BRB Nos. 96-0529 and 96-1073

ELLEN H. CALLNAN	)	
	)	
Claimant-Respondent	)	DATE ISSUED: _____
	)	
v.	)	
	)	
MORALE, WELFARE & RECREATION, DEPARTMENT OF THE NAVY	)	
	)	
and	)	
	)	
ESIS/CIGNA INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order on Remand - Denying Section 8(f) Relief of David W. Di Nardi, Administrative Law Judge, United States Department of Labor and the Decision and Order - Awarding Medical Benefits and the Decision and Order Denying Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney Fees of Joel F. Gardiner, Administrative Law Judge, United States Department of Labor.

Michael A. Feldman, Brunswick, Maine, for claimant.

B. Anne Smith and Gregory S. Shurman (Smith and Associates), and Elisa A. Roberts (Hamilton, Westby, Marshall & Antonowich, L.L.C.), Atlanta, Georgia, for employer/carrier.

LuAnn Kressley (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Denying Section 8(f) Relief (90-LHC-1746) of Administrative Law Judge David W. Di Nardi and the Decision and Order - Awarding Medical Benefits and the Decision and Order Denying Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney Fees (90-LHC-1746) of Administrative Law Judge Joel F. Gardiner 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*., as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act).[1] We must affirm the findings of fact and 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).

In 1985, claimant was awarded temporary total disability compensation for severe psychiatric problems resulting from a work-related incident in January 1984 while working for employer. Thereafter, she sought to modify her award to one for permanent total disability compensation. Claimant also sought payment of several disputed medical expenses. At an informal conference held via telephone on October 15, 1990, employer raised the issue of Section 8(f), 33 U.S.C. §908(f), relief and was afforded until November 8, 1990, to submit a completed application to the district director. On November 7, 1990, employer submitted its application. By letter dated November 14, 1990, the district director found employer's Section 8(f) application deficient because no medical evidence had been submitted documenting a pre-existing condition, no diagnosis or conclusion regarding an MMPI test conducted in January 1980 had been provided, and no medical evidence had been submitted establishing the extent of all impairments and the date of maximum medical improvement. The district director informed employer that it had until November 28, 1990, to correct these deficiencies and advised that failure to do so would result in invocation of

[1]The Board considers the one-year review period provided by Public Laws 104-134 and 104-208 to begin on May 14, 1996, the date employer's second consolidated appeal, BRB No. 96-1073, was filed. *See Barker v. Bath Iron Works Corp.*, 30 BRBS 198 (1996)(Order).

the Section 8(f)(3), 33 U.S.C. §908(f)(3), absolute defense. Employer did not respond.

The case was referred to the Office of Administrative Law Judges, and a formal hearing was held on November 14, 1991. The Director, Office of Workers' Compensation Programs (the Director) opposed employer's Section 8(f) application by raising the Section 8(f)(3) bar in a brief submitted to the administrative law judge. In his Decision and Order on Modification - Awarding Benefits dated May 1, 1992, Administrative Law Judge Di Nardi awarded claimant permanent total disability compensation commencing January 26, 1985, as well as the disputed medical expenses. In addition, Judge Di Nardi held that employer was entitled to Section 8(f) relief without addressing whether its Section 8(f) petition was sufficient to satisfy the criteria of Section 8(f)(3) and the applicable regulations.[2] The Director appealed Judge Di Nardi's decision to the Board requesting remand on the grounds that Judge Di Nardi improperly awarded Section 8(f) relief without first giving *de novo* consideration to whether the application submitted by employer is sufficient to satisfy the criteria of Section 8(f)(3) and the applicable regulations.

On appeal, the Board granted the Director's Motion to Remand, and thus, vacated Judge Di Nardi's denial of the Director's motion to dismiss employer's Section 8(f) application as well as Judge Di Nardi's award of Section 8(f) relief. *Callnan v. Morale, Welfare & Recreation Department, Department of the Navy*, BRB No. 92-1795 (Apr. 27, 1995)(unpub.). The Board instructed Judge Di Nardi, on remand, to determine whether employer's Section 8(f) application was sufficient to meet the requirements of Section 8(f)(3) of the Act and 20 C.F.R. §702.321 of the regulations. *Id*. In all other respects, Judge Di Nardi's Decision and Order on Modification - Awarding Benefits was affirmed. *Id*.

