BRB Nos. 90-0161
and 91-1559

ANTHONY C. HAMMER, JR.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
HARRINGTON & COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, the Errata Order, and the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Douglass M. Moragas, Metairie, Louisiana, for claimant.

Kathleen K. Charvet (McGlinchey, Stafford, Cellini & Lang), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Errata Order and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (88-LHC-1594) of Administrative Law Judge Richard D. Mills 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).[1] We must affirm the findings of fact and conclusions of law of the administrative law judge

[1]By Order dated September 3, 1991, the Board consolidated for purposes of decision claimant's appeal of the administrative law judge's Decision and Order Awarding Benefits and his Errata Order,

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 May 4, 1981, claimant sustained an injury during the course of his employment which lead to a hernia operation. Claimant's condition recurred in 1982 and 1983, resulting in claimant's undergoing two more surgical procedures. On August 15, 1985, claimant's hernia recurred again; following this last recurrence, claimant declined to undergo additional surgery.

BRB No. 90-0161, and employer's appeal of the administrative law judge's award of attorney's fees, BRB No. 91-1559. *See* 20 C.F.R. §802.104.

In his Decision and Order, the administrative law judge found that claimant could not return to his former occupational duties with employer. Next, the administrative law judge determined that employer established the availability of suitable alternate employment and that claimant retained a post-injury wage-earning capacity of $107.20 per week. The administrative law judge then awarded claimant permanent partial disability compensation from January 30, 1987, the date claimant reached maximum medical improvement, based on two-thirds of the difference between claimant's average weekly wage of $451.22 before his injury and his post-injury wage-earning capacity of $107.20 per week.[2] The administrative law judge also found claimant's refusal to undergo further surgery was reasonable and justified, *see* 33 U.S.C. §907(d)(4), and awarded claimant benefits for future medical expenses.

Thereafter, claimant's counsel submitted a fee petition to the administrative law judge requesting an attorney's fee of $7,965, representing 79.65 hours of services at $100 per hour, plus $1,728.56 in expenses. In a Supplemental Decision and Order, the administrative law judge awarded the fee in full.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. BRB No. 90-0161. In its appeal, employer contends that the administrative law judge erred in awarding a fee to claimant's counsel. BRB No. 91-1559.

[2]In an Errata Order, the administrative law judge found that claimant's post-injury wage-earning capacity is $112 per week.

Claimant contends that the administrative law judge erred in concluding that employer established the availability of suitable alternate employment based solely upon the single position of an airport parking lot cashier. We agree that the administrative law judge's decision cannot be affirmed. Where, as in the instant case, it is uncontroverted that claimant cannot return to his usual employment, claimant has established a *prima facie* case of total disability, thus shifting the burden of proof to employer to demonstrate the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience and physical restrictions, and which he could realistically secure if he diligently tried. *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). Employer must establish realistic, not theoretical, job opportunities. *See Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989) (Brown, J., dissenting on other grounds). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has stated that an employer can meet its burden of establishing the availability of suitable alternate employment by demonstrating the existence of only one job opportunity, and the general availability of other suitable positions, where "an employee may have a reasonable likelihood of obtaining such a single employment opportunity under appropriate circumstances." *See P & M Crane*, 930 F.2d at 431, 24 BRBS at 121 (CRT). According to the court, such circumstances would exist, for example, where the employee is highly skilled, the job relied upon by employer is specialized and the number of workers with suitable qualifications is small. In *Diosdado v. John Bludworth Marine, Inc.*, No. 93-5422 (Sept. 19, 1994)(5th Cir. 1994)(unpublished), the Fifth Circuit discussed its holding in *P & M Crane*, stating that *P & M Crane* establishes that more must be shown than the mere existence of a single job the claimant can perform; specifically, the court stated that in a case where one specific job has been identified and no general employment opportunities that were suitable alternatives for the claimant had been proffered, employer must establish a reasonable likelihood that claimant could obtain the single job identified.[3] *See Diosdado*, slip op. at 11-12.

In the instant case, employer's rehabilitation expert identified six positions which were deemed to be suitable for claimant. The administrative law judge found five of the six identified positions to be unsuitable for claimant; with regard to the airport parking lot attendant position, the administrative law judge found the position to be suitable, available, and within claimant's restrictions.[4] *See* Decision and Order at 9-10. The case before us is thus similar to the situation presented in *Diosdado*; specifically, as the court noted, "we have been confronted with the rare situation in which only one specific job is offered as suitable employment." *See Diosdado*, slip op.

[3]Local Rule 47.5.3 provides "Unpublished opinions are precedent. . . . " *See* 5th Cir. R. 47.5.3. Although the Fifth Circuit has determined that this opinion should not be published, *see* 5th Cir. R. 47.5.1, the decision in this case can be found at 29 BRBS 125 (CRT).

[4]The administrative law judge's determinations regarding the suitability of the five rejected positions have not been appealed by employer.

at 12. Like the employer in *Diosdado*, employer herein did not proffer any testimony of the general availability of jobs which claimant could perform. Moreover, the administrative law judge's decision in this case was issued prior to the court's decisions in *P & M Crane* and *Diosdado;* thus, he made no finding as to whether there was a "reasonable likelihood" under the *P & M Crane* standard that claimant could obtain the airport parking lot position. Accordingly, as the employer has identified only one employment opportunity deemed to be suitable for claimant, and has proffered no evidence of the general availability of jobs which claimant could perform, we conclude that the case must be remanded for further findings under the appropriate legal standard. We therefore vacate the administrative law judge's finding that employer has established the availability of suitable alternate employment, and we remand the case to the administrative law judge for a determination of the reasonable likelihood that claimant could obtain the sole position identified as being suitable for claimant.[5] On remand, should the administrative law judge find that employer has established the availability of suitable alternate employment, he must additionally reconsider the date of when claimant's permanent partial disability award will commence. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(Decision on Recon.).

We next address employer's appeal of the administrative law judge's award of an attorney's fee to claimant's counsel. BRB No. 91-1559. Employer initially contends that counsel's efforts before the administrative law judge resulted in only a nominal award, and consequently, claimant's case was not successfully prosecuted. We reject employer's argument. In this case, the administrative law judge found that claimant's attorney successfully prosecuted this claim by establishing causation, as well as obtaining an award of permanent partial disability compensation and future medical benefits for the remainder of claimant's life. *See* Supplemental Decision and Order at 2. Our decision to remand this case for reconsideration of the extent of claimant's disability does not disturb these findings; claimant's award may in fact increase as a result of the remand. Thus, the administrative law judge's finding that claimant's attorney successfully prosecuted this claim is affirmed.

We further reject employer's arguments that its settlement offers and pre-hearing compensation rates yield a greater amount of compensation to claimant than the permanent partial disability award entered by the administrative law judge. The administrative law judge found employer first offered claimant a $75,000 lump sum plus medical benefits and then offered claimant $899 per month with a 10 year guarantee plus medical benefits, whereas claimant obtained permanent partial disability of $895.52 for the rest of his life, plus medical expenses. Under these circumstances, the administrative law judge did not err in finding claimant obtained greater benefits than those offered by employer. *See, e.g., Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985).

Lastly, employer argues that attorney fees should not be assessed against it since claimant's attorney consistently refused to relate any of the settlement offers made by employer to his client. Claimant's counsel responds, asserting that every settlement offer was conveyed to and rejected by his client. We decline to address this contention, which is raised for the first time on appeal. *See*

[5]We reject claimant's argument that he should have been informed of the airport parking lot position by employer. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990).

Bullock v. Ingalls Shipbuilding, Inc., 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc.*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Accordingly, the administrative law judge's finding that employer demonstrated the availability of suitable alternate employment is vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order, Errata Order, and Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge