BRB Nos. 97-0927

STERLING SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
	)	DATE ISSUED: _____
TRINITY MARINE GROUP	)	
	)	
and	)	
	)	
TRINITY INDUSTRIES, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Collins C. Rossi (Bernard, Cassisa & Elliott), Metairie, Louisiana, for employer/ carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and MCGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (96-LHC-211) of Administrative Law Judge James W. Kerr, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and the conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On February 11, 1992, claimant sustained a posterolateral herniation of the L2-L3 disc while working as a loftsman for employer. Dr. Matta, an orthopedist, took claimant off of work approximately two weeks later, and thereafter provided conservative treatment. When claimant's symptoms improved, Dr. Matta recommended that he undergo work hardening. While attending the work hardening program, claimant complained of pain. Based on claimant's restrictions, employer

created a new position for him as a production planner, which claimant began performing on August 3, 1992. On October 1, 1992, however, claimant was terminated, allegedly due to excessive absenteeism. Thereafter, in September or October 1994, claimant obtained work as a trimmer for Rosewood Homes, with whom he remained employed as of the time of the hearing. Claimant sought permanent total disability compensation from the time of his termination until he began this job, and permanent partial disability benefits thereafter.[1]

[1]Employer voluntarily paid various periods of temporary total disability compensation.

In his Decision and Order, the administrative law judge found that claimant had reached maximum medical improvement on August 3, 1992, and that although he was incapable of performing his usual work, the light duty job employer had provided for him as a production planner at its facility constituted alternate employment which was both suitable and necessary. The administrative law judge concluded, however, that employer's purported reason for terminating claimant was not borne out by the record, and determined that as claimant's termination was related to his disability, *i.e,* absences due to back pain resulting from his February 1992 work injury, employer was not relieved of the obligation of establishing other suitable alternate work in the period subsequent to the discharge.[2] As employer did not offer any evidence of suitable alternate employment prior to claimant's job with Rosewood, the administrative law judge found that claimant was entitled to permanent total disability compensation from his August 4, 1992, date of permanency until September 6, 1994, the date that employer established that the job at Rosewood was available to claimant, and various amounts of permanent partial disability benefits thereafter.[3] The administrative law judge further determined, however, that the award of permanent total disability was subject to a credit for the period from August 3, 1992 until September 29, 1992, in which claimant had performed the production planner job. Employer appeals, arguing that because it provided claimant with a suitable light duty job as a production planner within its facility which would still be available to him but for the fact that he was terminated for excessive absenteeism, *i.e.*, for reasons unrelated to his work injury, the administrative law judge erred in awarding him disability compensation subsequent to the time claimant was offered this position. Claimant has not responded to employer's appeal.

In the present case, as it is undisputed that claimant is unable to perform his usual work, claimant has established a *prima facie* case of total disability. Accordingly, the burden shifted to employer to establish the availability of suitable alternate employment that claimant is capable of performing. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90 (CRT)

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[2]In its Petition for Review at 9-10, employer suggests that the administrative law judge initially determined in his Decision and Order at 13 that the production planner position constituted suitable alternate employment, then inconsistently determined in the next page of the decision that it did not. In his Decision and Order at 12, the administrative law judge found that the production planner job at employer's facility was suitable and involved necessary work. In his Decision and Order at 14, although the administrative law judge does state that the production planner position did not meet the requirements of suitable alternate employment, when viewed in context he is clearly saying that because claimant was terminated from this job for reasons related to his work injury, employer could not rely on this job to establish suitable alternate employment subsequent to claimant's termination.

[3]The permanent partial disability awards were based on the difference between claimant's stipulated average weekly wage of $463.27 and his 40 hour per week earnings at Rosewood adjusted for inflation based on various hourly rates reflecting his pay raises over the period from September 7, 1994 until June 1, 1996.

