

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HELEN J. CAVORLEY and U.S. COURT OF INTERNATIONAL TRADE,
New York, NY

*Docket No. 02-2325; Submitted on the Record;
Issued February 7, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by approving an attorney's fee in the amount of \$6,450.00 for services rendered from January 29, 1999 to January 14, 2000.

On January 21, 2002 Paul Kalker, Esquire, resubmitted a January 14, 2000 request for approval of an attorney's fee in the amount of \$6,450.00 for 43 hours of legal services performed from January 29, 1999 to January 14, 2000. Counsel's services were billed at an hourly rate of \$150.00. The fee petition was accompanied by a February 10, 1999 service agreement signed by appellant and Mr. Kalker, wherein the parties agreed to an hourly fee of \$150.00 and an initial retainer of \$3,000.00 to be held in a third party escrow account pending approval of the fee by the Office. Mr. Kalker stated in his January 21, 2002 letter that he had provided appellant a copy of the fee application for her comments on the reasonableness and appropriateness of the fee, but she refused to comment. In view of appellant's reported refusal to comment, he suggested that the Office consider the attorney fee application disputed.

By decision dated August 7, 2002, the Office approved an attorney's fee in the amount of \$6,450.00 for legal services performed by Mr. Kalker, noting that the claimant had not contested the reasonableness of the amount of the fee.

In her appeal to the Board, appellant argued that she never received notice from Mr. Kalker by either telephone or mail that his fee for services had exceeded the initial \$3,000.00 retainer held in escrow. She also stated that she did not know that she had the right to contest the reasonableness of the amount of the fee.

The Board finds that the Office abused its discretion by approving an attorney's fee in the amount of \$6,450.00 for services rendered from January 29, 1999 to January 14, 2000.

It is not the function of the Board to determine the fee for services performed by a representative of a claimant before the Office. That function is within the discretion of the

Office based on the criteria set forth in Title 20 of the Code of Federal Regulations and mandated by Board decisions. The sole function of the Board on appeal is to determine whether the action of the Office constituted an abuse of discretion.¹

Section 10.703(a)(1)(ii) provides in pertinent part that a fee application shall contain a statement of agreement or disagreement with the amount charged, signed by the claimant.² In the instant case, no such statement is included in the record. Mr. Kalker advised the Office on January 21, 2002 that he had provided appellant a copy of the fee application for her comments, but she refused to comment. He suggested that, in the absence of appellant's comments, the Office consider the attorney fee application disputed. The Office, however, ignored Mr. Kalker's suggestion and approved the requested fee as if it were undisputed. The Office specifically stated: "This fee has been approved because the claimant has not contested the reasonableness of the fee."

While the regulations provide that a fee application is deemed approved when it is accompanied by a signed statement indicating the claimant's agreement with the fee, the regulations do not specifically provide for a deemed approval when a claimant fails to contest a fee application.³ When a fee application has been disputed the Office is required to provide claimant a copy of the fee application and request the submission of further information in support of the objection. After claimant has been afforded a reasonable time to respond to the request, the Office will then proceed to review the fee application. Pursuant to section 10.703(c), when a fee is in dispute the Office will determine whether the amount of the fee is substantially in excess of the value of services received by looking at the following factors: (i) Usefulness of the representative's services; (ii) The nature and complexity of the claim; (iii) The actual time spent on development and presentation of the claim; and (iv) Customary local charges for similar services.⁴

On appeal, appellant contends to have not received a copy of the fee application. Absent appellant's written agreement to the fee, the regulations do not authorize the Office to approve a fee application without first determining whether the fee "is substantially in excess of the value of services received." Accordingly, the Board finds that the Office abused its discretion in approving Mr. Kalker's fee petition.

¹ *Alvin T. Groner, Jr.*, 47 ECAB 588 (1996); *Azalee L. McCoy*, 39 ECAB 786 (1988); *Edward Snider*, 39 ECAB 1268 (1988).

² 20 C.F.R. § 10.703(a)(1)(ii) (1999).

³ *See* 20 C.F.R. § 10.703(a)(2)(b) (1999).

⁴ 20 C.F.R. § 10.703(c) (1999).

The August 7, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
February 7, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member