On remand, Judge Di Nardi concluded that the Section 8(f) application filed by employer with the district director was not a "sufficient application" pursuant to Section 702.321 and the Board's decision in *Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992). Accordingly, the Director's Absolute Defense Motion was granted and employer's Section 8(f) application was denied, as employer did not request an extension of time within which to file additional medical evidence to cure the deficiencies in its Section 8(f) application. Thereafter, employer appealed Judge Di Nardi's Decision and Order on Remand - Denying Section 8(f) Relief to the Board, which acknowledged the appeal by Order dated January 29, 1996, and assigned the case docket number, BRB No. 96-0529.

[2]In addition, Judge Di Nardi found claimant entitled to interest, medical benefits, and attorney's fees for work performed between October 15, 1990 and July 7, 1992.

Meanwhile, claimant sought additional medical benefits for treatment of her psychological injury. In his Decision and Order - Awarding Medical Benefits, Judge Gardiner ordered employer to furnish such reasonable and necessary medical care as claimant's work-related psychiatric condition requires, subject to the provisions of 33 C.F.R. §907. In addition, Judge Gardiner reviewed a number of outstanding medical bills submitted into evidence by claimant, and ordered employer to make payment on those expenses which Judge Gardiner deemed to be compensable. Lastly, Judge Gardiner awarded claimant's counsel an attorney's fee of $32,212.20.[3]

Employer subsequently filed a Motion for Reconsideration requesting Judge Gardiner to deny or reduce his award of attorney's fees and expenses on the grounds that it was never served with the fee petition and, alternatively, since the fee petition failed to conform with the requirements of the Act and corresponding regulations. Judge Gardiner denied employer's Motion for Reconsideration finding that employer had been given an ample opportunity to contest the fee petition filed by claimant's counsel. In addition to denying employer's Motion for Reconsideration, Judge Gardiner awarded claimant's counsel a fee of $550.50 for services performed in defending the fee petition, representing $310.50 for 2.3 hours of attorney services at the hourly rate of $135 and $240 for six hours of services performed by the law clerk at the hourly rate of $40.

Employer then appealed the Decision and Order - Awarding Medical Benefits and the Decision and Order Denying Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney Fees of Judge Joel F. Gardiner. By Order dated May 30, 1996, the Board acknowledged the appeal, and assigned the case docket number, BRB No. 96-1073. Additionally, the Board, on its own motion, consolidated employer's appeals, BRB Nos. 96-0569 and 96-1073, for purposes of rendering a decision. Accordingly, presently before the Board for resolution are employer's appeals of Judge Di Nardi's Decision and Order on Remand - Denying Section 8(f) Relief and Judge Gardiner's Decision and Order - Awarding Medical Benefits and his Decision and Order Denying Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney Fees. The Director responds to employer's appeal of Judge Di Nardi's Decision and Order on Remand - Denying Section 8(f) Relief, BRB No. 96-0569, urging the Board to remand the case to the administrative law judge for a *de novo* review of employer's November 7, 1990, Section 8(f) application. Claimant responds to employer's appeal in BRB No. 96-1073,

[3]Judge Gardiner noted that claimant's counsel filed a fully documented fee application totaling $32,291.10, representing $23,956.25 in legal services billed at the hourly rates of $135 for claimant's counsel, $120 for his associate and $40 for his law clerk, and $8,334.85 in related expenses. The fee petition in question concerned attorney's fees and costs accrued after an informal conference dated September 8, 1994, wherein the propriety of claimant's claim for additional medical benefits was initially at issue. Judge Gardiner reduced the requested fee by $78.90, the amount which counsel sought for photocopying expenses.

urging affirmance of Judge Gardiner's Decision and Order - Awarding Medical Benefits and his Decision and Order Denying Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney Fees. In addition, claimant's counsel has filed with the Board an itemized petition for an attorney's fee for work performed in responding to employer's appeal of Judge Gardiner's decisions.

Appeal of Judge Di Nardi's decision, BRB No. 96-0569

Employer's challenge to Judge Di Nardi's decision to grant the Director's Absolute Defense Motion and, accordingly, deny employer's application for Section 8(f) relief is two-fold. Employer first asserts that the term "fully documented application" as required by Section 702.321 of the Act does "not vest the district director with powers of adjudication over the sufficiency of a Section 8(f) application" but requires the district director only to determine whether the application is incomplete on its face. Employer, therefore, argues that it is improper to allow the district director to weigh the evidence submitted for purposes of determining the sufficiency of an application for Section 8(f) relief. Secondly, employer avers that Judge Di Nardi erred in his consideration of its application for Section 8(f) relief in that he simply assumed that it was "insufficiently documented" without having first conducted a *de novo* review to determine whether its supporting documentation addressed each requirement embodied in Section 8(f)(3) of the Act and Section 702.321 of the regulations. Employer requests that the Board now review employer's Section 8(f) application dated November 7, 1990, to determine whether it was sufficiently documented pursuant to the aforementioned provisions of the Act and accompanying regulations. Alternatively, employer requests that the Board remand this case to the administrative law judge and instruct him to perform the appropriate analysis. The Director agrees with employer's request to remand the case to the administrative law judge for a complete consideration of employer's application for Section 8(f) relief pursuant to the Act and its accompanying regulations.

Section 8(f)(3) provides that an employer's request for Section 8(f) relief which is filed after September 28, 1984, such as the one in the instant case, must be presented to the district director prior to consideration of the claim by the district director and that failure to do so will bar the payment of benefits by the Special Fund, unless the employer could not have reasonably anticipated that Special Fund liability would be at issue.[4] 33 U.S.C.

[4]Section 8(f)(3) of the Act states:

> Any request, filed after September 28 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore (sic), shall be presented to the [district director] prior to the consideration of the claim by the [district director]. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the

§908(f)(3) (1988). The accompanying regulation, Section 702.321, 20 C.F.R. §702.321, requires employer to submit a "fully documented application," defines the term "fully documented,"[5] and puts forth the circumstances under which employer needs to submit its

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> employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3) (1988).

[5]Section 702.321(a)(1) defines "fully documented" as:

> A fully documented application shall contain the following information: (I) a specific description of the pre-existing condition relied upon as constituting an existing permanent partial disability; (ii) the reasons for believing that the claimant's permanent disability after the injury would be less were it not for the pre-existing permanent disability . . . . These reasons must be supported by medical evidence as specific in paragraph (a)(1)(iv) of this section; (iii) the basis for the assertion that the pre-existing condition relied upon was manifest to the employer; and (iv) documentary medical evidence relied upon in support of the request for Section 8(f) relief. This medical evidence shall

application. While Section 702.321(b)(3) states that an application need not be filed where claimant's condition has not reached maximum medical improvement and no claim for permanent benefits is raised by the date of referral, it provides that in all other cases failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the Special Fund; such a failure is excused only where the employer could not have reasonably anticipated the liability of the Special Fund prior to the issuance of a compensation order.

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be included, but not be limited to, a current medical report establishing the extent of all impairments and the date of maximum medical improvement.

* * *

Any evidence considered necessary for consideration of the request for Section 8(f) relief must be submitted when requested by the district director.

Section 702.321(c) empowers the district director to make a preliminary determination as to whether all the evidence required by Section 702.321(a) is submitted with the application for Section 8(f) relief, and if so, to then examine the relevant evidence to discern whether "the facts warrant relief under this section." 20 C.F.R. §702.321(c).[6] If the facts warrant relief, the district director is authorized to award such relief with the concurrence of the Director, and if not, the district director shall advise the employer of the grounds for the denial and the application for Section 8(f) relief may then be considered by an administrative law judge. 20 C.F.R. §702.321(c). However, a denial of Section 8(f) relief issued by the district director in this manner is not binding on employer, as the administrative law judge has the adjudicatory authority to determine the applicability of Section 8(f)(3) in response to a challenge by the Director. *Abbey v. Navy Exchange*, 30 BRBS 139 (1996). For instance, the administrative law judge has the authority to determine whether employer's failure to raise Section 8(f) before the district director is excused because it could not have reasonably anticipated the liability of the Special Fund, *see, e.g., Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991); *Currie v. Cooper Stevedoring Co., Inc.,* 23 BRBS 420 (1990), and to determine in the first instance the sufficiency of the Section 8(f) application employer filed with the district director. *Fullerton v. General Dynamics Corp.*, 26 BRBS 133 (1992); *Tennant*, 26 BRBS at 108. Thus, the district director's role in processing requests for Section 8(f) relief is, as employer suggests, ultimately limited by the administrative law judge's adjudicative powers.

Moreover, the parties' concerns regarding Judge Di Nardi's consideration of the Section 8(f) application have merit. In its earlier decision, the Board remanded this case to the administrative law judge for *de novo* consideration of whether employer's Section 8(f) application was sufficient to meet the requirements of Section 8(f)(3) and Section 702.321 of the regulations. In his Decision and Order on Remand, Judge Di Nardi discussed at length and quoted extensively from the Board's remand order, the parties' pertinent pleadings, the district director's initial consideration of employer's application, and other relevant precedent before concluding that employer's Section 8(f) application, submitted to the district director on November 7, 1990, was not sufficiently documented pursuant to the applicable standards. Judge Di Nardi, however, did not conduct a *de novo* review of employer's November 7, 1990, Section 8(f) application. Rather, it appears as though Judge

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[6]20 C.F.R. §702.321(c) in pertinent part states:

> If all the evidence required by paragraph (a) was submitted with the application for section 8(f) relief and the facts warrant relief under this section, the district director shall award such relief after concurrence by the Associate Director, DLHWC, or his or her designee. If the district director or the Associate Director or his or her designee finds that the facts do not warrant relief under section 8(f) the district director shall advise the employer of the grounds for the denial. The application for Section 8(f) relief may then be considered by an administrative law judge.

