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OFFICE OF PETITIONS

In re Patent of	:	
Davis I. Rawal	:	
Patent No. RE 37,215	:	
Reissued: June 12, 2001	:	
Reissue of Patent No.:	:	5,738,187
Issued: April 14, 1998	:	
Application No. 09/360,184	:	DECISION
Filed: July 23, 1999	:	ON PETITION
Title of Invention:	:	
FORK LEVEL INDICATOR	:	
FOR LIFT TRUCKS	:	

This is a decision on the Request for Reconsideration Under 37 CFR § 1.378(b), to reinstate the above-identified patent, filed May 9, 2006. The petition is properly treated under 37 CFR 1.378(e).

The petition is **DENIED**.

This Decision may be viewed as a final Agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review.

Background

The original patent issued April 14, 1998. The three and one-half (3½) year maintenance fee could have been paid from April 14, 2001, through October 14, 2001, or with a surcharge during the period from October 15, 2001, to April 14, 2002. Petitioner did not do so. Accordingly, the patent expired April 15, 2002.

The January 26, 2006 petition

Patentee filed a petition to reinstate the above-identified patent based upon an unavoidably delayed maintenance fee

payment, wherein Patentee asserted that delayed payment of the maintenance fee for the above-identified patent was unavoidable because, despite instructions to pay the maintenance fee to a well known service for payment of the maintenance fee, the maintenance fee was not paid.

Petitioner provided that Dennemeyer & Co. Inc. ("Dennemeyer") was given instructions to pay the maintenance fee. Dennemeyer subsequently provided Petitioner a debit note indicating payment of the annuity and including billing for the cost of the maintenance fee. Statement in Support of Petition ("Statement") at p.5. Petitioner subsequently learned that the maintenance fee had not been paid. Petitioner stated that Dennemeyer has been unable to locate in its records "an additional check for payment of this maintenance fee, which Dennemeyer believed to have been paid" from a previously submitted check. Further, Dennemeyer believed that it authorized any deficiency in the maintenance fee payment to be charged to its Deposit account; however, Dennemeyer has been unable to locate a copy of any such authorization. Finally, Petitioner asserted that "[n]o one employed by Dennemeyer in 2001 who might have knowledge of the transaction and such deposit account authorization is still with the company." Statement at p.6.

The petition was dismissed in a Decision mailed March 10, 2006. The Decision dismissing the petition informed Petitioner that he had failed to demonstrate that reliance upon Dennemeyer was reasonable. Applicant was required to provide evidence that, despite reasonable care on behalf of Dennemeyer, and reasonable steps to ensure timely payment, the maintenance fee was unavoidably not paid. Patentee was informed that an adequate showing required a statement by all persons with direct knowledge of the cause of the delay, setting forth the facts as they know them. In this petition, Petitioner provided that "[n]o one employed by Dennemeyer in 2001 who might have knowledge of the transaction and such deposit account authorization is still with the company." Statement at p.6.

The Decision also required copies of all documentary evidence referred to in the statement (by any and all persons with direct knowledge of the cause of the delay), to be furnished as exhibits to the statement. Here, Dennemeyer has been unable to locate in its records "an additional check for payment of this maintenance fee, which Dennemeyer believed to have been paid" from a previously submitted check. Id. Further, while Dennemeyer believed that it authorized any deficiency in the maintenance

fee payment to be charged to its Deposit account, Dennemeyer was unable to locate a copy of any such authorization. Id.

The Decision informed Petitioner that he had failed to demonstrate that reliance upon Dennemeyer for payment of the maintenance fee for the above-identified patent was reasonable. Petitioner failed to provide any information relating to the payment of the above-identified patent from the responsible party: Dennemeyer, save a debit note from Dennemeyer to Petitioner indicating payment. There is no assertion of a docketing error or a clerical error on the part of an employee, and no evidence in this Office that the maintenance fee was timely paid. While Dennemeyer asserted that the maintenance fee was timely paid, its own records, submitted with petitions filed April 28, 2005 and August 8, 2005, revealed that neither the maintenance fee, nor an authorization to charge its deposit account for any deficiency in payment of the maintenance fee, were submitted for the above-identified patent.

