Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 1, 2016

CLAIM NO. 201464029

MARK POWERS, SR. PETITIONER

VS. **APPEAL FROM HON. STEPHANIE KINNEY, ADMINISTRATIVE LAW JUDGE**

LOUISVILLE METRO GOVERNMENT
HON. STEPHANIE KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Mark Powers, Sr. ("Powers") appeals from the October 13, 2015 Opinion, Award and Order and the December 1, 2015 Order on Petition for Reconsideration rendered by Hon. Stephanie Kinney, Administrative Law Judge ("ALJ"). The sole question on appeal is whether the ALJ erred in finding Powers is not entitled to a period of temporary total disability ("TTD") during the time he

worked on restricted duty prior to reaching maximum medical improvement ("MMI"). We affirm.

The facts relevant to this appeal are undisputed. Powers was employed by Louisville Metro Government as an equipment operator. He injured his shoulder as a result of a work accident on September 17, 2014. He returned to work the next day on light duty as a flagger, and continued working at the same wages until he went off work for surgery performed October 21, 2014. Prior to the injury, Powers periodically performed work as a flagger as a part of his employment. Although flagging was frequently assigned as alternative work for those with restrictions, it was a necessary position. Following surgery, Powers initially returned to work picking up trash. This work was not part of his regular employment. Powers returned to flagging after three weeks and eventually returned to regular duty.

The ALJ determined Powers was paid his same rate of pay and the work he performed as a flagger from September 17, 2014 through October 20, 2014 was a customary job duty. Therefore, Powers was not entitled to TTD benefits for that period. The ALJ determined the post-operative work picking up trash was not part of Powers'

pre-injury job duties and awarded TTD benefits for that period.

Powers filed a petition for reconsideration arguing his work prior to the injury primarily involved strenuous physical work and flagging was only a very limited pre-injury job function. Thus, the work as a flagger should not be viewed as his customary work and an award of TTD benefits for the period from September 17, 2014 through October 20, 2014 is warranted. In her order dated December 1, 2015, the ALJ reiterated that she found flagging was a customary job duty performed at the time of the work injury. The ALJ further noted flagging work was performed by all members of the crew.

On appeal, Powers again argues flagging should not be considered "customary employment" because it constituted only a minimal portion of his pre-injury work. The overwhelming majority of his duties consisted of intense physical labor, from which he was restricted during the period in question. Citing Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015), Powers notes an ALJ has discretion to evaluate the work performed and determine whether or not it constitutes a return to the claimant's "customary" work duties.

The Supreme Court recently clarified when TTD benefits may be awarded in cases where an employee returns to modified duty prior to reaching MMI. In Trane Commercial Systems v. Tipton, --- S.W.3d --- 2016 WL 671170 (Ky. 2016), the Court explained as follows:

> We take this opportunity to further delineate our holding in *Livingood*, and to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents." *Double L Const., Inc.*, 182 S.W. 3d at 514. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD benefits. Therefore, the following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.
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> As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." *Central Kentucky Steel v. Wise*, 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee

who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, *i.e.* work within her physical restrictions and for which she has the experience, training, and education; *and* the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.

Applying the preceding to this case, we must agree with the ALJ that Tipton was not entitled to TTD during the period in question. Tipton's physician released her to perform light and sedentary work, which Trane provided for her. Additionally, although Tipton had not previously assembled circuit boards, she had assembled the air conditioning units and had tested them. Furthermore, she did not produce any evidence that assembling circuit boards required significant additional training or that it was beyond her intellectual abilities. In fact, it appears that Tipton was certainly capable of and wanted to perform the circuit board assembly job because she bid on and was awarded the job after her release to full-duty work. Thus, there was ample evidence of substance to support the

> ALJ's denial of Tipton's request for additional TTD benefits, and we reverse the Court of Appeals.

Here, Powers was not at MMI from the work injury prior to his surgery. He was released to light duty and the flagging work was within his restrictions. Powers did not have a loss in earnings. Powers had previously performed flagging duties, although it was not his primary duty. Flagging was not a “make work” job duty, though no prior training was necessary. Substantial evidence supports the ALJ’s conclusion that the flagging work from September 17, 2014 through October 20, 2014 constitutes “customary” employment. Further, Powers identifies no “extraordinary circumstances” that would justify an award of TTD benefits while he was engaged in the customary employment from September 17, 2014 through October 20, 2014. Thus, Powers is not entitled to TTD benefits for that period. The ALJ’s decision comports with the holding in Trane Commercial Systems v. Tipton, supra. We are therefore without authority to direct a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the October 13, 2015 Opinion, Award and Order and the December 1, 2015 Order on Petition for Reconsideration rendered by Hon. Stephanie Kinney, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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