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**D E C I S I O N**  
**of 22 April 1998**

**Case Number:** T 1228/97 - 3.4.2  
**Application Number:** 91304321.2  
**Publication Number:** 0458508  
**IPC:** G02B 5/18, A61F 2/16, G02C 7/06,  
G02B 3/08

**Language of the proceedings:** EN

**Title of invention:**

A tuned fresnel lens for multifocal intraocular applications  
including small incision surgeries

**Applicant:**

Iolab Corporation

**Opponent:**

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**Headword:**

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**Relevant legal provisions:**

EPC Art. 108, second sentence  
EPC R. 36(3)

**Keyword:**

"No valid payment of the appeal fee"  
"Appeal not deemed to have been filed"

**Decisions cited:**

T 0041/82, T 0017/83

**Catchword:**

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Case Number: T 1228/97 - 3.4.2

**D E C I S I O N**  
**of the Technical Board of Appeal 3.4.2**  
**of 22 April 1998**

**Appellant:** Iolab Corporation  
500 Iolab Drive  
Claremont  
California 91711-4881 (US)

**Representative:** Fisher, Adrian John  
Carpmaels & Ransford  
43 Bloomsbury Square  
London WC1A 2RA (GB)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 21 August 1997  
refusing European patent application  
No. 91 304 321.1 pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** E. Turrini  
**Members:** S. V. Steinbrener  
B. J. Schachenmann



## Summary of Facts and Submissions

- I. The appeal refers to the decision of the Examining Division of the European Patent Office posted on 21 August 1997 refusing European patent application No. 91 304 321.2.
  
- II. On 31 October 1997 the applicant's representative informed the European Patent Office by facsimile that an appeal was filed against the decision referred to above and that the appeal fee should be debited from his deposit account "in accordance with the accompanying fee sheet". The facsimile letter was unsigned and did not provide the address of the appellant.
  
- III. By signed letter dated 6 November 1997 which arrived at the EPO on 10 November 1997 the professional representative confirmed the filing of an appeal. Furthermore he provided the name and the address of the appellant.
  
- IV. By facsimile of 15 December 1997 the representative pointed to the fact that his letter of 31 October 1997 was unsigned and did not provide the address of the appellant, contrary to Rule 64(a). He concluded that the letter must therefore be deemed not to have been received. Since, in these circumstances, no appeal fee could have been payable, he requested refund of the appeal fee which had been deducted from his deposit account.

- V. By communication dated 14 January 1998 sent by registered letter with advice of delivery, the Registry of the Board informed the Appellant that no Statement of Grounds had been filed and that the appeal could be expected to be rejected as inadmissible. The appellant was invited to file observations within two months.
- VI. No answer has been given to the Registry's communication.

### **Reasons for the Decision**

1. The only question to be dealt with in the present case is whether the appeal is inadmissible (Rule 65(1) EPC) or shall not be deemed to have been filed. Only in the latter case the requested refund of the appeal fee is possible (T 41/82, OJ EPO 1982, 256).
2. According to Article 108 EPC the notice of appeal shall not be deemed to have been filed until after the fee for appeal has been paid.
  - 2.1 It was the intention of the professional representative to use his deposit account for the payment of the appeal fee (cf. point II, supra). According to point 6.2 of the "Notice of the President of the EPO dated 20 November 1981 concerning ... the arrangements for deposit accounts" (published on page 665 ff. of the EPO publication "Regulations Implementing the European Patent Convention 1997"), a deposit account can only be debited on the basis of a debit order made out in

writing **and signed by the account holder** (or, where appropriate, on the basis of a telex). However, the provisions of Rule 36(3) EPC concerning unsigned documents do not apply to debit orders since they cannot be considered as "documents" within the meaning of Rule 36 EPC but are a means of paying fees, (cf. Gall, Münchner Gemeinschaftskommentar, 10. Lieferung, February 1986, Article 51 EPC: Nr. 239, page 103). Hence, the filing of an unsigned debit order is no valid payment and cannot be cured, according to Rule 36(3) EPC, by the subsequent filing of a signed copy.

2.2 In the circumstances of the present case, the unsigned facsimile letter of 31 October 1997 contained the statement that the appeal fee should be debited from the representative's deposit account, "in accordance with the accompanying fee sheet". However, no such fee sheet is contained in the file nor could any trace of it be revealed by an investigation carried out within the Office. There is no indication that such a fee sheet indeed arrived at the EPO. If, on the other hand, the facsimile letter itself is considered as a debit order (cf. T 17/83, OJ EPO 1984, 306), it cannot, due to the lacking signature, have the effect of a valid payment (see point 2.1, supra). Hence, the facsimile letter neither made reference to nor contained a valid debit order. In these circumstances the EPO should not have debited the representative's deposit account.

2.3 Thus, the appeal fee was not paid within the 2 months period provided for by Article 108 EPC which ended on 31 October 1997, i.e. on the day the facsimile letter

referred to above arrived at the EPO. In the circumstances of this case and since, in particular, the appellant did not submit any argument to the contrary, the appeal shall not be deemed to have been filed.

3. In consequence the appeal fee should be reimbursed.

### **Order**

#### **For these reasons it is decided that:**

1. The appeal is deemed not to have been filed.
2. Reimbursement of the appeal fee is ordered.

The Registrar: The Chairman:

P. Martorana    E. Turrini