The Decision stated that the law in this area is clear: 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).

The dismissal reiterated that 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. Thus, where the record fails to disclose that the patentee took reasonable 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).

The Decision dismissing the petition concluded that Petitioner's assertion - that despite instructions to pay the maintenance fee to a well-known service for payment of the maintenance fee, the

maintenance fee was not paid - does not amount to an unavoidable delay.

The Instant Request for Reconsideration

Patentee files the instant Request for Reconsideration and again asserts that reliance upon Dennemeyer was reasonable, because Dennemeyer handles maintenance fee payments for numerous corporate IP departments and law firms throughout the world and annually pays maintenance fees for thousands of U.S. and foreign patents from their Washington, DC office." Petition at p.2. Patentee has not filed any statement(s) from anyone at Dennemeyer with direct knowledge of the cause of the delay, setting forth the facts as they know them.

Patentee next provides that Dennemeyer submitted a check, number 1059, in the amount of \$63,580, and indicated thereon were Payment Orders (PO) 821/973/981/983. PO 821, in the amount of designated a fee payment of \$2,150 for patent 5,300,932 ('932 patent), and \$1,010 for patent 5,738,187. The Office used \$1,075 for payment of the '932 patent because of its status as a small entity. Patentee provides that the remaining \$1,075 was sufficient to cover the maintenance fee for this patent. Id.

Patentee next provides that Dennemeyer's records indicate that their standard operating procedure at the time PO 821 was submitted to this Office was to 1) identify at least one PO that identified at least one patent for which a fee was to be paid; 2) noted a dollar amount of an enclosed check(s) for payment, and 3) authorized the PTO to charge any discrepancies to Dennemeyer's deposit account. Id. Patentee submits a copy of a Declaration by Jacki Mutziger explaining Dennemeyer's current operating procedures.

Patentee thus concludes that reliance upon Dennemeyer was reasonable.

Patentee next asserts that, despite reasonable care on behalf of Dennemeyer, the maintenance fee was unavoidably not paid. Petitioner supports this assertion with hypothesis as to who may have erred in the payment of the maintenance fee for this patent: the failure to pay the maintenance fee "resulted from an error on the part of Dennemeyer, an error on the part of the PTO or an error on the part of both Dennemeyer and the PTO, which error or errors resulted in the PTO failing to completely process PO 821 using funds from check number 1059, funds from Dennemeyer's deposit account..., or funds from some other check."

Petition at p.3. Petitioner references a Decision on petition mailed November 22, 2005.

The Decision on Petition, mailed November 22, 2005, was mailed in response to a renewed petition filed under 37 CFR 1.377, filed August 8, 2005. The gist of the original petition and renewed petition under 37 CFR 1.377 were to allege timely payment of the maintenance fee for patent No. 5,738,187.

The decisions dismissing the petitions summarized the events surrounding submission of check no. 1059, with PO's (821/973/981/983) for payment of the maintenance fees for 38 patents listed thereon. The Decisions note that the maintenance fees were paid for 32 patents, which totaled the amount of the check: \$63,850. Maintenance fees were charged to deposit account 50-1902 for the remainder of the patents on the list except for 5,738,187 (parent of the instant reissue patent); 5,751,993 (the fee was charged to deposit account 15-0440); 5,755,114 (the fee was paid by another check), and 5,755,880 (the fee was paid by another check). The Decision noted that a copy of the paper authorizing the fees to be charged to deposit account 50-1902 had not been provided.

The Decision(s) informed Patentee that check no. 1059 was insufficient to cover the maintenance fee for all of the patents listed in the PO's, and Patentee had failed to prove that either a proper check or that authorization to charge Patentee's deposit account fees listed on PO 821 were filed with this Office.

Petitioner argues that, despite there being \$1,075 remaining from PO 821 after payment of the maintenance fee for the '932 patent, the PTO took no action on "the subject patent also identified on PO 821." Petition at p.4.