(5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 2d 1031, 14 BRBS 156 (5th Cir. 1981). One way that employer can meet its burden of establishing the availability of suitable alternate employment is by providing claimant with a suitable job at its facility performing work which is necessary to employer's business. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Where employer provides claimant with a suitable job and claimant is terminated for malfeasance unrelated to his work-related disability, employer does not bear the renewed burden of showing other suitable alternate employment. *See, e.g.*, *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996); *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992) *aff'd sub nom. Brooks v. Director, OWCP,* 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1992); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). If, however, claimant's discharge is integrally related to his work injury, employer may not rely on the job it provided for claimant to meet its burden of establishing the availability of suitable alternate employment. *See Base Billeting Fund, Laughlin Air Force Base*, 588 F.2d 173 (5th Cir. 1979); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175, 179-180 (1996).

We affirm the administrative law judge's award disability compensation because his determination that claimant was terminated from this job for reasons integrally related to his work injury is rational, supported by substantial evidence, and in accordance with applicable law. *See O'Keeffe*, 380 U.S. at 159. In the present case, the record contained conflicting evidence regarding the circumstances surrounding claimant's termination. Employer's managers, Mr. Pennington and Mr. Faherty, testified that claimant was fired for excessive absenteeism, indicating that in the production planner position he was missing about one day of work per week. Tr. at 74-75. Mr. Faherty explained that because the production planner position was a much needed position, they needed someone reliable. Tr. at 111. Moreover, he testified that employer's policy on absenteeism required an employee who was not going to be in to call in by 8.00 a.m., and indicated that failure to do so for more than 3 days would result in termination. Tr. at 107. In addition, Mr. Faherty explained that the problem with claimant was not so much the amount of time he was off, but rather was more the fact that he would not always report when he was going to be out of work; he did admit, however, that claimant would sometimes call in . Tr. at 106. Moreover, Mr. Faherty also stated that when claimant returned to work, he sometimes had no reasons for his absence, or complained his back was hurting. Tr. at 106

Claimant, on the other hand testified that since returning to work as a production planner, he only missed about two days when his back was hurting, and that he was written up for the first absence, and fired after the second absence. Tr. at 42. Claimant further stated that the first day he missed work he called Brenda Sticker at employer's facility to inform her of his inability to work. Tr. at 42. Moreover, he provided testimony that he always informed employer that the reason he missed work was because of his back, Tr. at 126, and that he did not know of any other employee who had been fired for excessive absenteeism. Tr. at 43.

After reviewing employer's attendance records, EX 18, the administrative law judge found that they corroborated claimant's testimony and did not corroborate Mr. Faherty and Mr. Pennington's testimony that claimant missed about a day of work a week. The administrative law judge specifically found that the attendance records reflected that claimant had an unexcused absence and received a work warning on September 16, 1992, and a second unexcused absence on September 30, 1992. EX 18. The administrative law judge further determined that although there were notations on the attendance records on August 12, 20, 21, 26, 27, 1992 and September 10, 1992, as they had no defined code, there was no way for him to determine whether claimant was at work or not on those days.

Crediting claimant's account of the circumstances surrounding his termination as corroborated by employer's attendance records, and noting the admission of employer's managers that they were aware that claimant was having back problems during the period in question, the administrative law judge found that claimant's termination was not the result of a legitimate personnel action premised on excessive absenteeism. He further determined that as claimant's termination was because of absences due to back pain resulting from his work injury, employer was not relieved of the obligation of establishing other suitable alternate employment subsequent to the termination.

Claimant's testimony, the attendance records and the admission of employer's managers that they were aware that claimant was having back problems in the period prior to the termination, provide substantial evidence to support the administrative law judge's finding that claimant was terminated from the production planner job at employer's facility for reasons related to his work injury. *See O'Keeffe*, 380 U.S. at 359. Although employer contends on appeal that the administrative law judge's finding that claimant was fired without just cause for reasons related to his work injury is irrational and not supported by substantial evidence, the specific arguments it raises amount to no more than a request for the Board to reweigh the record evidence. It is, however, solely within the purview of the administrative law judge to consider the weight to be accorded to evidence and to make credibility determinations. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995). As employer has failed to identify any reversible error made by the administrative law judge in evaluating the conflicting evidence, we affirm his determination that the offer of the alternate job as a production planner did not relieve employer of the obligation of identifying other suitable alternate employment subsequent to claimant's termination. As employer

does not otherwise contest the disability award made by the administrative law judge, his award of permanent total and permanent partial disability compensation subsequent to claimant's termination is affirmed. *See Manship*, 30 BRBS at 179-180.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge