



Paper No. 12

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OFFICE OF PETITIONS

In re Patent No. 5,920,908 :
Issue Date: July 13, 1999 :
Application No. 08/933,621 :
Filed: September 9, 1997 :
Attorney Docket No. P-97197 :

ON PETITION

This is a decision on the renewed petition, filed July 10, 2007, under 37 CFR 1.378(e), to accept the delayed payment of a maintenance fee for the above-identified patent.

The petition is **DENIED**.

BACKGROUND

The above-identified patent issued July 13, 1999. The three and one-half maintenance fee was due July 13, 2003, and could have been paid from July 13, 2002 through January 13, 2003, or with a surcharge during the period from January 14, 2003 through July 13, 2003. Since this maintenance fee was not timely paid, the patent expired at midnight on July 13, 2003.

A first petition to accept the three and one-half year maintenance fee as unavoidably delayed under 37 CFR 1.378(b) was filed December 4, 2006, and was dismissed in the decision of May 10, 2007. Thus, the earliest the three and one-half year maintenance fee was on file at the USPTO was some 3 years and 5 months after the end of the grace period.

A renewed petition¹ under 37 CFR 1.378(b) was filed July 10, 2007. Petitioner requested reconsideration and provided answers to several inquiries for additional information set forth in the adverse decision May 10, 2007. Petitioner contended that Bruce Stein and the law firm of Aufrichtig, Stein & Aufrichtig was responsible for notifying the client when maintenance fees were due and that the delay was unavoidable due to the failure of Aufrichtig, Stein & Aufrichtig to properly docket the above-identified patent for maintenance fee payment.

¹ A similar petition was filed in U.S. Patent No. 5,498,472

STATUTE, REGULATION, AND EXAMINING PROCEDURE

35 U.S.C. § (2)(B)(2) provides, in part, that:

The Office-- may, establish regulations, not inconsistent with law, which

(A) shall govern for the conduct of proceedings in Office.

35 U.S.C. § 41(c)(1) provides that:

The Director may accept the payment of any maintenance fee required by subsection (b) of this section which is made within twenty-four months after the six-month grace period if the delay is shown to the satisfaction of the Director to have been unintentional, or at any time after the six-month grace period if the delay is shown to the satisfaction of the Director to have been unavoidable. The Director may require the payment of a surcharge as a condition of accepting payment of any maintenance fee after the six-month grace period. If the Director accepts payment of a maintenance fee after the six-month grace period, the patent shall be considered as not having expired at the end of the grace period.

37 CFR 1.378(b) provides that:

(b) Any petition to accept an unavoidably delayed payment of a maintenance fee filed under paragraph (a) of this section must include:

(1) The required maintenance fee set forth in §1.20 (e) through (g);

(2) The surcharge set forth in §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.

37 CFR 1.378(c) provides that:

Any petition to accept an unintentionally delayed payment of a maintenance fee filed under paragraph (a) of this section must be filed within twenty-four months after the six-month grace period provided in §1.362(e) and must include:

- (1) The required maintenance fee set forth in § 1.20 (e) (g);
- (2) The surcharge set forth in §1.20(i)(2); and
- (3) A statement that the delay in payment of the maintenance fee was unintentional.

OPINION

Petitioner requests reconsideration of the previous adverse decision on the petition filed under 37 CFR 1.378(b) and submits that due to the malfeasance of counsel Bruce Stein (Stein), partner in the firm of Aufrichtig, Stein & Aufrichtig ("AS&A"), the expiry of the instant patent is unavoidable.

Petitioner has not met his burden of proving to the satisfaction of the Director that the delay was unavoidable within the meaning of 35 U.S.C. § 41(c)(1) and 37 CFR 1.378(b).

A late maintenance fee is considered under the same standard as that for reviving an abandoned application under 35 U.S.C. § 133 because 35 U.S.C. § 41(c)(1) uses the identical language, i.e., "unavoidable" delay. Ray v. Lehman, 55 F.3d 606, 608, 609, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995)(quoting In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (Comm'r Pat. 1988)). Decisions on reviving abandoned applications 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 business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514 15 (D.C. Cir. 1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32 33 (Comm'r Pat. 1887) see also Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141. In addition, decisions on revival are made on a "case by case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982).

35 U.S.C. § 41(c)(1) does not require an affirmative finding that the delay was avoidable, but only an explanation as to why the petitioner has failed to carry his or her burden to establish that the delay was unavoidable. Cf. Commissariat A. L'Energie

Atomique v. Watson, 274 F.2d 594, 597, 124 USPQ 126, 128 (D.C. Cir. 1960)(35 U.S.C. § 133 does not require the Commissioner to affirmatively find that the delay was avoidable, but only to explain why the applicant's petition was unavailing). Petitioner is reminded that it is the patentee's burden under the statutes and regulations to make a showing to the satisfaction of the Commissioner that the delay in payment of a maintenance fee is unavoidable. See 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); Ray v. Lehman, *supra*.

As 35 USC § 41(b) 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 USC § 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 v. Lehman, 55 F.3d 606, 609, 34 USPQ2d 1786, 1788 (Fed. Cir. 1995). 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 by the responsible party to ensure the timely payment of the maintenance fee for this patent. Id.

As the patent holder at the time of expiration, it was incumbent on petitioner to have itself docketed this patent for payment of the maintenance fee in a reliable system as would be employed by a prudent and careful person with respect to his most important business, or to have engaged another for that purpose. See California Medical Products v. Technol Med. Prod., 921 F.Supp. 1219, 1259 (D.Del. 1995). Even where another has been relied upon to pay the maintenance fees, such asserted reliance per se does not provide a petitioner with a showing of unavoidable delay within the meaning of 37 CFR § 1.378(b) and 35 USC § 41(c). Id. Rather, such reliance merely shifts the focus of the inquiry from the petitioner to whether the obligated party acted reasonably and prudently. Id. Nevertheless, a petitioner is bound by any errors that may have been committed by the obligated party. Id.

The instant petition asserts that Stein, a partner and while an attorney, Stein was not registered to practice before the USPTO, was the person responsible for tracking all maintenance fee reminder notices and payments. Stein created handwritten spreadsheets for deadlines and due dates and alerted Peter Aufrichtig (Aufrichtig) when a due date was arising and prepared correspondence to clients which was always reviewed and signed by Aufrichtig. Specifically, the system in place consisted of: (1) once the original patent was received, a letter was drafted to the client enclosing such patent and notifying the client that the firm would attend to payment of the maintenance fees; (2) Stein added such due dates to his handwritten spreadsheet; (3) the handwritten spreadsheet was occasionally given to Aufrichtig's assistant for typing so Aufrichtig could review upcoming dates in Stein's absence; (4) Aufrichtig would receive incoming maintenance fee correspondence relating to maintenance fees; (5) Aufrichtig

would give such correspondence to an assistant to pull the file; (6) the assistant would give the file to Stein for attending to payment; and (7) Stein would docket the next payment due date. Stein reported to Aufrichtig on a bi-weekly basis; however, Aufrichtig allowed Stein to work independently and manage the docketing and maintenance fee patent portfolio, only involving Aufrichtig when it was necessary to sign a letter to a client, prepare or file a paper with the USPTO or actually pay a fee.

Aufrichtig further states: (1) it was later learned that Stein would take faxes and mail prior to receipt by Aufrichtig or his assistant and never properly attend to docketing certain deadlines or alerting Aufrichtig to certain upcoming deadlines; (2) it appears as though once Stein missed a deadline he would hide documents related to the missed deadline; (3) Stein was terminated after a trademark client discovered that a block of trademark registrations had become abandoned; (4) and that upon cleaning out of Stein's office, correspondences and notice from the USPTO indicating that certain patent and trademark files were abandoned, and in cases such as this one no notices were found.

In the petition decision mailed May 10, 2007, petitioner was asked to provide: (1) copies of the docketing system records for the above-identified patent; and (2) information regarding the training provided to the personnel responsible for the docketing error, degree of supervision of their work, examples of other work functions carried out, and checks on the described work which were used to assure proper execution of assigned tasks. Although Aufrichtig alleges that Aufrichtig trained Stein on proper deadlines and related fees, Aufrichtig has failed to provide information regarding the training provided or copies of the docketing system records for the above-identified patent. Aufrichtig has failed to provide examples of other work functions carried out by Stein and has failed to indicate if checks on Stein's described work were ever made to assure proper execution of assigned tasks. It appears as though the timely submission of maintenance fees is entirely dependent upon on Stein properly updating a paper chart manually, yet there is no system in place for ensuring that these action are done correctly nor is there any way to determine at a later date if these actions were properly completed.

Additionally, Aufrichtig was asked to provide a statement from the patent holder indicating: (1) the steps that were in place to ensure timely payment of the maintenance fee, (2) a complete explanation of how the system worked, (3) an explanation as to why the system failed in this instance, and (4) a documented showing that AS&A were in fact obligated to track the fee on behalf of the patent holder. While Aufrichtig has provided the document showing required in item (4) above, Aufrichtig has failed to provide any meaningful information with regard to items (1), (2), and (3). However, it remained petitioner's burden to supply adequate direct evidence bearing on the unavoidable delay analysis. See, Krahn v. Commissioner, 15 USPQ2d 1823, 1825 (D.C. E Va 1990). As noted above, petitioner still has not provided the direct evidence

necessary to substantiate that: (1) this patent was docketed for payment by AS&A; (2) the patent was docketed in a reliable docketing system as would be relied upon by a prudent and careful person with respect to his most important business; (3) AS&A, or Stein was "unavoidably" prevented from timely discharging the alleged obligations toward petitioner; and (4) petitioner was "unavoidably" prevented from taking more diligent action with respect to either payment or reinstatement.

Accordingly, Aufrichtig has not shown there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance.

This is fatal to petitioner's burden of showing to the satisfaction of the Director that the delay was unavoidable. Decisions on reviving abandoned applications 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 business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887)). The AS&A docketing system for this patent, which system included both the handwritten spreadsheet, as well as the personnel who created and administered the handwritten spreadsheet, cannot reasonably be considered "an ordinary and trustworthy agency" or the failure therein to have occurred "unexpectedly or through the unforeseen fault or imperfection" of the aforementioned agencies and instrumentalities. Here, the failure of the AS&A system and its administering personnel was not an unforeseeable, isolated event. Rather, the failure extended to at least a block of trademark registrations and at least 2 patents in all (including this patent) that expired. This simply does not demonstrate to the satisfaction of the Director an unforeseeable, isolated failure in a normally reliable and diligently administered system (and its personnel) as contemplated by Mattullath and Pratt that may properly be said to be unavoidable within the meaning of 35 USC 41(c) and 37 CFR 1.378(b).

Next, petitioner has not shown the responsible employee was sufficiently trained and experienced with regard to the function and routine for the performance of the business routine at issue such that reliance upon the employee represented the exercise of the

due care and diligence of a prudent and careful person with respect to his most important business. Specifically, petitioner has provided no specifics as to exactly what Stein's training and experience consisted of. This cannot be considered to be sufficient training and experience with regard to the handwritten spreadsheet and the routine for its performance that reliance upon such employee represented the exercise of due care nor can it be considered the greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. See Ray, supra; Matullath, supra. Furthermore, petitioner has not provided any statements from all persons with direct knowledge of the events surrounding the alleged docketing error, *i.e.*, Stein. Therefore, petitioner has not carried his burden of showing 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.

Petitioner has also failed to demonstrate why petitioner's failure to diligently monitor AS&A's performance under its contractual obligation to track and pay the maintenance fee can reasonably be considered to constitute unavoidable delay. See Futures Technology Ltd. v. Quigg, 684 F.Supp. 430, 7 USPQ2d 1588 (E.D. Va. 1988). That is, petitioner's apparent failure to monitor AS&A's performance under the alleged contract, or diligently inquire of AS&A, or anyone else, including the USPTO, into the status of the patent and maintenance fee payment, does not reflect the due care and diligence employed by a prudent and careful person with respect to their most important business, and as such, cannot demonstrate that the delay was unavoidable delay. Id. Rather, a prudent person takes diligent action to ensure that contracted services are timely performed as specified. Id. Note further in this regard, that the record, does not present any invoice(s) for services rendered with respect to tracking the maintenance fee payment, much less for the payment itself. The record lacks any showing that AS&A --or Stein-- ever represented to petitioner that the maintenance fee had been paid, much less that petitioner ever paid AS&A for services rendered with respect to the maintenance fee payment. There is no showing that petitioner, upon timely discovering that AS&A had not yet presented petitioner with an itemized bill for payment of the fee, diligently inquired of AS&A or *e.g.*, Stein as to why that allegedly contracted service had not been timely discharged, in time to prevent expiration of the patent, or more diligently present a petition seeking reinstatement. Rather, the issue is that: it remained petitioner's burden to supply adequate direct evidence bearing on the unavoidable delay analysis.

The USPTO must rely on the actions or inactions of duly authorized and voluntarily chosen representatives of the applicant, and petitioner 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); California, supra. Specifically, petitioner's delay caused by the mistakes or omissions

of his voluntarily chosen counsel does not constitute unavoidable delay within the meaning of 35 U.S.C. §§ 133 and 41. See Haines v. Quigg, *supra*; 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. Indeed, as the Court stated:

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'

Link, at 633-34 (1962) (citation omitted).²

It follows that such is not unavoidable delay within the meaning of 35 USC 41(c) and 37 CFR 1.378(b). Ray, *supra*. Since such an error could have been avoided by the

² While a clerical error, if shown to be unforeseeable, may provide a basis for asserting unavoidable delay, per MPEP 711.03(II)(C)(2), attorney error is remedied differently: "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping [a] suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant." Link v. Wabash R.R. Co., 370 U.S. 626, 634 n.10, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962); Mekdeci v. Merrell Nat'l. Laboratories, 711 F.2d 1510, 1522-23 (11th Cir. 1983) "There is no constitutional or statutory right to effective assistance of counsel on a civil case.' . . . [A] 'party . . . does not have any right to a new trial in a civil suit because of inadequate counsel, but has as its remedy a suit against the attorney for malpractice.'" (quoting Watson v. Moss, 619 F.2d 775, 776 (8th Cir. 1980)); Kushner v. Winterthur Swiss Ins. Co., 620 F.2d 404, 408 (3rd Cir. 1980) "[a]n aggrieved party in a civil case, involving only private litigants unlike a defendant in a criminal case, does not have a constitutional right to the effective assistance of counsel. The remedy in a civil case, in which chosen counsel is negligent, is an action for malpractice."; Ray at 606, 34 USPQ2d at 1789 "[f]inally, Ray argues that [his counsel's] responsibilities were limited and did not include payment of maintenance fees. This argument is completely inconsistent with Ray's contentions before the PTO where he asserted that [his counsel] did not fulfill his full obligations to Mr. Ray" with respect to payment of the maintenance fee. Whatever the responsibilities of [Ray's counsel], we agree with the Commissioner that the PTO is not the proper forum for resolving disputes between patentees and their representatives." Here, Stein was a named partner in AS&A.

exercise of the ordinary care and diligence that is observed by prudent and careful persons with respect to their most important business, has failed to show the delay in payment of the maintenance fee is unavoidable. The U.S. Patent and Trademark Office is not the proper forum for resolving disputes between applicants and their chosen representatives with respect to the failure to take a timely action in a proceedings before the USPTO. See Ray v. Lehman, 55 F.3d 606, 34 USPQ2d 1786 (Fed. Cir. 1995).

Even assuming *arguendo* that petitioner should not be bound by the mistakes of AS&A (or Stein), the record further does not support a finding of unavoidable delay, as petitioner has not shown adequate diligence in this matter. That is, a showing of diligence in matters before the USPTO on the part of the party in interest is essential to support a finding of unavoidable delay herein. See Futures Technology, Ltd. v. Quigg, 684 F. Supp. 430, 431, 7 USPQ2d 1588 (E.D. Va. 1988)(applicant's diligent inquiries into the status of the application coupled with affirmative misrepresentations by its fiduciary as to its true status which prevented more timely action showed unavoidable delay); Douglas v. Manbeck, 21 USPQ2d 1697, 1699-1700 (E.D. Pa. 1991), *aff'd*, 975 F.2d 869, 24 USPQ2d 1318 (Fed. Cir. 1992) (even representation by counsel does not relieve the applicant from his obligation to exercise diligence before the USPTO; applicant's lack of diligence extending two and one half years overcame and superseded any omissions by his duly appointed representative); R.R. Donnelley & Sons v. Dickinson, 123 F.Supp.2d 456, 460, 57 USPQ2d 1244 (N.D. Ill. 2000)(failure of patent owner to itself track or obligate another to track the maintenance fee and its failure to exercise diligence for a period of seven years, precluded acceptance of the maintenance fee); MMTC v. Rogan, 369 F.Supp2d 675 (E.D. Va 2004)(passive reliance on reminder notice resulting in failure to take any steps to ensure payment of the maintenance fee is not unavoidable delay); Femspec v. Dudas, 2007 U.S. Dist. LEXIS 8482 (N.D.Ca 2007)(lack of any steps in place to maintain patent in force by estate executor unfamiliar with patent law is not unavoidable delay); Burandt v. Dudas, *supra* (delay not unavoidable where no steps shown to be employed to remind responsible party to timely pay maintenance fees, no inquiry by patent holder of responsible party or Patent and Trademark Office as to whether maintenance fees would, or already had been paid). The delay was not unavoidable, because had patent holder exercised the due care of a reasonably prudent person, petitioner would have been able to act to correct the situation in a more timely fashion. Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987); Douglas, *supra*; Donnelley, *supra*; Burandt, *supra*.

The record does not recount a situation where any person or firm, on and after July 13, 2003: falsely represented to the inventor that the maintenance fee was being tracked by that entity on the inventor's behalf; or falsely represented to the inventor that the maintenance fee had been paid on the inventor's behalf; or falsely represented to the inventor that this patent had been maintained in force on the inventor's behalf, such

that the inventor was “unavoidably” prevented from taking more timely action in this matter. *Cf. Futures, supra*. Rather the record shows that on and after July 13, 2003, the inventor was and remained able to freely communicate with AS&A, as to whether this or any of the inventor’s patents was being tracked, whether the fee had been paid, or whether the patent was in force, and even the USPTO as to whether the fee had been paid, or whether the patent was in force. However the inventor took no further action after July 13, 2003, with respect to tracking, paying, or checking the status of this patent until December 2006. The record showing of this protracted absence of due care and diligence by the inventor is inconsistent with the actions of a prudent and careful person with respect to his most important business, and as such precludes a reasonable and rational finding that the delay in payment of the maintenance fee was unavoidable.

It is pointed out that in view of the inordinate delay in this case, even if petitioner could have shown the existence of a clerical error(s) in this case, it would still have been necessary to demonstrate why the lack of assignee diligence for a period of over three years should not be fatal to reinstatement. See *Donnelley, supra*; *Douglas, supra*. Rather, as also noted in *Douglas, supra*, and *Haines, supra*, it would appear that petitioner’s lack of diligence would overcome and supersede any delay caused by its representative(s). As recounted in *Burandt* at 646:

In its decisions, the USPTO explained that the evaluation of a petition to reinstate a patent under the “unavoidable delay” standard looks to three time frames: (1) the delay that originally resulted in the expiration, (2) the delay in filing the first petition to reinstate, and (3) the delay in filing a grantable petition to reinstate...The USPTO’s evaluation, therefore, focused on the activities of the responsible party in each of the relevant time periods.

Accordingly, it was incumbent on petitioner to have itself docketed this patent for payment of the maintenance fee in a reliable system as would be employed by a prudent and careful person with respect to his most important business, or to have engaged another for that purpose. See *California Medical Products v. Technol Med. Prod., supra*. Nevertheless, a petitioner is bound by any errors that may have been committed by the obligated party. *Id.*

The issue at hand is solely whether the maintenance of the instant patent was actually conducted with the care or diligence that is generally used and observed by prudent and careful persons in relation to their most important business. Here, the delay was not unavoidable, because had petitioner exercised the due care of a reasonably prudent person, petitioner would have been able to act to correct the situation in a more timely fashion. See *Haines v. Quigg, supra*; *Douglas v. Manbeck, supra* (unavoidable delay not shown where no diligence for over 30 months); *R.R. Donnelley & Sons v. Dickinson, supra* (N.D. Ill. 2000)(a showing of diligence is essential to demonstrate unavoidable delay).

DECISION

Petitioner has failed to meet his burden of proving to the satisfaction of the Director the entire delay in submission of the maintenance fee herein was unavoidable within the meaning of 35 U.S.C. § 41(c)(1) and 37 CFR 1.378(b). Accordingly, the maintenance fee will not be accepted, this patent will not be reinstated, and this patent remains expired. The petition is **denied**.

The USPTO will not further consider or reconsider this matter. See 37 CFR 1.378(e).

The maintenance fee and surcharge will be refunded in due course by Treasury Check.

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

This patent file is being returned to the Files Repository.

Telephone inquiries concerning this decision should be directed to David A. Bucci at (571) 272-7099.

A handwritten signature in cursive script, appearing to read "Charles Pearson".

Charles Pearson
Director, Office of Petitions