Petitioner acknowledges that Dennemeyer designated the payment of the maintenance fee for surrendered patent 5,738,187 instead of the subject patent RE 37,215; Dennemeyer failed to enclose an additional check or checks for sufficient funds to cover a fourth PO 981; Dennemeyer failed to follow their standard PO processing procedures and failed to enclose a letter to the Commissioner authorizing the PTO to use funds from check number 1059 for the payment of PO 821 and to charge any discrepancies on PO 821 to Dennemeyer's deposit account.

Patentee asserts that the PTO erred in failing to apply funds from check no. 1059 for payment of the maintenance fee for this

patent (despite Patentee's admission that no instructions to this effect were provided by the Dennemeyer); the PTO failed to recognize that \$1,075 of \$2,150 designated for payment of the '932 patent were available from check no. 1059 for payment of the maintenance fees for this patent (despite this Office having used all of the funds from check no. 1059 for the payment of maintenance fees listed on the four PO's appearing on check no. 1059); and this Office failed to notify Dennemeyer that PO 821 had not been fully processed. Patentee was informed in the Decision dismissing the petition mailed March 10, 2006, that "the Office has no duty to notify patentees of the requirement to pay maintenance fees or to notify patentees when the maintenance fees are due. It is solely the responsibility of the patentee to assure that the maintenance fee is timely paid to prevent expiration of the patent." March 10, 2006 Decision dismissing the January 26, 2006 petition.

Applicable Law Under 37 CFR 1.378(b)

A grantable petition under 37 CFR 1.378(b) must be accompanied by a showing to the satisfaction of the Commissioner that the entire delay in paying the required maintenance fee from the due date for the fee until the filing of a grantable petition pursuant to this paragraph was unavoidable.

UNAVOIDABLE DELAY

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.

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. As 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 do 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).

The Office has no duty to notify patentees

Under the statutes and rules, the Office has no duty to notify patentees of the requirement to pay maintenance fees or to notify patentees when the maintenance fees are due. It is solely

the responsibility of the patentee to assure that the maintenance fee is timely paid 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. The Office will attempt to assist patentees through the mailing of a Maintenance Fee Reminder in the grace period. However, the failure to receive a Maintenance Fee Reminder will not relieve the patentee of the obligation to timely pay the appropriate maintenance fee to prevent expiration of the patent, nor will it constitute unavoidable delay if the patentee seeks to reinstate the patent under 37 CFR 1.378(b). See *In re Patent No. 4,409,763*, 7 USPQ2d 1798 (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).

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 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 (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). 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). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

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.

For example, 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.

Further to this, 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 MPEP 711.03(c)

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).

Finally, a "delay (in responding) resulting from the lack of knowledge or improper application of the patent statute, rules of practice, or [Manual of Patent Examining Procedure]... does not constitute unavoidable delay." MPEP 711.03(c).

Petitioner must establish that petitioner treated the patent the same as a reasonable and prudent person would treat his or her most important business.

The general standard applied by the Office requires petitioner to establish that petitioner treated the patent the same as a reasonable and prudent person would treat his or her most important business.¹ However, "The question of whether an applicant's delay in prosecuting an application was unavoidable [will] be decided on a case-by-case basis, taking all of the facts and circumstances into account."² The statute requires a "showing" by petitioner. Therefore, petitioner has the burden of proof. The decision will be based solely on the written, administrative record in existence. It is not enough that the delay was unavoidable; petitioner must prove that the delay was unavoidable. An adequate showing that the delay at issue was unavoidable requires a showing of the steps taken to ensure the timely payment. A petition will not be granted if petitioner provides insufficient evidence to "show" that the delay was unavoidable.

¹ The Commissioner is responsible for determining the standard for unavoidable delay and for applying that standard. 35 U.S.C. 41(c)(1) states, "The Commissioner may accept the payment of any maintenance fee ... at any time ... if the delay is shown to the satisfaction of the Commissioner to have been unavoidable." (emphasis added).

"In the specialized field of patent law, ... the Commissioner of Patent and Trademarks is primarily responsible for the application and enforcement of the various narrow and technical statutory and regulatory provisions. His interpretation of those provisions is entitled to considerable deference." Rydeen v. Quigg, 748 F.Supp. 900, 904, 16 U.S.P.Q.2d (BNA) 1876 (D.D.C. 1990), aff'd without opinion (Rule 36), 937 F.2d 623 (Fed. Cir. 1991) (citing Morganroth v. Quigg, 885 F.2d 843, 848, 12 U.S.P.Q.2d (BNA) 1125 (Fed. Cir. 1989); Ethicon, Inc. v. Quigg, 849 F.2d 1422, 1425, 7 U.S.P.Q.2d (BNA) 1152 (Fed. Cir. 1988) ("an agency' interpretation of a statute it administers is entitled to deference"); see also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 81 L. Ed. 694, 104 S. Ct. 2778 (1984) ("if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.")).

"The critical phrase 'unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable' has remained unchanged since first enacted in 1861." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 U.S.P.Q. (BNA) 977 (D.C. Cir. 1982). The standard for "unavoidable" delay for reinstating a patent is the same as the unavoidable standard for reviving an application. See Ray v. Lehman, 55 F.3d 606, 608-609, 34 U.S.P.Q.2d (BNA) 1786, 1787 (Fed. Cir. 1995) (citing In re patent No. 4,409,763, 7 U.S.P.Q.2d (BNA) 1798, 1800 (Comm'r Pat. 1990; Smith v. Mossinghoff, 671 F.2d 533, 538, 213 U.S.P.Q. (BNA) 977 (D.C. Cir. 1982). The court in In re Mattullath, accepted the standard, which had been proposed by Commissioner Hall, which "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." In re Mattullath, 38 App. D.C. 497, 514-515 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)).

² Smith v. Mossinghoff, 671 F.2d 533, 538, 213 U.S.P.Q. (BNA) 977 (1982).

As provided in the Manual of Patent Examining Procedure (MPEP), the patentee's lack of knowledge of the need to pay the maintenance fee and the failure to receive the Maintenance Fee Reminder do not constitute unavoidable delay. MPEP § 2590, *See, also, 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).

Opinion

The record supports the following findings of fact:

(1) Check no. 1059 was submitted for \$63,580, for payment of the maintenance fee for 38 patents.

(2) Dennemeyer designated the payment of the maintenance fee for surrendered patent 5,738,187 instead of the subject patent RE 37,215;

(3) The check was insufficient to pay the maintenance fees for all 38 patents.

(4) This Office exhausted all of the funds to pay maintenance fees for patents listed;

(5) Funds from deposit account 50-1902 and 15-0440 were used to pay the fees for some of the remaining listed patents, another of the remaining patents was paid by a separate check;

(6) Dennemeyer failed to follow their standard PO processing procedures and failed to enclose a letter to the Commissioner authorizing the PTO to use funds from check number 1059 for the payment of PO 821 and to charge any discrepancies on PO 821 to Dennemeyer's deposit account;

(7) Patentee has not filed copies of any authorizations to charge any deposit account any deficient maintenance fee amounts;

(8) Patentee has not filed any statement(s) from anyone at Dennemeyer with direct knowledge of the cause of the delay, setting forth the facts as they know them.

The law in this regard is clear. Plaintiffs, through their counsel's actions, or their own, must be held responsible for failing to ensure timely payment of the maintenance fee for the subject patent. Petitioner's delay caused by the actions or

inactions of her voluntarily chosen representative does not constitute unavoidable delay. Nor does a delay resulting from the lack of knowledge or improper application of the patent statute, rules of practice, or MPEP. In this instance, Patentee asserts that this office failed to notify the Patentee that the maintenance fee for the subject patent had not been paid; however, it is solely the responsibility of the patentee to assure that the maintenance fee is timely paid to prevent expiration of the patent.

As iterated supra, 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. Thus, where the record fails to disclose that the patentee took reasonable 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). Petitioner has simply failed to meet his burden of proof and has presented insufficient facts to establish what occurred at the Dennemeyer Firm.

Decision

The instant petition under 37 CFR 1.378(e) is granted to the extent that the decision of March 10, 2006, 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**.

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

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