

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**STEPHEN U. WEBB** )  
Claimant )  
VS. )  
**NATIONAL ENVELOPE CORPORATION** )  
Respondent )  
AND )  
**ACE AMERICAN INSURANCE CO.** )  
Insurance Carrier )

Docket No. 1,046,493

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the January 3, 2013, Award entered by Administrative Law Judge Steven J. Howard (ALJ). The Board heard oral argument on May 7, 2013. Mark E. Kolich, of Lenexa, Kansas, appeared for claimant. Brenden W. Webb, of Overland Park, Kansas, appeared for respondent.

The parties have stipulated that claimant has a 17 percent functional disability to the body as a whole. The ALJ found that claimant had not earned a post-injury wage since December 2, 2010, and, further, that claimant does not fall within the definition of an employee as set out in K.S.A. 2007 Supp. 44-508(b). Accordingly, the ALJ found claimant was entitled to a work disability based on a 100 percent wage loss and a 0 percent task loss.

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

Respondent argues that claimant's receipt of rent from his investment property constitutes a wage from a self-employed business and, therefore, claimant did not prove a wage loss and is not entitled to a work disability.

Claimant argues the ALJ correctly found he was not an employee earning a wage and that he had a 100 percent wage loss.

The issue for the Board's review is: Is claimant entitled to a work disability?

### **FINDINGS OF FACT**

On December 13, 2007, claimant had an accident at work and injured both shoulders and his neck. He left his employment with respondent on December 2, 2010, and has not worked anywhere since.

Claimant owns several houses, which he rents out. The rent on the property he owns is paid to the Housing Authority, and he receives a check from the Housing Authority in the amount of \$3,100 per month. Claimant does not manage or do any maintenance on any of his properties. Claimant makes mortgage payments, insurance payments, and pays maintenance costs. Claimant said he is in debt.

The parties have stipulated that claimant's preinjury average weekly wage, excluding fringe benefits, was \$501.30. Claimant's average weekly wage, including fringe benefits, was \$526.30. The parties have also stipulated that claimant has a 17 percent functional impairment to his whole body as a result of his work-related accident.

### **PRINCIPLES OF LAW**

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of

the average gross weekly wage that the employee was earning at the time of the injury.

### ANALYSIS AND CONCLUSION

The only issue in this case is whether claimant is earning wages by receiving rental income on investment property. The Board must determine if investment income should be included in the “average weekly wage the worker is earning after the injury” pursuant to K.S.A. 2007 Supp. 44-510e(a). The ALJ found, and the Board agrees, that claimant was not a worker as defined in K.S.A. 2007 Supp. 44-508(b), which states:

“Workman” or “employee” or “worker” means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer.

Additionally, the Board finds that claimant is not earning wages as defined in K.S.A. 2007 Supp. 44-511(a)(3), which states:

The term “wage” shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment.

Pursuant to the direction of the Court of Appeals<sup>1</sup>, the Board is not using K.S.A. 2007 Supp. 44-511(a)(3) to define the post-injury wage in the exact same manner as the pre-injury wage. The statute is used as the only source within the act that provides guidance for determining the nature of wages.

In order for income to be considered a “wage” for the purposes of the workers compensation act, the income must be received for services rendered to an employer. Claimant does not personally maintain his rental properties. The Kansas City Housing Authority collects the rent, not claimant. Claimant’s sole involvement in the operation of his rental property is to receive rent from a third party. Claimant is not receiving money for services rendered to anyone. Claimant is simply enuring himself to the benefits of an investment. Profit or loss from an investment is not a wage for the purposes of the act.

The Board finds that claimant is not a worker earning a post-injury wage for the purposes of K.S.A. 2007 Supp. 44-510e.

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<sup>1</sup> *Nistler v. Footlocker Retail, Inc.*, 40 Kan. App. 2d 831, 838, 196 P.3d 395 (2008).

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated January 3, 2013, is affirmed.

The ALJ approved the fee agreement between claimant and his attorney. This file contains no attorney fee agreement between claimant and his current attorney as mandated by K.S.A. 44-536(b). As such, there can be no approval of that fee agreement. Should claimant's counsel desire a fee be approved, he must file and submit this written contract to the Director for approval.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant  
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Steven J. Howard, Administrative Law Judge