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In the Matter of the Compensation of  
**KELLY D. SKEEL, Claimant**  
WCB Case No. 03-00264  
ORDER ON REVIEW  
Malagon Moore et al, Claimant Attorneys  
Alice M Bartelt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Phillips Polich and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Howell's order that affirmed a Director's order that declined to reclassify claimant's left medial epicondylitis claim as disabling. On review, the issue is classification.

We adopt and affirm the ALJ's order with the following modification and supplementation.

Claimant, a die caster whose job required constant bending of his elbow, was diagnosed with left medial epicondylitis. The SAIF Corporation accepted his claim for that condition as "nondisabling," and he continued his regular job. He was later discharged for reasons unrelated to his claim and went to work for a new employer. Claimant requested that SAIF reclassify his claim as disabling. A Director's Classification Review and Order affirmed SAIF's classification. Claimant requested a hearing from the Director's order.

For an injury to be classified as disabling, temporary benefits must be due and payable or there must be a reasonable expectation that permanent disability will result from the injury. ORS 656.005(7)(c). The ALJ found that Dr. Brandt, claimant's treating physician, did not describe claimant as being disabled from performing regular work with the employer-at-injury until after he had stopped working for that employer. The ALJ reasoned that Dr. Brandt's report could not constitute retroactive authorization of disability for the period claimant worked for the employer-at-injury. Additionally, because claimant had returned to regular work for the at-injury employer without wage loss and was subsequently discharged for reasons unrelated to his injury, the ALJ concluded that claimant had lost no wages because of his injury. The ALJ then determined that claimant's claim was "nondisabling" because no temporary disability was due and payable and because permanent disability was not reasonably expected.

On review, claimant contends that the compensable injury is likely to result in permanent disability and that he was eligible for temporary disability benefits.

Therefore, claimant argues that his claim should be classified as “disabling.” We disagree with claimant’s contentions.

Citing ORS 656.214(2)(a)<sup>1</sup> and a dictionary definition of the word “loss,” claimant contends that he is entitled to an award of permanent disability if he experiences a “decrease in the amount, magnitude, or degree” to which he can use his injured arm. He cites Dr. Brandt’s opinion that he is “disabled from his regular employment” at his employer-at-injury to show that he suffers such a “loss.” (Ex. 10-1).

Scheduled permanent disability, however, is not determined by the dictionary definition of the word “loss,” but rather by the disability “standards” adopted by the Director pursuant to ORS 656.726(4)(f). In any event, Dr. Brandt found it medically probable that claimant would suffer no permanent impairment and does not suffer a chronic condition that significantly limits his ability to repetitively use his left elbow. (Ex. 10-1–2). Under these circumstances, we agree with the ALJ’s determination that permanent disability is not reasonably expected. *SAIF v. Schiller*, 151 Or App 58, 62 (1997), *rev den* 326 Or 389 (1998); *Lester B. Lewis*, 51 Van Natta 778, 779 (1999) (In determining whether a compensable injury is disabling under ORS 656.005(7)(c), expert medical opinion is required indicating that a permanent disability award is likely or expected).

Claimant also argues that because Dr. Brandt found him unable to perform his regular job at his employer-at-injury, he was entitled to temporary disability benefits. The relevant question is not whether claimant was able to perform his regular job, but whether temporary disability payments were “due and payable.” If claimant did not lose wages, such payments were not due and payable. *Audrey L. McDaniel*, 50 Van Natta 1423, 1424 (1998). Claimant contends that an employer may not avoid a “disabling” claim classification by providing modified work or continuing a wage payment, but *McDaniel* allows an employer to do so. *See Alfredo R. Hernandez*, 51 Van Natta 71, 75 (1999) (wages at modified job, whether or not modified job was available, were the same as wages at time of injury; calculation of the claimant’s temporary disability was therefore zero).

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<sup>1</sup> The statute provides that the criteria for the rating of disability shall be the “permanent loss of use or function of the injured member due to the industrial injury.” ORS 656.214(2).

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As claimant lost no wages as a result of his disability, no temporary disability payments were due and payable.<sup>2</sup>

Because no disability payments were due and payable and because claimant has no expectation of permanent disability resulting from the injury, claimant's injury claim was properly classified as "nondisabling." Accordingly, we affirm.

ORDER

The ALJ's order dated May 1, 2003 is affirmed.

Entered at Salem, Oregon on October 8, 2003

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<sup>2</sup> We do not adopt the ALJ's reasoning that implies that the claim is "nondisabling" because claimant lost no wages during his employment with the employer at injury. Otherwise, as supplemented herein, we agree with the ALJ's analysis of the claim.