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Paper No. 19

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JUL 23 2008

OFFICE OF PETITIONS

In re Patent of	:	
Likins et al.	:	
Patent No.: 5,978,749	:	
Issue Date: 11/02/1999	:	
Application No 08/884990	:	DECISION ON
Filing or 371(c) Date: 06/30/1997	:	PETITION
Title of Invention:	:	
PILE INSTALLATION RECORDING	:	
SYSTEM	:	

This is a decision on the Request for Reconsideration of Petition under 37 CFR § 1.378(b), to reinstate the above-identified patent, filed May 14, 2007, and on the Response to Requirement for Information, filed January 4, 2008, supplemented on April 21, 2008 and June 4, 2008.

The petition is **DENIED**.

Background

The patent issued November 2, 1999. Patentee could have paid the three and one half (3½) year maintenance fee between November 2, 2002, and May 2, 2003, without a surcharge, or within the six (6) month grace period between May 3, 2003 and November 2, 2003. Patentee failed to do so; accordingly, the patent became expired on November 3, 2003.

The October 23, 2006 petition

Petitioner filed a petition to reinstate the patent on October 23, 2006, wherein Petitioner stated that it took over responsibility for payment of the maintenance fee for the above-identified patent from Arter & Hadden LLP (Arter Hadden) on July 23, 2003. Arter Hadden used an electronic database to track patent docket information. Petitioner provided that it migrated the electronic database from Arter Hadden, but subsequently commenced and completed an exhaustive, manual audit of all physical files to verify the integrity of the docket system. The audit revealed several files for which no data relative to patent issuance had been entered; however, electronic file information for the above-identified patent included completed docket information, and further set forth that the maintenance fee had been paid.

Petitioner received an inquiry on September 19, 2006, requesting the status of the present patent, and a review his records, which showed that the maintenance fee had been paid at least as of November 2, 2003. Other than the present patent, no other entry of any docket item listed a maintenance fee as having been paid when it had not been paid.

Petitioner was unable to confirm payment of the maintenance fee. Patentee stated that it had used a system called "PATTSY", for the past three (3) years to track and pay maintenance fees. Once the Patent issued, the Docket Coordinator routinely entered an entry date in PATTSY, and PATTSY automatically generated the due date for the maintenance fee. As stated above, maintenance fees for the present patent were indicated as paid at least since November, 2, 2003.

Petitioner provided that the Firm had one docket coordinator responsible for all entries in PATTSY. At Arter Hadden, from the period between approximately May 2001 through May 2004, the docket coordinator was Ms. Olivia Steuball. The Patentee permitted two people to update the data in PATTSY: the docket coordinator, Ms. Amy Gagich, and the information technology ("IT") specialist, Mr. Dustin DeFranco.

Petitioner was unable to search the history at Arter Hadden to verify whether Arter Hadden had paid the maintenance fee.

Ms. Gagich stated that she had no knowledge of entering the date into PATTSY; no knowledge that the maintenance fee was paid for the present patent, nor did she have any other information that the patent was paid.

No statement from Ms. Steuball was provided.

The March 14, 2007 Decision dismissing the petition

In a Decision dismissing the petition mailed March 14, 2007, the following information regarding a docketing error as the cause of the delay in paying the maintenance fee was stated:

An error in a docketing system could possibly result in a finding that a delay in payment was unavoidable if it were shown that reasonable care was exercised in designing and operating the system and that the patentee took reasonable steps to ensure that the patent was entered into the system to ensure timely payment of the maintenance fees.

A showing of unavoidable delay will (in addition to the above) require: (1) evidence concerning the procedures in place that should have avoided the error resulting in the delay; (2) evidence concerning the training and experience of the persons responsible for the error; and (3) copies of any applicable docketing records to show that the error was in fact the cause of the delay. See MPEP § 711.03(c)(III)(C)(2).

A delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of "unavoidable" delay, provided it is shown that:

(A) the error was the cause of the delay at issue;

(B) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; and

(C) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care. See In re Egbers, 6 USPQ2d 1869, 1872 (Comm'r Pat. 1988), rev'd on other grounds sub nom., Theodor Groz & Sohne & Ernst Bechert Nadelfabrik KG v. Quigg, 10 USPQ2d 1787 (D.D.C. 1988); In re Katrapat, 6 USPQ2d 1863, 1867-68 (Comm'r Pat. 1988).

March 14, 2007 Decision at p.4.

The Decision required the Patentee to “demonstrate (1) the error was the cause of the delay at issue (1) evidence concerning the procedures in place that should have avoided the error resulting in the delay, and (2) evidence concerning the training and experience of the persons responsible for the error.” Id., at p.5.

The Decision noted that

Patentee has failed to demonstrate that there was a docketing error, because Patentee is unable to confirm whether the maintenance fee was timely paid. As such, Patentee is unable to point to a docketing error. Patentee has not provided any statement from any person at Arter Hadden, and in particular Ms. Steuball, who could demonstrate that an error occurred at Arter Hadden. Moreover, Petitioner has not provided any evidence concerning any procedures in place at Arter Hadden that should have avoided the error resulting in the delay.

Patentee has provided evidence concerning the Patentee's procedures in place that should have avoided the error resulting in the delay; however, Patentee's own docketing clerk states that she has no knowledge of entering the date into PATTSY that the maintenance fee was paid for the present patent, nor has she any other information that the patent was paid.

Patentee has also not presented anyone who was responsible for the error. As such, Patentee is unable to present evidence concerning the training and experience of the persons responsible for the error. Again, no statement from Ms. Steuball has been provided, and Ms. Gagich states that she has no knowledge of entering the date into PATTSY that the maintenance fee was paid for the present patent, nor has she any other information that the patent was paid.

Id. (Emphasis supplied).

The May 14, 2007 Petition Requesting Reconsideration

On May 14, 2007, Petitioner filed a petition for reconsideration and the Declaration of Susan L. Mizer (“Mizer Declaration”), who practiced as a patent attorney at Arter & Hadden, LLP (Arter Hadden).

Ms. Mizer provided that she was familiar with the PATTSY docketing system and the docketing procedures used by Arter Hadden. Ms. Mizer stated that she worked extensively with Olivia Steuball while she was the docketing administrator at Arter Hadden. Ms. Mizer attested to the reliability of the docketing system at Arter Hadden, and to the training and competence of Ms. Steuball in the use of the PATTSY docketing system.

Ms. Mizer stated that “Ms. Steuball erroneously failed to pay or confirm receipt by the U.S. Patent & Trademark Office of the 3½ year maintenance fee for U.S. Patent No. 5,978,749, and also docketed the fees as having been paid in the PATTSY docketing system.” Mizer Declaration at p.2. Ms. Mizer stated that “[t]he electronic files of Arter Hadden’s PATTSY docketing system were transferred to Tucker Ellis & West LLP (“Tucker Ellis”), and imported into its system. Thus, Ms. Steuball’s error was the direct cause of the delay in paying the subject maintenance fee.” Id. Ms. Mizer provided that the electronic files of Arter Hadden are no longer available. Id. Ms. Mizer related that Ms. Steuball had a reputation for accuracy and reliability, and that Ms. Steuball was asked to continue to maintain the docket system for Tucker Ellis, but abruptly and unexpectedly gave two weeks notice while Tucker Ellis was still in the process of building its infrastructure. Mizer Declaration at p.3.

The November 5, 2007 Requirement for Information

A Requirement for Information was mailed November 5, 2007. The Requirement for Information provided the following analysis of the May 14, 2007 Request for Reconsideration:

As stated in the March 14, 2007 Decision dismissing the petition:

A delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of “unavoidable” delay, provided it is shown that:

(A) the error was the cause of the delay at issue;

(B) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; and

(C) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care. See In re Egbers, 6 USPQ2d 1869, 1872 (Comm'r Pat. 1988), rev'd on other grounds sub nom., Theodor Groz & Sohne & Ernst Bechert Nadelfabrik KG v. Quigg, 10 USPQ2d 1787 (D.D.C. 1988); In re Katrapat, 6 USPQ2d 1863, 1867-68 (Comm'r Pat. 1988).

In the Request for Reconsideration, Petitioner provided the declaration of Ms. Mizer; however, Ms. Mizer had neither trained nor supervised Ms. Steuball, such that Ms. Mizer was not in a

position to know, based upon first hand knowledge, whether Ms. Steuball was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon Ms. Steuball represented the exercise of due care. Ms. Mizer stated that she "worked extensively with Ms. Steuball;" however, Ms. Mizer was a patent attorney. Ms. Mizer did not explain the nature of the extensive work that she did with Ms. Steuball, who was the docket clerk. Moreover, Ms. Mizer related that Arter Hadden had a reliable system for docketing patent matters; however, the function at issue is the timely payment of maintenance fees. Ms. Mizer failed to explain the clerical function performed to ensure timely payment of maintenance fees. Instead, Ms. Mizer related her understanding of the docketing system at Arter Hadden for handling and docketing of patent matters as a patent attorney in the IP department.

Moreover, Petitioner has not identified "the error" that was the cause of the delay. Ms. Mizer stated that Ms. Steuball erroneously failed to pay or confirm receipt by the U.S. Patent & Trademark Office of the 3½ year maintenance fee for U.S. Patent No. 5,978,749, and also docketed the fees as having been paid in the PATTSY docketing system, but Ms. Mizer did not explain how the failure occurred. Ms. Mizer had not explained whether or how maintenance fee due dates were entered into the PATTSY system; how decisions were made as to whether to pay the maintenance fees, and how an affirmative decision to pay a maintenance fee translated into the actual submission of the maintenance fee to this Office. Ms. Mizer made a bald allegation that Ms. Steuball erroneously failed to pay or confirm receipt of the maintenance fee, but Ms. Mizer did not say how Ms. Steuball erred (i.e. entered an incorrect patent number; disregarded an instruction to pay the maintenance fee, etc.) – only that she erred in not paying the maintenance fee.

Required Information

The Requirement for Information required 1) identification of the error; 2) identification/explanation of the business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance, and 3) evidence concerning the training and experience of the persons responsible for the error such that reliance upon such person was reasonable.

Regarding 1) a statement from Ms. Steuball identifying the error was required.

Regarding 2), Petitioner was asked to explain how maintenance fee due dates were entered into the PATTSY system; how decisions were made as to whether to pay the maintenance fee(s), and how an affirmative decision to pay a maintenance fee translated into the actual submission of the maintenance fee to this Office.

Regarding 3) A statement from Ms. Steuball's supervisor during the relevant period, that Ms. Steuball was sufficiently trained and experienced with regard to the function and routine for its performance such that reliance upon Ms. Steuball represented the exercise of due care, was required.

The Response to Requirement for Information, filed January 4, 2008, supplemented on April 21, 2008 and June 4, 2008

Petitioner filed a response to the Requirement for Information on January 4, 2008, supplemented on April 21, 2008 and June 4, 2008.

The January 4, 2008 Response

In the January 4, 2008 Response, Petitioner filed a Declaration of Olivia Steuball, and a Declaration of Denae Wunderle, Director of Human Resources at Tucker, Ellis and West LLP. Ms. Steuball states that she was the intellectual property coordination at the former law firm of Arter & Hadden LLP, serving in that position until the firm ceased the practice of law on July 15, 2003. Thereafter, Ms. Steuball commenced her position as intellectual Property Coordinator for Tucker, Ellis & West, a position she held until May, 2004. Ms. Steuball states that her duties at both Tucker Ellis and Arter Hadden included being the initial recipient of all incoming correspondence from this Office, and that her duties at both firms also included updating and monitoring patent docketing information in the PATTSY docketing system, said docketing system having been employed by both firms. Ms. Steuball states that she promptly entered all relevant information, including maintenance fee information into the PATTSY system. Regarding the error that resulted in the delayed payment of the maintenance fee for the present patent, Ms. Steuball states only that “[a]n absence of a generated reminder relative to a maintenance fee due date is indicative of an absence of an entry in the system which would trigger such an appropriate notice,” and that “any failure to generate a maintenance fee notice would be attributable to an error in the docketing system or associated procedure.” Steuball Declaration at p.2.

Of note is that Ms. Steuball does not identify the error, nor does Ms. Steuball assert that she made an error. Contrariwise, Ms. Steuball states that she promptly entered all relevant information, including maintenance fee information into the PATTSY system.

The Declaration of Denae Wunderle states that she was the supervisor of Ms. Steuball while at Tucker Ellis, and that she has access to Ms. Steuball’s personnel records from Arter Hadden. Ms. Wunderle states that Ms. Steuball met or exceeded expectations in her performance at both firms. Ms. Wunderle admittedly did not supervise Ms. Steuball at Arter Hadden.

The Supplemental Response to the Requirement for Information, filed April 21, 2008

On April 24, 2008, the response to the Requirement for Information was supplemented with the Declaration of John X. Garred, a partner at Tucker Ellis. Mr. Garred states that prior to joining Tucker Ellis, he practiced as a patent attorney at Arter Hadden. Mr. Garred states that (at Arter Hadden), all incoming correspondence was routed by administrative personnel to a patent attorney for handling, and the patent attorney was directly responsible for assuring that the correct information, including the due dates for maintenance fees, were submitted to the docketing coordinator, Ms. Steuball. Mr. Garred states that the patent attorney was ultimately responsible for verification of the accuracy of the dates entered into the PATTSY docketing system, and that he was the attorney to whom all incoming correspondence from this Office concerning the present patent was routed. Mr. Garred states that he failed to confirm the accuracy of the dates entered into the PATTSY docketing system pursuant to the information from this Office. Garred Declaration at p.2. Mr. Garred states that “Ms. Steuball erroneously

failed to pay or confirm receipt by the Patent Office of the maintenance fee for the present patent, based upon inaccurate information entered into the PATTSY system. Id. Thereafter, Mr. Garred states, the electronic files were transferred from Arter Hadden to Tucker Ellis, and that “the erroneous information provided to and entered by Ms. Steuball was the direct cause of the delay in paying the maintenance fee.” Id.

The Second Supplemental Response to the Requirement for Information filed June 4, 2008

Petitioner filed a Supplemental Declaration of Mr. Garred on June 4, 2004. In the Supplemental Declaration, Mr. Garred clarifies that as a managing attorney, he is ultimately responsible for errors committed by subordinate staff, including docketing coordinators who work with him, and that the responsibility includes inaccurate information that may be relayed by him or others to staff members, and also includes errors that are directly attributed to staff members engaged in such duties. Mr. Garred reiterates that Ms. Steuball was a trustworthy employee, but that due to an unavoidable error, directly attributable to a single, critical docket entry by Ms. Steuball, an employee reasonably deemed trustworthy, and despite the use of a highly reliable docketing system, the present patent expired for failure to timely pay the maintenance fee. Mr. Garred concludes that the error was caused by inaccurate information being entered into the Arter Hadden system, and said inaccurate information is directly attributable to actions of lack of actions by Ms. Steuball. Garred Supplemental Declaration at p.2. Mr. Garred admits that Ms. Steuball did not specifically acknowledge any significant responsibility leading to the expiration of the present patent. Id.

Applicable Law, Rules and MPEP

37 CFR 1.378(b) provides that a patent may be reinstated at any time following expiration of the patent for failure to timely pay a maintenance fee. A petition to accept late payment of a maintenance fee, where the delay was unavoidable, must include:

- (A) the required maintenance fee set forth in 37 CFR 1.20(e)-(g);
- (B) the surcharge set forth in 37 CFR 1.20(i)(1); and
- (C) 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 required 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. Furthermore, an adequate showing requires a statement by all persons with direct knowledge of the cause of the delay, setting forth the facts as they know them. Copies of all documentary evidence referred to in a statement should be furnished as exhibits to the statement. (Emphasis supplied).

As language in 35 U.S.C. § 41(c)(1) is identical to that in 35 U.S.C. § 133 (i.e., “unavoidable” delay), a late maintenance fee for the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 35 U.S.C. § 133. See Ray v. Lehman, 55 F.3d 606, 608-09, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995) (quoting In re Patent No. 4,409,763,

7 USPQ2d 1798, 1800 (Comm'r Pat. 1988), aff'd sub nom. Rydeen v. Quigg, 748 F. Supp. 900, 16 USPQ2d 1876 (D.D.C. 1990), aff'd, 937 F.2d 623 (Fed. Cir. 1991) (table), cert. denied, 502 U.S. 1075 (1992)). See MPEP § 711.03(c) for a general discussion of the "unavoidable" delay standard.

Because 35 U.S.C. § 41(c) requires the payment of fees at specified intervals to maintain a patent in force, rather than some response to a specific action by the Office under 35 U.S.C. § 133, a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees. Ray, 55 F.3d at 609, 34 USPQ2d at 1788. That is, 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 showing of the steps taken to ensure the timely payment of the maintenance fees for this patent. Id. Thus, 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 CFR 1.378(b)(3) preclude acceptance of the delayed payment of the maintenance fee under 37 CFR 1.378(b).

In view of the requirement to enumerate the steps taken to ensure timely payment of the maintenance fee, the patentee's lack of knowledge of the need to pay the maintenance fee and the failure to receive the Maintenance Fee Reminder does not constitute unavoidable delay. See Patent No. 4,409,763, supra. See also Final Rule entitled "Final Rules for Patent Maintenance Fees," published in the Federal Register at 49 Fed. Reg. 34716, 34722-23 (August 31, 1984), and republished in the Official Gazette at 1046 Off. Gaz. Pat. Office 28, 34 (September 25, 1984). Under the statutes and rules, the Office has no duty to notify patentee of the requirement to pay maintenance fees or to notify patentee when the maintenance fee is due. It is solely the responsibility of the patentee to ensure that the maintenance fee is paid timely to prevent expiration of the patent. The failure to receive the reminder notice will not shift the burden of monitoring the time for paying a maintenance fee from the patentee to the Office. Thus, evidence that despite reasonable care on behalf of the patentee and/or the patentee's agents, and reasonable steps to ensure timely payment, the maintenance fee was unavoidably not paid, could be submitted in support of an argument that the delay in payment was unavoidable.

Moreover, the Patent and Trademark Office must rely on the actions or inactions of duly authorized and voluntarily chosen representatives of the applicant, and applicant is bound by the consequences of those actions or inactions. Link v. Wabash, 370 U.S. 626, 633-34 (1962); Huston v. Ladner, 973 F.2d 1564, 1567, 23 USPQ2d 1910, 1913 (Fed. Cir. 1992); see also Haines v. Quigg, 673 F. Supp. 314, 317, 5 USPQ2d 1130, 1132 (D.N. Ind. 1987). Specifically, petitioner's delay caused by the actions or inactions of his voluntarily chosen representative does not constitute unavoidable delay within the meaning of 35 USC 133 or 37 CFR 1.137(a). Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (D. Ind. 1987); 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. 130, 131 (Comm'r Pat. 1891). 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 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

An error in a docketing system could possibly result in a finding that a delay in payment was unavoidable if it were shown that reasonable care was exercised in designing and operating the system and that the patentee took reasonable steps to ensure that the patent was entered into the system to ensure timely payment of the maintenance fees.

A showing of unavoidable delay will (in addition to the above) require: (1) evidence concerning the procedures in place that should have avoided the error resulting in the delay; (2) evidence concerning the training and experience of the persons responsible for the error; and (3) copies of any applicable docketing records to show that the error was in fact the cause of the delay. See MPEP § 711.03(c)(III)(C)(2).

A delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of “unavoidable” delay, provided it is shown that:

(A) the error was the cause of the delay at issue;

(B) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; and

(C) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care. See In re Egbers, 6 USPQ2d 1869, 1872 (Comm'r Pat. 1988), rev'd on other grounds sub nom., Theodor Groz & Sohne & Ernst Bechert Nadelfabrik KG v. Quigg, 10 USPQ2d 1787 (D.D.C. 1988); In re Katrapat, 6 USPQ2d 1863, 1867-68 (Comm'r Pat. 1988).

Opinion

Petitioner is required to show the error was the cause of the delay. Petitioner, however, has failed to identify the error. Regarding the error, Ms. Mizer stated that “Ms. Steuball erroneously failed to pay or confirm receipt by the U.S. Patent & Trademark Office of the 3½ year maintenance fee for U.S. Patent No. 5,978,749, and also docketed the fees as having been paid in the PATTSY docketing system.” Mizer Declaration at p.2.

Ms. Mizer did not, however, explain how the failure occurred. Ms. Mizer did not explain whether or how maintenance fee due dates were entered into the PATTSY system; how decisions were made as to whether to pay the maintenance fees, and how an affirmative decision to pay a maintenance fee translated into the actual submission of the maintenance fee to this Office. Ms. Mizer made an allegation that Ms. Steuball erroneously failed to pay or confirm receipt of the maintenance fee, but Ms. Mizer did not say how Ms. Steuball erred (i.e. entered an incorrect patent number; disregarded an instruction to pay the maintenance fee, etc.) – only that she erred in not paying the maintenance fee.

Ms. Steuball stated that she promptly entered all relevant information, including maintenance fee information into the PATTSY system. Regarding the error that resulted in the delayed payment of the maintenance fee for the present patent, Ms. Steuball states only that “[a]n absence of a generated reminder relative to a maintenance fee due date is indicative of an absence of an entry

in the system which would trigger such an appropriate notice,” and that “any failure to generate a maintenance fee notice would be attributable to an error in the docketing system or associated procedure.” Steuball Declaration at p.2.

Of note is that Ms. Steuball also has not identified the error, nor did Ms. Steuball assert that she made an error. Contrariwise, Ms. Steuball states that she promptly entered all relevant information, including maintenance fee information into the PATTSY system.

Mr. Garred has also not identified the error that was the cause of the delay. Mr. Garred stated that Ms. Steuball erroneously failed to pay or confirm receipt by the Patent Office of the maintenance fee for the present patent, based upon inaccurate information entered into the PATTSY system; however, Mr. Garred has not stated how Ms. Steuball erred (i.e. entered an incorrect patent number; disregarded an instruction to pay the maintenance fee, etc.,) – only that she erred in not paying or confirming receipt of the maintenance fee, and Mr. Garred admits that Ms. Steuball did not specifically acknowledge any significant responsibility leading to the expiration of the present patent. Id.

In addition to Petitioner, Ms. Mizer and Mr. Garred, being unable to identify the error putatively caused by Ms. Steuball, Ms. Steuball states that she promptly entered all relevant information, including maintenance fee information into the PATTSY system, and does not assert that she made an error.

Petitioner has also provided conflicting evidence as to who the person is who is responsible for the delay. Ms. Mizer and Mr. Garred have identified Ms. Steuball as being responsible for the delay; however, Ms. Steuball, does not acknowledge that she is responsible for error that caused the delay. Mr. Garred states that he failed to confirm the accuracy of the dates entered into the PATTSY docketing system pursuant to the information from this Office. Garred Declaration at p.2. Mr. Garred also states that “Ms. Steuball erroneously failed to pay or confirm receipt by the Patent Office of the maintenance fee for the present patent, based upon inaccurate information entered into the PATTSY system. Id. While a delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of “unavoidable” delay, provided Petitioner meets the required showing, Petitioner's delay caused by the actions or inactions of his voluntarily chosen representative does not constitute unavoidable delay.

Moreover, a showing of unavoidable delay requires: (1) evidence concerning the procedures in place that should have avoided the error resulting in the delay; (2) evidence concerning the training and experience of the persons responsible for the error; and (3) copies of any applicable docketing records to show that the error was in fact the cause of the delay. See MPEP § 711.03(c)(III)(C)(2).

Regarding (2), Petitioner has also not provided any statement from any person at Arter Hadden, who supervised Ms. Steuball, and who could attest on a personal knowledge basis to Ms. Steuball's training while at Artery Hadden.

Ms. Mizer had neither trained nor supervised Ms. Steuball, such that Ms. Mizer was not in a position to know, based upon first hand knowledge, whether Ms. Steuball was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon Ms. Steuball represented the exercise of due care. The Declaration of Denae Wunderle states that she was the supervisor of Ms. Steuball while at Tucker Ellis, and that she has access to Ms. Steuball's personnel records from Arter Hadden. Ms. Wunderle, therefore, was also not in a position to know, based upon first hand knowledge, whether Ms. Steuball was sufficiently trained and experienced while at Arter Hadden, with regard to the function and routine for its performance that reliance upon Ms. Steuball represented the exercise of due care.

Regarding (3), Petitioner has not provided any copies of docket records at Arter Hadden to show that the error was the cause of the delay.

Decision

The instant petition under 37 CFR 1.378(e) is granted to the extent that the decision of March 14, 2007 has been reconsidered; however, the renewed petition to accept under 37 CFR 1.378(e) the delayed payment of a maintenance fee and reinstate the above-identified patent is **DENIED**.

This patent file is being forwarded to the Files Repository.

Telephone inquiries concerning this matter should be directed to Attorney Derek L. Woods at (571) 272-3232.



Charles Pearson
Director
Office of Petitions