out of & In the Course of Employment

The parties readily acknowledge that Mr. Young suffered an injury by accident, while working on a tree house. The parties, however, dispute whether Mr. Young was an employee of Stoam Holdings on August 29, 2007; and, if so, whether the accident arose out and in the course of Mr. Young's employment with Stoam Holdings. Having resolved the initial question of employment, the issue remains whether Mr. Young suffered an accident arising out of and in the course of his employment with Stoam Holdings.

Whether an employee suffers an injury arising out of and in the course of employment is a two-part test. Did the injury first, arise out of and, second, in the course of, employment? These parts have been stated thusly:

An injury arises out of employment if there is a causal connection between the nature of the employee's duties or the conditions he was required to perform them and the resulting injury. [citing authority]. More specifically, 'an injury arises out of employment if (1) the injury results from a natural and reasonable incident of the employment, a rational consequence of some hazard connected therewith or a risk reasonably inherent in the particular conditions of the employment and 2) if the injury is the result of a risk peculiar to the employment or enhanced thereby.' *Mann v. City of Pacific*, 860 S.W.2d 12, 16-17 (Mo. App. E.D. 1993).

* * * * *

The "in the course of employment" test refers to the time, place and circumstances under which the injury is received. [citing authority]. An injury occurs "in the course of employment" if it occurs 'within the period of employment at a place where the employee may reasonably be, while engaged in the furtherance of the employer's business or if he is

injured in doing an act reasonably incidental to the performance of his duties, of which his employer might reasonably have knowledge or reasonably anticipate.” [citing authority].

Under certain circumstances the period of employment may include periods when an employee voluntarily comes to work to perform activities that are reasonably incidental to employment. [citing authority]. An employee’s course of employment may be expanded to off-duty periods due to the employee’s desire to advance his employer’s interest and because he was at a place he was reasonably be and reasonably fulfilling duties of his employment. [citing authority]. *Mann*, at p. 15.

In the present case, during the period in question, Stoam Holdings was endeavoring to transfer its operations to the State of Florida. Mr. Tune, as an employee of Stoam Holdings, requested Mr. Young’s assistance in loading materials that were located in a barn built by Stoam Holdings employees onto trailers owned by Stoam Holdings. Then, on August 29, 2007, the two men engaged in construction of a tree house (or deer stand), utilizing the Stoam Holdings steel and foam insulation style of walls. To be sure, in accepting Mr. Tune’s offer of work and in agreeing to build the tree house (or deer stand), Mr. Young possessed interest in reestablishing and continuing an employment relationship with the officials of Stoam Holdings. Relative to this concern, Mr. Young would not have been located at these premises had it not been for his employment with the company. Thus, these circumstances satisfy the test set forth in *Mann*.

Further, actions of an employee, which benefit an employer upon a private basis, are still considered to have arisen out of and in the course of employment. See, in particular, 2 *Larson the Law of Workman’s Compensation*, Section 27.04. *Larson* states in pertinent part:

When any person in authority directs an employee to run some private errand or do some work outside his normal duties for the private benefit of the employer or superior, an injury in the course of that work is compensable. *Larson* at pgs. 27-39.

Larson also states the following:

When these two problems [referring to dual employment and insurance coverage] are set to one side, the rule on private errands directed by the employer becomes clear, and the case is shown a large majority in favor of compensability. Some typical examples of successful claims will show the wide range within which this rule operates, and the extreme degree of remoteness between the main employment and the private task that can exist and yet not interrupt the course of the employment: citing examples. The technical reason for these holdings is that, whatever the normal course of employment may be, the employer and his supervisory staff had it within their power to enlarge that course by assigning tasks outside the usual area. If they do not assign these tasks on the strength of the employer-employee relation on which compensability depends, then what is the source of authority by which the task is assigned?

The practical reason for the rule is that any other view places the employee in an intolerable dilemma: if he complies with the order, he forfeits compensation protection; if he does not comply, he gets fired. *Larson* at pgs. 27-41 to 27-43.