Di Nardi has accepted, at face value, the district director's initial determination that the application is deficient.[7] In addition, Judge Di Nardi seems to place great emphasis on employer's failure to file a response or request an extension of time within the time allotted by the district director to correct the identified deficiencies. This factor has little to do with the issue of whether employer's application for Section 8(f) relief is sufficiently documented, particularly if, as employer asserts, its application already meets the requisite standards for sufficiency, for under such conditions, employer's need to "correct identified deficiencies" would be moot.

[7]The District Director, by letter dated November 14, 1990, found that the Section 8(f) application was deficient "because no medical evidence had been submitted documenting a pre-existing condition, no diagnosis or conclusion regarding an MMPI test conducted in January, 1980 had been provided, and no medical evidence had been submitted establishing the extent of all impairments and the date of maximum medical improvement."

In addition, contrary to Judge Di Nardi's notation, the factual pattern presented in the instant case is not "exactly similar to the facts presented the Board in *Hargrave."* Decision and Order on Remand - Denying Section 8(f) Relief at 16. In *Hargrave v. Cajun Tubing Testors, Inc.,* 24 BRBS 248 (1991), employer filed an admittedly inadequate application for Section 8(f) relief with the district director, was granted sixty days to submit a fully documented application, and eventually filed a revised application almost seven months later. The district director and the administrative law judge both granted the Director's Absolute Defense Motion pursuant to Section 8(f)(3) and, accordingly, rejected employer's request for Section 8(f) relief on the grounds that the revised application was not timely filed and because employer had neither requested nor received an extension of time to justify its untimely submission. On appeal, employer argued only that it had explicitly asked for and orally received an extension of time such that its "late" submission of the revised application was, in fact, timely.[8] Therefore, the adequacy of the documentation of employer's initial application for Section 8(f) relief was, by mutual agreement, never considered. In contrast to *Hargrave*, employer in the instant case has steadfastly maintained that its initial application submitted to and rejected by the district director is, on its face, sufficiently documented to meet the requirements of the Act and its accompanying regulations. Thus, the issue for consideration in this case involves, not as in *Hargrave* a consideration of whether employer requested and received an extension of time to submit an amended application for Section 8(f) relief, but instead a fresh consideration of employer's application for Section 8(f) relief dated November 7, 1990, to discern whether it meets the requirements of Section 8(f)(3) and Section 702.321. In this regard, the instant case is more in line with *Tennant*, in which the administrative law judge proceeded to consider the merits of employer's entitlement to Section 8(f) relief without considering the Director's challenge to the sufficiency of the application. The Board held that:

> consistent with the regulatory scheme implementing Section 8(f)(3) and with the administrative law judge's general adjudicatory powers under the Act, we hold that, in a proceeding before an administrative law judge in which the Director has properly raised the Section 8(f)(3) absolute defense, the administrative law judge initially must give *de novo* consideration to whether the employer submitted a sufficient application requesting Section 8(f) relief

[8]The Board rejected employer's contention and therefore affirmed the administrative law judge's Order Granting the Director's Motion to Dismiss Employer's Request for Section 8(f) Relief. *Hargrave v. Cajun Tubing Testors, Inc.*, 24 BRBS 248 (1991). The Board's decision was affirmed by the United States Court of Appeals for the Fifth Circuit in *Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 72, 25 BRBS 109 (CRT)(5th Cir. 1992).

which is in compliance with the regulations at 20 C.F.R. §702.321.

Tennant, 26 BRBS at 108; *see also Fullerton,* 26 BRBS at 133. The Board, therefore, clearly acknowledged in *Tennant* the parties' right to a hearing before an administrative law judge and *de novo* consideration on the issue of whether its application for Section 8(f) relief submitted to the district director was incomplete. Accordingly, we vacate Judge Di Nardi's denial of employer's request for Section 8(f) relief and again remand this case to the administrative law judge for an independent consideration of whether employer's Section 8(f) application dated November 7, 1990, meets the requirements of Section 8(f)(3) and Section 702.321. *Id.*

