

Veröffentlichung im Amtsblatt	Ja/Nein
Publication in the Official Journal	Yes/No
Publication au Journal Officiel	Oui/Non

Aktenzeichen / Case Number / N° du recours : J 12/86

Anmeldenummer / Filing No / N° de la demande : 83 900 239.1

Veröffentlichungs-Nr. / Publication No / N° de la publication : W083/01918

Bezeichnung der Erfindung: Rotatable shell cutter with indexable cutting
Title of invention: inserts
Titre de l'invention :

Klassifikation / Classification / Classement : B 23 B 41/02, 51/00

ENTSCHEIDUNG / DECISION

vom / of / du 6 February 1987

Anmelder / Applicant / Demandeur : Linville, Kevin D.

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence : Shell cutter/LINVILLE

EPO/EPC/CBE Rule 67

Kennwort / Keyword / Mot clé : "Reimbursement of appeal fee" - "Withdrawal of
appeal" - "No filing of statement of grounds of appeal"

Leitsatz / Headnote / Sommaire

An appeal fee cannot be reimbursed if after a notice of appeal has been duly filed and the appeal fee has been duly paid the appeal is withdrawn before the expiry of the period for filing the statement of grounds of the appeal.

Europäisches
Patentamt
Beschwerdekammern

European Patent
Office
Boards of Appeal

Office européen
des brevets
Chambres de recours



Case Number : J 12/86

D E C I S I O N
of the Legal Board of Appeal
of 6 February 1987

Appellant : Linville, Kevin D.,
6257 Sturm Road,
Huntington, WV 25705
USA

Representative : Fort, Jacques
cabinet Plasseraud
84, rue d'Amsterdam
F-75009 Paris

Decision under appeal : Decision of the Receiving Section of
the European Patent Office
dated 18 December 1985, refusing a
request for re-establishment of
rights under Article 122 EPC.

Composition of the Board :

Chairman : P. Ford
Member : R. Schulte
Member : G. D. Paterson

Summary of Facts and Submissions

- I. In a decision of the Receiving Section dated 18 December 1985, an application for re-establishment of rights in respect of European patent application No. 83 900 239.1 was refused. By a telex dated 19 February 1986 the Appellant by his representative filed an appeal against this decision. The telex was confirmed by a letter dated 19 February 1986, and the appeal fee was paid in due time.
- II. No statement of grounds of appeal was filed.
- III. By a letter dated 10 April 1986 the representative of the Appellant stated that "The appeal against the decision rejecting the request for *restitutio in integrum* is hereby withdrawn". In the same letter it was further requested that the appeal fee be refunded, because "no brief supporting the appeal has been filed and consequently the appeal will be considered as without existence".
- IV. By a letter dated 20 May 1986 the Registrar of the Board of Appeal acknowledged receipt of the appeal filed by the telex dated 19 February 1986, and of the letter dated 10 April 1986 by which the appeal was withdrawn. In relation to the request for refund of the appeal fee, the Appellant's attention was drawn to Decision T 89/84 "Reimbursement of appeal fees/TORRINGTON", OJ EPO 11/1984, page 562.

Reasons for the Decision

1. According to Rule 67 EPC an appeal fee shall be reimbursed either in the event of interlocutory revision (under Article 109 EPC), or if the Board of Appeal deems an appeal to be allowable, if such reimbursement is equitable by

reason of a substantial procedural violation. Interlocutory revision did not take place and the appeal cannot be allowed. There is therefore no basis in Rule 67 EPC for ordering refund of the appeal fee in the present case.

2. In the "Torrington" decision identified above, the Board of Appeal referred to two earlier cases (T 41/82 "Reimbursement of appeal fees/Sandoz", OJ EPO 7/1982, page 256, and T 13/82, "Statement of Grounds of Appeal/BBC", OJ EPO 10/1983, page 411) in each of which no statement of grounds of appeal was filed in due time, and in each of which it was held that the appeal fee could not be refunded. In all these cases it was considered that the restrictive language of Rule 67 EPC is plainly inconsistent with the idea that a Board of Appeal has a wide discretion to order reimbursement of appeal fees. In the Torrington case itself it was in effect held that whatever the reason for the failure to file a statement of grounds of appeal, once the notice of appeal has been filed no refund of the appeal fee is possible.

3. In the present case the Appellant has submitted that the appeal fee should be refunded because the consequence of the failure to file a statement of grounds of appeal is that the appeal should be considered as never having existed. Clearly, if an appeal fee of DM 680.00 had been paid in respect of an appeal which had never existed, the payer would be entitled to have that appeal fee paid back to him. However, that is not the present case. As soon as the notice of appeal was filed in due time (which, in accordance with Article 108 EPC, requires also that the appeal fee has been paid), an appeal was in existence.

The consequence of the failure to file a statement of grounds of appeal in due time is not that the appeal is regarded as without existence, but merely that under

Rule 65 EPC the appeal must be rejected as inadmissible. Consequently, by virtue of Article 110(1) EPC the appeal cannot be examined by the Board of Appeal in respect of its allowability.

The consequence of the withdrawal of the appeal by the Appellant, before the expiry of the prescribed four month period for filing a statement of grounds of appeal, is again not that the appeal can be regarded as without existence, but that the appeal is withdrawn from consideration by the Board of Appeal, and therefore cannot be examined either for admissibility or for allowability. In such a case, the appeal existed until it was withdrawn.

4. In the Board's view, once an appeal has been filed in accordance with Article 108 EPC and has therefore come into existence, the only power to order reimbursement of the appeal fee is that provided by Rule 67 EPC. Since as discussed in paragraph 1 above, Rule 67 EPC provides no basis in the present case for ordering reimbursement, in the Board's judgement it has no power to order reimbursement of the appeal fee as requested by the Appellant.
5. Although the present appeal was withdrawn from consideration by the Board of Appeal in respect of admissibility and allowability, the Board of Appeal has issued this Decision in the exercise of its inherent power to decide any application made to it which arises out of the appeal (following Case T 41/82, mentioned above).

Order**For these reasons, it has been decided that:**

The application for reimbursement of the appeal fee made in the Appellant's letter dated 10 April 1986 is rejected.

The Registrar:

J. R. G.

The Chairman:

*P. E. H. M.**Summ 11.2.87*

00335

W.P.