In addition, *Larson* addresses the authority of the person who issues the order to commence or continue work upon a private errand for the employer. *Larson* states, at Section 27.04[6] that the actual authority of the person who issues the order is irrelevant. See *Larson* at Section 27.04[6] pgs. 27-44 to 27-45. Missouri case law supports these comments in *Larson*. See, for example, *Tyra v. Delta Veterinary Clinic, Inc.*, 687 S.W.2d 931 (Mo. App. S.D. 1985); *Nichols v. Davidson Hotel Co., Inc.*, 333 S.W.2d 536 (Mo. App. S.D. 1960); *Liverman v. Wagner*, 384 S.W.2 107 (Mo. App. KCD 1965). See, also, *Corrington Park Assoc., LLC, v. Barefoot, Inc.*, 983 S.W.2d 210 (Mo. App. W.D. 1998) for the proposition that David Tune had apparent authority to bind Stoam Holdings to an employment relationship between Stoam Holdings and Mr. Young.

Therefore, in light of the foregoing, and after consideration and review of the evidence and arguments of counsel, I find and conclude that Mr. Young suffered an injury by accident on August 29, 2007; and the accident arose

out of and in the course of his employment with Stoam Holdings.

III. Covered Employer

[Whether Stoam Holdings was an employer operating under and subject to the Missouri Workers' Compensation Law at the time of the claimed accident?]

The alleged employer, Stoam Holdings, asserts that, at the time of the claimed accident, it was not an employer operating under and subject to The Workers' Compensation Law for the State of Missouri. After consideration and review of the evidence and arguments of counsel, I find and conclude that, on August 29, 2007, Stoam Holdings was an employer operating under and subject to Chapter 287, RSMo.

The term "employer" is defined in Section 287.030, RSMo, which states:

- The word "employer" as used in this chapter shall be construed to mean: (1) Every person, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, using the service of another for pay;

Additionally, in the absence of an employer election to be covered under Chapter 287, RSMo, a general employer must have five or more employees in order to be deemed a covered employer; while a construction industry employer need only have one employee in order to be deemed a covered employer. In this context, Section 287.030, RSMo states:

(3) Any of the above-defined employers must have five or more employees to be deemed an employer for the purposes of this chapter unless election is made to become subject to the provisions of the chapter as provided in subsection 2 of section 287.090, except that construction industry employers who erect, demolish, alter or repair improvements shall be deemed an employer for the purposes of this chapter if they have one or more employees. . . .

Section 287.030.1(3).

The evidence is supportive of a finding that, on August 29, 2007, Stoam Holdings was an employer operating under and subject to Missouri's workers' compensation law. First, Stoam Holdings, as a business engaged in the manufacturing and erection of residential homes and other buildings to be situated on real estate, is a construction industry employer. Thus, Stoam Holdings need only have one employee to be deemed an employer under Chapter 287, RSMo. Secondly, at the time of the claimed accident on August 29, 2007, Stoam Holdings enjoyed five or more employees, and may be deemed a general employer covered under Chapter 287, RSMo. See *George Brewer v. Pen Mar.*, 980 S.W.2d 147 (Mo App. W.D. 1998). In this regard, on August 29, 2007, Stoam Holdings, at a minimum, had five employees: (1) Russell Wright, (2) Joseph Wright, (3) Ashley Holm, (4) David Tune, and (5) Tim Young. The counting of employees for purpose of Section 287.030, RSMo includes statutory employees. *Borjas v. Landmark Builders*, 792 S.W.2d 29 (Mo. App. E.D. 1990).

In addition, while Stoam Holdings argues that it had ceased its operations by June 2007, several facts support a contrary conclusion. Notably, the company continued to maintain health insurance coverage for a number of employees extending through the Summer of 2007. At a minimum, it maintained health insurance for at least three, and conceivably, eight employees. It continued to maintain its status as a limited liability company with the Missouri Secretary of State. It continued to own a multiple trucks and trailers. In deed, Messrs. Tune and Young used trucks and trailers owned and by Stoam Holdings in loading the equipment stored at the Saddlebrooke barn. And, officials with the company were engaged in negotiations or discussions with a Florida company known as Worldwide Ornamental to commence production of Stoam Holdings style homes in southern Florida. While Stoam Holdings was no longer producing homes in August 2007, it was attempting to transfer business operations and therefore had

interests for which employees such as Mr. Young could provide a benefit.

IV.
Notice

The evidence is supportive of a finding that Mr. Young provided notice of the injury to Stoam Holdings. Notably, at the time of the incident David Tune was present and Mr. Tune immediately informed Russell Wright of the incident, seeking instructions for emergency care. Further, the parties do not dispute that Russell Wright received timely and actual notice of the accident; and, there is no evidence of Stoam Holdings being prejudiced by the form of, or absence of written, notice. Accordingly, this issue is resolved in favor of the employee.

V.
Venue

The evidence is supportive of a finding that venue is proper. Notably, both Mr. Young and Mr. Tune testified that the accident occurred on property located in Christian County, Missouri. Accordingly, insofar as the trial in this case was held in Christian County, Missouri, venue is proper.

V.
Medical Care / Medical Causation

On August 29, 2007, while engaged in the erection of the tree house (or deer stand) and construction of the floor, Mr. Tune and Mr. Young proceeded to place the tree house into a tree located on the Wright property. This tree overlooked a pond located on the property. Mr. Young was approximately 12-15 feet from ground level when he was attempting to place the subflooring securely in the tree. Without the subfloor being sufficiently supported for his weight, Mr. Young fell through the subflooring to the ground, landing upon his face and head.

This accident caused Mr. Young to suffer nasal, facial and neck injuries, including facial lacerations and a comminuted nasal fracture. The injury necessitated immediate surgery that included surgically closing the laceration and reducing the nasal fracture. Additionally, Mr. Young received follow-up care associated with the surgical repair performed by Dr. Waxman. Additionally, in light of continuing pain and discomfort, causally related to the August 29, 2007 accident, Mr. Young received a referral to the Back and Spine Center for treatment of headaches, back pain and neck pain.

In Missouri, a causal connection may be inferred if the injury develops coincidentally with a triggering act. In such instances, under the sudden onset doctrine, the trier of fact may infer causation without the aid of medical testimony. The most obvious cases in which the sudden onset doctrine is applicable are the accidents where a person suffers a broken bone or open wound. In such a case, there is no need for medical testimony to causally link discomfort to an injury since the trier of fact is able to infer that the pain experienced resulted from the injury which received the treatment. See generally *Crawford v. Shop-N-Save Warehouse Foods, Inc.*, 91 S.W.3d 646 (Mo. App. E.D. 2002). See also *Berten v. Pierce*, 819 S.W.2d 685 (Mo. App. W.D. 1991); *Tucker v. Wibbenmyer*, 901 S.W.2d 350 (Mo. App. E.D. 1995).

Past Medical Expenses

The medical care and expenses incurred by Mr. Young, causally related to the August 29, 2007 accident, are in the amounts and as follows:

Jay Woodring, M.D. (Outpatient - Anesthesia)	\$ 1,870.00
Joel E. Waxman, M.D. (Outpatient Emergency)	\$ 3,137.00
Joel E. Waxman, M.D. (Inpatient Emergency)	\$ 176.00
James M. Sauer, M.D. (Emergency Room)	\$ 777.00
Kenneth B. Synder, M.D. (Emergency Room)	\$ 87.00
G. Jeff Ondr, M.D. (Emergency Room)	\$ 581.00
Jamie S. Myers, M.D. (Inpatient Emergency)	\$ 189.00

St. John's Hospital (September 5, 2007)	\$ 2,821.00
St. John's Hospital (August 29, 2007)	<u>\$23,923.00</u>
Total:	\$33,561.00

The aforementioned medical care was reasonable, necessary and causally related to the August 29, 2007 accident.

Section 287.140, RSMo, requires an employer to provide medical treatment as may be reasonably required to cure and relieve an employee from the effects of the work-related injury. Accordingly, in light of the foregoing, the employer Stoam Holdings, LLC is responsible for payment of the medical care and expenses the employee, Tim Young, incurred in the course of receiving treatment for the injuries he sustained on August 29, 2007.

The employer, Stoam Holdings, LLC, did not have workers' compensation insurance coverage at the time of the injury and accident of August 29, 2007. Yet, the employer was operating subject to the requirements of The Workers' Compensation Law for the State of Missouri, and was obligated by law to carry the requisite insurance coverage.

Accordingly, the employer Stoam Holdings, LLC is ordered to pay to the employee, Tim Young, the sum of \$33,561.00, which represents payment of past medical care and expenses. Similarly, the Treasurer of the State of Missouri, as the Custodian of the Second Injury Fund, is liable to the employee, Tim Young, for payment of medical care and expenses in the amount of \$33,561.00.