Appeal of Judge Gardiner's decisions, BRB No. 96-1073

Employer asserts that Judge Gardiner erred in denying its Motion for Reconsideration of the award of an attorney's fee in his Decision and Order - Awarding Medical Benefits. Employer's sole contention on appeal is that it was denied the opportunity to contest the fee petition since it was never served with a copy of the petition prior to the issuance of Judge Gardiner's decision. In support of its contention, employer maintains that no certificate of service was attached to the fee petition, nor did claimant's counsel produce either the original or a copy of the certificate of service allegedly attached to the fee petition in its objections to employer's Motion for Reconsideration. Employer also argues that Judge Gardiner's reliance on the Board's decision in *Luna v. Todd Shipyards Corp.*, 12 BRBS 70 (1980), to deny its Motion for Reconsideration, is misplaced, since it is cited for a proposition that does not apply to the instant case. Employer specifically avers that, unlike the present case, in *Luna*, there was no dispute as to whether employer had knowledge of the fee petition.

In his Decision and Order Denying Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney Fees, Judge Gardiner specifically acknowledged employer's assertion that it was not served with a copy of the fee petition at the time that counsel originally filed it. In reciting the procedural history of the attorney's fee petition, Judge Gardiner noted that claimant's counsel indicated that he had forwarded a copy of the fee petition to employer's attorney on September 14, 1995, at the same time it was submitted to the Office of Administrative Law Judges. Relying on claimant's representation, Judge Gardiner determined that employer had over four months to contest the attorney's fee request prior to the issuance of his fee award, and, thus, concluded that employer had ample opportunity to contest the fee petition. Accordingly, Judge Gardiner declined to consider employer's specific objections to the fee petition for the first time and denied employer's Motion for Reconsideration.

As noted above, Judge Gardiner relied solely upon claimant's counsel's representation that employer was served with a copy of the fee petition. The applicable regulation, 20 C.F.R. §702.132(a), specifically requires service of a fee petition "upon the other parties." In addition, due process requires that employer be given a reasonable time

to respond. *See generally Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989). The record contains a letter dated September 14, 1995, sent to Judge Gardiner by claimant's counsel wherein four additional post-hearing exhibits are outlined, including Claimant's Exhibit 30, which is described as "an Affidavit of Attorney's Fees for work performed after the informal conference." A "courtesy copy" of this letter was apparently sent to employer's attorney, although there is no evidence that the actual fee petition was sent. In addition, claimant's counsel's "Affidavit of Attorney's Fees" does not include a service sheet or any statement that the fee petition was sent to employer. Accordingly, we vacate Judge Gardiner's Decision and Order Denying Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney Fees as well as his award of attorney's fees in his Decision and Order - Awarding Medical Benefits and remand for reconsideration of the issue of whether employer was served with the fee petition.[9] On remand, Judge Gardiner may reopen the record to afford claimant's counsel the opportunity to submit a copy of the certificate of service in order to establish that employer was, in fact, served with a copy of the fee petition prior to the issuance of Judge Gardiner's fee award, in which case, his award of attorney's fees can be reinstated. If, however,

[9]In *Luna*, the Board held that where employer has been provided with its due process rights, notably notification and the opportunity to be heard, an administrative law judge may issue one decision adjudicating both the merits of a claim and the attorney's fee. *Luna v. Todd Shipyards Corp.*, 12 BRBS 70 (1980). In addition, the Board noted that an employer who has knowledge of a pending fee petition and thus, has had ample opportunity to object to said fee prior to the issuance of an award of attorney's fees, cannot for the first time raise its objections in a Motion for Reconsideration. *Id.* The *Luna* case, in contrast to the instant case, did not involve a dispute as to whether employer was served and/or had knowledge of the fee petition. Consequently, Judge Gardiner's reliance on *Luna*, particularly in light of the facts presently at hand in this case, is misplaced.

claimant cannot produce proof of service, then Judge Gardiner should reconsider the original fee petition in light of the objections raised by employer.[10]

Accordingly, Judge Di Nardi's Decision and Order on Remand - Denying Section 8(f) Relief and Judge Gardiner's Decision and Order Denying Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney Fees, as well as his award of attorney's fees in his Decision and Order - Awarding Medical Benefits, are vacated and the case is remanded for further consideration consistent with this opinion. Judge Gardiner's Decision and Order - Awarding Medical Benefits is affirmed in all other respects.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[10]Claimant's counsel has submitted a detailed fee request of $480 for services rendered in defending against employer's appeal of Judge Gardiner's award of attorney's fees. Because we have determined that a remand is necessary, the Board finds that approval of an attorney's fee is inappropriate at this time. *Eckstein v. General Dynamics Corp.*, 11 BRBS 781 (1980).