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OFFICE OF PETITIONS

In re Application of
Patricia Wiener
Application No. 07/998,320
Patent No. 5,280,558
Filed: December 30, 1992
Issue Date: January 18, 1994
Attorney Docket No.: 14739-1-1
Title: SMART SKIN ARRAY WOVEN
FIBER OPTIC RIBBON AND ARRAYS
AND PACKAGING THEREOF

DECISION ON RENEWED PETITION
UNDER 37 C.F.R. §1.378(E)

This is a decision on the petition filed June 22, 2004, under 37 C.F.R. §1.378(e), requesting reconsideration of a prior decision pursuant to 37 C.F.R. §1.378(b)¹, which refused to accept the delayed payment of the 7½ year maintenance fee for the above-referenced patent.

The request to accept the delayed payment of the maintenance fee is **DENIED**².

The patent issued January 18, 1994. The grace period for paying the 7½ year maintenance fee

¹ Any petition to accept an unavoidably delayed payment of a maintenance fee filed under 37 C.F.R. §1.378(b) must include:

- (1) The required maintenance fee set forth in 37 C.F.R. §1.20 (e) through (g);
- (2) The surcharge set forth in 37 C.F.R. §1.20(i)(1), and;
- (3) A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

² This decision may be regarded as a final agency action within the meaning of 5 U.S.C. §704 for the purposes of seeking judicial review. See MPEP 1002.02.

provided in 37 CFR 1.362(e) expired at midnight on January 18, 2002, with no payment received. Accordingly, the patent expired at midnight on January 18, 2002. On March 22, 2004, Petitioner filed a petition under 37 C.F.R. §1.137(a), which was dismissed as inappropriate via a decision mailed March 29, 2004.

On April 6, 2004, Petitioner filed a petition under 37 C.F.R. §1.378(b)³, which was dismissed via the mailing of a decision on May 4, 2004 for failure to meet the third requirement under 37 C.F.R. §1.378(b).

With the instant petition pursuant to 37 C.F.R. §1.378(e), Petitioner has again failed to meet the third requirement above. A discussion follows.

The standard

35 U.S.C. §41(c)(1) states:

The Director may accept the payment of any maintenance fee... after the six-month grace period if the delay⁴ is shown to the satisfaction of the Director to have been unavoidable.

§1.378(b)(3) is at issue in this case. Acceptance of a late maintenance fee under the unavoidable delay standard is considered under a very stringent standard. Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business⁵.

In addition, decisions are made on a "case-by-case basis, taking all the facts and circumstances into account."⁶ Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable."⁷

An adequate showing that the delay in payment of the maintenance fee at issue was "unavoidable" within the meaning of 35 U.S.C. 41(c) and 37 CFR 1.378(b)(3) requires a

³ On April 12, 2004, a duplicate copy of this petition was received in the Office.

⁴ This delay includes the entire period between the due date for the fee and the filing of a grantable petition pursuant to 37 C.F.R. §1.378(b).

⁵ *In re Mattullath*, 38 App. D.C. 497, 514-15 (1912)(quoting *Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also *Winkler v. Ladd*, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), *aff'd*, 143 U.S.P.Q. 172 (D.C. Cir. 1963); *Ex parte Henrich*, 1913 Dec. Comm'r Pat. 139, 141 (1913).

⁶ *Smith v. Mossinghoff*, 671 F.2d at 538, 213 U.S.P.Q. at 982.

⁷ *Haines*, 673 F. Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32.

showing of the steps taken to ensure the timely payment of the maintenance fees for this patent. Where the record fails to disclose that the patentee took reasonable steps, or discloses that the patentee took no steps, to ensure timely payment of the maintenance fee, 35 U.S.C. 41(c) and 37 C.F.R. §1.378(b)(3) preclude acceptance of the delayed payment of the maintenance fee under 37 CFR 1.378(b).

A delay caused by an applicant's lack of knowledge or improper application of the patent statute, rules of practice, or the MPEP is not rendered "unavoidable" due to either the applicant's reliance upon oral advice from USPTO employees or the USPTO's failure to advise the applicant to take corrective action⁸.

Presuming for the purposes of discussion that it was an act/omission of Counsel that contributed to any of the delay herein, the act(s) or omissions of the attorney/agent are imputed wholly to the applicant/client⁹ in the absence of evidence that the attorney/agent has acted to deceive the client.¹⁰

The Office must rely on the actions or inactions of duly authorized and voluntarily chosen representatives of the applicant, and the applicant is bound by the consequences of those actions or inactions¹¹. Specifically, petitioner's delay caused by the mistakes of negligence of his voluntarily chosen representative does not constitute unavoidable delay within the meaning of 35 USC 133¹².

The actions of the attorney are imputed to the client, for when a petitioner voluntarily chooses an attorney to represent him, the petitioner cannot later avoid the repercussions of the actions or inactions of this selected representative, for clients are bound by the acts of their lawyers/agents, and constructively possess "notice of all facts, notice of which can be charged upon the attorney¹³."

Courts hesitate to punish a client for its lawyer's gross negligence, especially when the lawyer affirmatively misled the client," but "if the client freely chooses counsel, it should be bound to counsel's actions¹⁴."

⁸ See *In re Sivertz*, 227 USPQ 255, 256 (Comm'r Pat. 1985).

⁹ The actions or inactions of the attorney/agent must be imputed to the petitioners, who hired the attorney/agent to represent them. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-634, 82 S.Ct. 1386, 1390-91 (1962). The failure of a party's attorney to take a required action or to notify the party of its rights does not create an extraordinary situation. Moreover, the neglect of a party's attorney is imputed to that party and the party is bound by the consequences. See *Huston v. Ladner*, 973 F.2d 1564, 23 USPQ2d 1910 (Fed Cir. 1992); *Herman Rosenberg and Parker Kalon Corp. v. Carr Fastener Co.*, 10 USPQ 106 (2d Cir. 1931).

¹⁰ When an attorney intentionally conceals a mistake he has made, thus depriving the client of a viable opportunity to cure the consequences of the attorney's error, the situation is not governed by the stated rule in *Link* for charging the attorney's mistake to his client. *In re Lonardo*, 17 USPQ2d 1455 (Comm'r. Pat. 1990).

¹¹ *Link v. Wabash*, 370 U.S. 626, 633-634 (1962).

¹² *Haines*, 673 F.Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32; *Smith v. Diamond*, 209 USPQ 1091 (D.D.C. 1981); *Potter v. Dann*, 201 USPQ 574 (D.D.C. 1978); *Ex parte Murray*, 1891 Dec. Comm'r Pat. 103, 131 (Comm'r Pat. 1891).

¹³ *Link* at 633-634.

¹⁴ *Inryco, Inc. v. Metropolitan Engineering Co., Inc.*, 708 F.2d 1225, 1233 (7th Cir. 1983). See also, *Wei v.*

The portions of the MPEP relevant to the facts as presented

2504 Patents Subject to Maintenance Fees

37 CFR 1.362. Time for payment of maintenance fees.

- (a) Maintenance fees as set forth in §§ 1.20(e) through (g) are required to be paid in all patents based on applications filed on or after December 12, 1980, except as noted in paragraph (b) of this section, to maintain a patent in force beyond 4, 8 and 12 years after the date of grant.
- (b) Maintenance fees are not required for any plant patents or for any design patents. Maintenance fees are not required for a reissue patent if the patent being reissued did not require maintenance fees.
- (c) The application filing dates for purposes of payment of maintenance fees are as follows:
 - (1) For an application not claiming benefit of an earlier application, the actual United States filing date of the application.
 - (2) For an application claiming benefit of an earlier foreign application under 35 U.S.C. 119, the United States filing date of the application.
 - (3) For a continuing (continuation, division, continuation-in-part) application claiming the benefit of a prior patent application under 35 U.S.C. 120, the actual United States filing date of the continuing application.
 - (4) For a reissue application, including a continuing reissue application claiming the benefit of a reissue application under 35 U.S.C. 120, the United States filing date of the original non-reissue application on which the patent reissued is based.
 - (5) For an international application which has entered the United States as a Designated Office under 35 U.S.C. 371, the international filing date granted under Article 11(1) of the Patent Cooperation Treaty which is considered to be the United States filing date under 35 U.S.C. 363.
- (d) Maintenance fees may be paid in patents without surcharge during the periods extending respectively from:
 - (1) 3 years through 3 years and 6 months after grant for the first maintenance fee,
 - (2) 7 years through 7 years and 6 months after grant for the second maintenance fee, and
 - (3) 11 years through 11 years and 6 months after grant for the third maintenance fee.
- (e) Maintenance fees may be paid with the surcharge set forth in § 1.20(h) during the respective grace periods after:
 - (1) 3 years and 6 months and through the day of the 4th anniversary of the grant for the first maintenance fee.
 - (2) 7 years and 6 months and through the day of the 8th anniversary of the grant for the second maintenance fee, and
 - (3) 11 years and 6 months and through the day of the 12th anniversary of the grant for the third maintenance fee.
- (f) If the last day for paying a maintenance fee without surcharge set forth in paragraph (d) of this section, or the last day for paying a maintenance fee with surcharge set forth in paragraph (e) of this section, falls on a Saturday, Sunday, or a federal holiday within the District of Columbia, the maintenance fee and any necessary surcharge may be paid under paragraph (d) or paragraph (e) respectively on the next succeeding day which is not a Saturday, Sunday, or Federal holiday.
- (g) Unless the maintenance fee and any applicable surcharge is paid within the time periods set forth in paragraphs (d), (e) or (f) of this section, the patent will expire as of the end of the grace period set forth in paragraph (e) of this section. A patent which expires for the failure to pay the maintenance fee will expire at the end of the same date (anniversary date) the patent was granted in the 4th, 8th, or 12th year after grant.
- (h) The periods specified in §§ 1.362 (d) and (e) with respect to a reissue application, including a continuing reissue application thereof, are counted from the date of grant of the original non-reissue application on which the reissued patent is based.

Maintenance fees are required to be paid on all patents based on applications filed on or after December 12, 1980,

State of Hawaii, 763 F.2d 370, 372 (9th Cir. 1985); LeBlanc v. I.N.S., 715 F.2d 685, 694 (1st Cir. 1983).

except for plant patents and design patents. Furthermore, maintenance fees are not required for a reissue patent if the patent being reissued did not require maintenance fees. Application filing dates for purposes of determining whether a patent is subject to payment of maintenance fees are as follows:

- (A) For an application not claiming benefit of an earlier application, the actual United States filing date of the application.
- (B) For an application claiming benefit of an earlier foreign application under 35 U.S.C. 119(a)-(d), the actual United States filing date of the application.
- (C) For a continuing (continuation, division, continuation-in-part) application claiming the benefit of a prior patent application under 35 U.S.C. 120, the actual United States filing date of the continuing application.
- (D) For a reissue application, including a continuing reissue application claiming the benefit of a reissue application under 35 U.S.C. 120, the United States filing date of the original nonreissue application on which the patent reissued is based.
- (E) For an international application that has entered the United States as a Designated Office under 35 U.S.C. 371, the international filing date granted under Article 11(1) of the Patent Cooperation Treaty which is considered to be the United States filing date under 35 U.S.C. 363.

2506 Times for Submitting Maintenance Fee Payments

37 CFR 1.362(d) sets forth the time periods when the maintenance fees for a utility patent can be paid without surcharge. Those periods, referred to generally as the "window period," are the 6-month periods preceding each due date. The "due dates" are defined in 35 U.S.C. 41(b). The window periods are (1) 3 years to 3 1/2 years after the date of issue for the first maintenance fee payment, (2) 7 years to 7 1/2 years after the date of issue for the second maintenance fee payment, and (3) 11 years to 11 1/2 years after the date of issue for the third and final maintenance fee payment. A maintenance fee paid on the last day of a window period can be paid without surcharge. The last day of a window period is the same day of the month the patent was granted 3 years and 6 months, 7 years and 6 months, or 11 years and 6 months after grant of the patent. 37 CFR 1.362(e) sets forth the time periods when the maintenance fees for a utility patent can be paid with surcharge. Those periods, referred to generally as the "grace period," are the 6-month periods immediately following each due date. The grace periods are (1) 3 1/2 years and through the day of the 4th anniversary of the grant of the patent, (2) 7 1/2 years and through the day of the 8th anniversary of the grant of the patent and, (3) 11 1/2 years and through the day of the 12th anniversary of the grant of the patent. A maintenance fee may be paid with the surcharge on the same date (anniversary date) the patent was granted in the 4th, 8th, or 12th year after grant to prevent the patent from expiring. Maintenance fees for a reissue patent are due based upon the schedule established for the original utility patent. The filing of a request for ex parte or inter partes reexamination and/or the publication of a reexamination certificate does not alter the schedule of maintenance fee payments of the original patent. If the day for paying a maintenance fee falls on a Saturday, Sunday, or a Federal holiday within the District of Columbia, the maintenance fee may be paid on the next succeeding day that is not a Saturday, Sunday, or Federal holiday. For example, if the window period for paying a maintenance fee without a surcharge ended on a Saturday, Sunday, or a Federal holiday within the District of Columbia, the maintenance fee can be paid without surcharge on the next succeeding day that is not a Saturday, Sunday, or a Federal holiday within the District of Columbia. Likewise, if the grace period for paying a maintenance fee with a surcharge ended on a Saturday, Sunday, or a Federal holiday within the District of Columbia, the maintenance fee can be paid with surcharge on the next succeeding day that is not a Saturday, Sunday, or a Federal holiday within the District of Columbia. In the latter situation, the failure to pay the maintenance fee and surcharge on the next succeeding day that is not a Saturday, Sunday, or a Federal holiday within the District of Columbia will result in the patent expiring on a date (4, 8, or 12 years after the date of grant) earlier than the last date on which the maintenance fee and surcharge could be paid. This situation results from the provisions of 35 U.S.C. 21, but those provisions do not extend the expiration date of the patent if the maintenance fee and any required surcharge are not paid when required. For example, if the grace period for paying a maintenance fee with a surcharge ended on a Saturday, the maintenance fee and surcharge could be paid on the next succeeding business day, e.g., Monday, but the patent will have expired at midnight on Saturday if the maintenance fee and surcharge were not paid on the following Monday. Therefore, if the maintenance fee and any applicable surcharge are not paid, the patent will expire as of the end of the grace period as listed above. A patent that expires for failure of payment will expire on the anniversary date the patent was granted in the 4th, 8th, or 12th year after the grant.

2542 Change of Correspondence Address

Unless a fee address has been designated, all notices, receipts, refunds, and other communications relating to the patent will be directed to the correspondence address (37 CFR 1.33) used during the prosecution of the application. Practitioners of record when the patent issues who do not wish to receive correspondence relating to maintenance fees must change the correspondence address in the patented file or provide a fee address to which such correspondence should be sent. It is not required that a practitioner file a request for permission to withdraw pursuant to 37 CFR 1.36 solely for the purpose of changing the correspondence address in a patented file.

The correspondence address should be updated or changed as necessary to ensure that all communications are received in a timely manner. A change of correspondence address may be made as provided in 37 CFR 1.33(a). The correspondence address may be changed as provided in 37 CFR 1.33(a)(1) prior to the filing of an oath or declaration. After an oath or declaration has been executed and filed by at least one inventor, the correspondence address may be changed as provided in 37 CFR 1.33(a)(2). Requests for a change of the correspondence address may be sent to the Office of Public Records, Document Services Division, Special Handling Branch during the enforceable life of the patent. To ensure accuracy and to expedite requests for change to the correspondence address, it is suggested that the request include both the patent number and the application number. Form PTO/SB/122 may be used to request a change of correspondence address in a patent application. Form PTO/SB/123 may be used to request a change of correspondence address for an issued patent.

Application of the standard to the current facts and circumstances

In the original petition under 37 C.F.R. §1.378(b), submitted April 6, 2004, Petitioner set forth that the application was prosecuted by the law firm of Townsend and Townsend. At some point after the patent had issued, the Petitioner could no longer pay the firm, and Townsend and Townsend consequently ceased representing the Petitioner. Subsequently, Petitioner retained the services of attorney William H. Dana.

Petitioner asserted that she was not aware of the need to submit maintenance fees, and that Townsend and Townsend failed to apprise her of the same. In the decision mailed May 4, 2004, the following was proffered:

- It is the responsibility of the Applicant to monitor her patent;
- The letters patent itself spells out the need for the submission of maintenance fees;
- The actions of ones chosen counsel cannot constitute unavoidable delay, and;
- Petitioner failed to institute reasonable steps to ensure timely payment of the maintenance fee.

The decision concluded with the following recommendation:

On renewed petition, Petitioner may wish to further develop her assertion that she encountered financial hardship. A showing of "unavoidable" delay based upon financial difficulty is very stringent, in that in order for a petitioner to demonstrate that she lacked the financial resources to pay the fee(s) associated with patent prosecution, substantial documentation must be provided. Such a showing must be supported by a **complete and thorough** showing of her and/or her company's financial condition during the entire period between January 18, 2001 until the filing of the renewed petition, including **income, expenses, tax return statements, bank records, assets, credit and obligations**, which made the delay in payment of the maintenance fee and surcharge unavoidable. Petitioner should provide copies of all documents or records pertaining to each of these so as to confirm the financial difficulty.

Petitioner is reminded that the period of delay with which he must be concerned is the *entire* period of delay in filing the required reply, from the due date for the maintenance fee up until the filing of a grantable petition.

(emphasis included).

As set forth in the previous decision, Petitioner should be made aware that the standard associated with the filing of a petition under the unavoidable standard is extremely difficult to meet.

Petitioner's explanation of the delay has been considered, and it has been determined that it fails to meet the standard for acceptance of a late payment of the maintenance fee and surcharge based on unavoidable delay, for the reasons set forth below.

Petitioner has not made an adequate showing that the failure to pay the maintenance fee was unavoidable, given the exercise of due care. The period for paying the 7½ year maintenance fee without the surcharge extended from January 18, 2001 to July 18, 2001, and for paying with the surcharge from July 19, 2001 to January 18, 2002. The 7½ year maintenance fee was not paid until April 7, 2004, i.e. more than 2 years after the patent expired.

Petitioner has set forth that there are two reasons that the maintenance fee was not submitted in a timely manner: she has asserted financial hardship, and she has asserted that she gave the money to her law firm, and it was reasonable for her to rely on counsel to pay the 7½ year maintenance fee.

The issue of financial hardship:

Petitioner has set forth that her company was in "extreme financial distress"¹⁵ and has included a tax return from 1998 to substantiate this allegation. Petitioner has further included eviction notices dated November 23, 2003, December 22, 2003, and April 22, 2004.

Petitioner has also asserted that she encountered difficulties receiving payment from her main customer. She sued this customer in 2003, and has provided the 2004 decision from a court in California, in which she prevailed.

Petitioner has further provided three bank statements from July 31, 1999 – August 31, 1999, December 31, 2003 – January 31, 2004, and January 31, 2004 – February 29, 2004. Petitioner has also submitted two notices of insufficient funds dated January 30, 2004 and February 2, 2004, along with a balance sheet dated March 31, 2004 which shows assets and liabilities as of that date. These documents fail to provide a complete picture of Petitioner's financial condition for the entire period from the expiration of the patent at midnight on January 18, 2002 to the filing of the renewed petition. As stated in the previous decision, the standard associated with the characterization of the failure to submit the maintenance fee as "unavoidable" carries with it

¹⁵ Renewed petition, page 1.

a rather stringent standard, and as such, the showing of her company's financial condition during the delay must be complete and thorough. In order for such a showing to be successful in establishing that the delay was unavoidable, documentation must be provided which establishes financial hardship was endured during the *entire* period of delay, from the due date for the maintenance fee up until the filing of a grantable petition. The first bank statement and the 1998 corporate tax return both represent a time which precedes the expiration of the patent, and as such, they are not relevant. Petitioner has submitted two bank statements which provide only a partial showing of her company's financial condition for a period of two months, from December 31, 2003 through February 29, 2004. The patent expired at midnight on January 18, 2002, and the original petition under 37 C.F.R. §1.378(b) was submitted on April 6, 2004. The Office has no way of determining what Petitioner's financial condition was from January of 2002 to December of 2003, and in March of 2004. As such, the evidence which Petitioner has provided is not sufficient to support her allegation of financial hardship during this entire period.

Furthermore, the payment of the foreign fees makes it difficult for the Petitioner to assert that financial hardship precluded her from submitting the U.S. maintenance fee in a timely manner. Her petition of March 22, 2004 set forth that her attorney in Europe, Australia and Canada paid the required maintenance fees, but the U.S. maintenance fees were not submitted due to a failure in communication with her U.S. patent attorneys. The petition of March 22, 2004 indicated it is "apparent from the status of our fees in Europe, Canada, and Australia that we would have paid these fees if we had knowledge of failure of the communication between our U.S. attorneys." Unfortunately, it is equally apparent that if Petitioner had money to seek and maintain patent protection abroad, then she had money to maintain the above-identified patent as well. By Patentee's own admission, it was the failure in communication with her US patent attorneys, and not financial hardship, which caused the failure to timely pay the maintenance fee.

Patentee's reliance on counsel:

Petitioner has also included two letters which establish that in 1998, the attorney of record, Robert Colwell of Townsend and Townsend, ceased representing the Petitioner for failure to pay her legal fees. The attorney of record sent her a letter on August 20, 1998, stating that due to a lack of payment, the firm's records department had been instructed to collect the Petitioner's files and return them to her. On February 22, 2000, the attorney of record sent a letter to the Petitioner, stating that her account was \$15,690.23 past due. In this renewed petition, Petitioner holds that counsel continued to represent her interests during the period when the second maintenance fee became due. This characterization stands in contrast Patentee's petition of March 22, 2004, where she states that her representation changed from Townsend and Townsend ("old attorney") to a "new attorney," and Petitioner blames the expiration on the old attorney's failure to properly communicate with the new attorney.

Petitioner has also included two checks which were made out to the law firm of record: check number 6245, dated May 1, 2000, in the amount of \$11,298.87 and check number 6788, dated February 22, 2001, in the amount of \$4,391.36. These two amounts add up to \$15,690.23 – the exact amount which was owed to the law firm of record, as set forth in the included letter from

Townsend and Townsend dated February 22, 2000. The letter itemized the charges on an "attached Statement of Account," which Petitioner has not provided to the Office. While the Office cannot state with certainty that these two checks were applied to her past due account, it would certainly appear that way. Due to the fact that these checks were written shortly after the date of the letter, and for the exact amount indicated in the letter, the Office must assume that these checks were written in response to the notification the letter provided that Petitioner owed the law firm for services and expenses which had been previously incurred by the firm on her behalf. Since the maintenance fee in question was not due for another year, it is unlikely that the maintenance fee appeared on the "Statement of Account." Petitioner's failure to include this attachment further suggests that Patentee's payment to Townsend and Townsend did not create a reasonable expectation that Townsend and Townsend would continue to be responsible for tracking and paying future maintenance fees.

Moreover, even if Petitioner received an oral assurance that check number 6245 would be submitted to the Office for all "outstanding maintenance fees in the present case as well as others," such would not help Patentee, as the 7½ year maintenance fee was not outstanding in May 2000 and thus not covered by the alleged oral agreement. Finally, even assuming, *arguendo*, that Townsend and Townsend remained as Patentee's counsel and undertook the obligation to track and pay the 7½ year maintenance fee, such would still not establish that the delay was unavoidable. In the absence of evidence which would show that an attorney has deceived his client, the client is responsible for the actions of her chosen counsel¹⁶. Reliance upon counsel would merely shift the focus of inquiry from petitioner to whether petitioner's agent acted reasonably and prudently¹⁷. As such, it was incumbent upon petitioner to have demonstrated, via a documented showing, that petitioner's agent had taken reasonable steps to ensure timely payment of the maintenance fee, and that the maintenance fee was unavoidably not paid despite the exercise of reasonable care by patentee's agent. Patentee has provided no such showing and as such has failed to satisfy the evidentiary requirement under 37 CFR 1.378(b)(3).

It is for these reasons that acceptance of the delayed payment of the maintenance fee is precluded.

CONCLUSION

The prior decision which refused to accept, under 37 C.F.R §1.378(b), the delayed payment of a maintenance fee for the above-identified patent, has been reconsidered. For the above stated reasons, the delay in this case cannot be regarded as unavoidable within the meaning of 35 U.S.C. §41(c)(1) and 37 C.F.R. §1.378(b).

¹⁶ Link v. Wabash, *supra*.

¹⁷ California Medical Products v. Technol Medical Products, 921 F. Supp. 1219 (D.Del. 1995).

Since this patent will not be reinstated, the petitioner is entitled to a refund of both the surcharge and 7 ½ year maintenance fee, but not the \$130 fee associated with the filing of the instant renewed petition under 37 C.F.R. §1.378(e). A treasury check will be issued in due course.

The correspondence address has been changed, as requested in the petition filed April 7, 2004.

As stated in 37 C.F.R. §1.378(e), no further reconsideration or review of this matter will be undertaken.

Telephone inquiries should be directed to Senior Attorney Paul Shanoski at (571) 272-3225.

A handwritten signature in black ink, appearing to read "Charles Pearson", with a long horizontal flourish extending to the right.

Charles Pearson
Director
Office of Petitions
United States Patent and Trademark Office