In addition, the evidence presented in this case is supportive of a finding that the employee, Tim Young, is in need of additional medical care in order to cure and relieve him of the effects of the injuries caused by the August 29, 2007 accident. In this regard, Mr. Young testified that he continues to suffer from pain in his back and neck, as well as headaches and pain referable to the face. And, according to Mr. Young, prior to the injury he had not suffered any facial, head, neck or upper back injuries. In this regard, I find Mr. Young credible and accept as true his testimony. Accordingly, I find and conclude that, as a consequence of the August 29, 2007 accident, the employee, Tim Young, is entitled to additional medical care in order to cure and relieve him from the effects of the August 29, 2007 accident and injury.

Therefore, the employer, Stoam Holdings, LLC, is ordered to provide the employee, Tim Young, with additional medical care, and which is reasonable, necessary, and causally related to the August 29, 2007 accident. Similarly, the Treasurer of the State of Missouri, as the Custodian of the Second Injury Fund, is ordered to provide the employee, Tim Young, with additional medical care, and which is reasonable, necessary, and causally related to the August 29, 2007 accident.

The Treasurer of the State of Missouri, as the Custodian of the Second Injury Fund, is entitled to reimbursement against the employer, as is allowed by law.

V. Compensation Rate

The parties did not stipulate to a specific wage rate, and the employee failed to sustain his burden of proof in establishing an average weekly wage under Section 287.250, RSMo. Notably, Mr. Young presented testimony relative to the weekly wages he received in his employment with Stoam Holdings prior to his termination of employment in June 2007. Mr. Young, however, did not present any testimony relative to his return to employment with Stoam Holdings. This new employment relationship involved a new beginning, premised on the business effectuating a transfer of operations to the State of Florida. Accordingly, evidence of wages earned in a prior employment relationship is not an appropriate basis to identify the applicable compensation rate governing the new employment relationship. Nor did Mr. Young provide evidence of wages earned over the three-day period.

Therefore, I find and conclude that, at this time, the applicable compensation rate is the statutory minimal of \$40.00 per week. The parties, however, may revisit this issue, by further adjudication or resolution by agreement of the parties.

VI.
Temporary Total Disability Compensation

Mr. Young testified that he missed work from August 30, 2007 through November 7, 2007 (ten weeks), because of the injuries he sustained on August 29, 2007. Mr. Young's testimony is supported by the medical records and the nature of the injuries he sustained on August 29, 2007.

Accordingly, after consideration and review of the evidence, I find and conclude that, during the period of August 30, 2007 through November 7, 2007, Mr. Young was unemployable in the open and competitive labor market.

Therefore, in light of the foregoing, I find and conclude that, as a consequence of the August 29, 2007 accident, Mr. Young was temporarily and totally disabled during the period of August 30, 2007 through November 7, 2007 (ten weeks). The employer, Stoam Holdings, LLC, is ordered to pay to the employee the sum of \$400.00, which represents 10 weeks of temporary total disability compensation, payable for the period of August 30, 2007 through November 7, 2007 (ten weeks), at the statutory minimum compensation rate of \$40.00. (The issue of additional temporary disability compensation, including compensation rate, shall be deferred pending further hearing or resolution by agreement of the parties.)

In light of the award being temporary in nature, the case shall remain open as provided by law. Similarly, all issues not resolved herein shall be deferred pending further hearing. The award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Date: August 22, 2008

Made by: /s/ L. Timothy Wilson

L. Timothy Wilson
Chief Administrative Law Judge
Division of Workers' Compensation
Signed August 19, 2008

A true copy: Attest:

/s/ Jeffrey W. Buker

Jeffrey W. Buker

Director

Division of Workers' Compensation

The complexity of the issues and extenuating circumstances merited leaving the record open for submission of additional evidence, and extending time for issuance of the award.

All references to Stoam Holdings, L.L.C. include Stoam Industries, L.L.C.

The parties differ on whether the building project involved the construction of a tree house, as opposed to the construction of a deer stand. Notwithstanding, the parties agree that the work being performed by Mr. Young involved the construction of a dwelling in a tree, off the ground, and on his residence.