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**Datasheet for the decision
of the Enlarged Board of Appeal
of 28 July 2010**

Case Number: R 0006/10
Appeal Number: T 0520/09 - 3.2.02
Application Number: 00917730.4
Publication Number: 1161186
IPC: A61B 17/12
Language of the proceedings: EN

Title of invention:
Occlusion apparatus

Applicant:
Board of Regents, The University of Texas System

Opponent:
-

Headword:
Occlusion apparatus/BOARD OF REGENTS UNIVERSITY OF TEXAS
SYSTEM

Relevant legal provisions:
EPC Art. 112a, 113(1), 117, 122(1)
EPC R. 106, 107(2), 117, 109(2)(a), 109(3)

Keyword:
"Petition for review - clearly inadmissible"

Decisions cited:
J 0002/98, J 0007/99

Catchword:
-



Case Number: R 0006/10

D E C I S I O N
of the Enlarged Board of Appeal
of 28 July 2010

Petitioner:
(Applicant)

Board of Regents,
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201 West 7th Street
Austin
Texas 78701 (US)

Representative:

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Decision under review:

Decision of the Technical Board of Appeal
3.2.02 of 2 December 2009.

Composition of the Board:

Chairman: J.-P. Seitz
Members: B. Schachenmann
R. Freimuth

Summary of Facts and Submissions

I. The petition for review concerns decision T 0520/09 of the Board of Appeal 3.2.02 of 2 December 2009 dismissing the appeal of the applicant of European patent application No. 00917730.4 against a decision of the Examining Division rejecting a request for re-establishment of rights into the time-limit for further processing. The petition relies on the ground of Article 112a(2)(c) EPC and, as an auxiliary measure, on Article 112a(2)(d) EPC.

II. The proceedings in case T 0520/09 can be summarized as follows:

- (a) The Examining Division rejected the applicant's request for re-establishment of rights on the ground that the substantive requirements of Article 122(1) EPC 1973 were not met. The factual background was that in several cases before the EPO, including the present one, the assistant of the professional representative had manipulated the files and withheld EPO communications which later were found among her personal papers. Thus, as submitted by the applicant, the non-compliance with the time limit was due to mental and physical problems of the assistant which were not recognized until her very last day in the office. However, the Examining Division found that in the present circumstances the condition of an "isolated mistake within a normally satisfactory monitoring system" was not met since more than one case was concerned. The assistant had prepared requests for extensions of time limits on her own

initiative which then had been signed by the representative without checking the file. As a consequence, it was found questionable whether the assistant had been sufficiently supervised and that the necessary cross-checks had been made.

(b) The applicant's appeal against this decision was mainly based on the submission that the present case was similar to case J 2/98. In that case the Legal Board of Appeal had decided that acts of a professional representative which were not due to an isolated act of carelessness or negligence but to his health condition would not prevent a finding that all due care was taken. The appellant submitted that, since in the present case the assistant had not presented any medical certificate and refused to give any comments concerning these cases, "we depend on presumptions".

(c) In a communication of 29 July 2009 the Board of Appeal 3.2.02 informed the appellant of its provisional view that the reasons presented were not sufficient for reversing the decision under appeal. The fact that the representative had signed several requests for extension of time limits without checking the file showed that the assistant could decide, without his supervision, if and when to present him the file. The fact that the same error happened in two cases showed that this way of handling the files was not an exception.

- (d) Oral proceedings before the Board of Appeal were held on 2 December 2009. As follows from the minutes of these proceedings, the appellant's representative requested, before the debate was closed for deliberation, that the decision under appeal be set aside and the time limit for further processing be re-established. In the oral proceedings the representative set out again the system in use in their office for treating and distributing incoming mail, handling the files and monitoring time limits (see point VI of the decision under review). Concerning the assistant's behaviour, he submitted that she had never made a mistake before and that he had no reason not to trust her. He could not explain why she acted as she did, but assumed that she had mental health problems. Thus, the present case could be compared with the cases decided in J 7/99, in which the representative gave up prosecuting an application due to a mental block and J 2/98, in which the representative had mental health problems.
- (e) As follows from the reasons of the decision under review, the Board of Appeal found that the time-limit in question had been missed due to a series of measures taken by the assistant on her own initiative which were not detected because, according to the submissions in the present case, neither any system of cross-checking nor any other supervisory mechanisms were in place to detect any wrong behaviour of employees or failures in the proper execution of their duties, particularly when employees are acting on their own initiative as in the present case. The Board added: "Even if

it is assumed in favour of the appellant that the assistant had mental health problems, the decisions cited are not relevant because in those cases it was the representative himself who could not exercise his functions properly due to mental health problems".

III. In the petition for review, it is submitted that the Board of Appeal should have initiated a hearing of the assistant as a witness according to Article 117 and Rule 117 to 124 EPC "as requested". Without a statement of the assistant, the representative was not in a position to present all necessary evidence. As he had pointed out in the oral proceedings before the Board of Appeal, he was not in a position to force the assistant to be present as a witness. Attempts to contact her had been unsuccessful. Since the assistant was not summoned by the Board, the representative did not have the full right to be heard guaranteed by Article 113 EPC. Should this not be considered as a fundamental violation of Article 113 EPC, it was submitted that "at least fundamental procedural defects occurred in the appeal proceedings". As an auxiliary measure the petition is therefore based on Article 112a(2)(d) EPC.

Reasons for the Decision

Admissibility of the petition for review

1. The petitioner is adversely affected by the decision T 0520/09 of the Board of Appeal 3.2.02 dismissing the appeal. The petition for review refers to the grounds of Article 112a(2)(c) and (d) EPC. Assuming, in favour

of the petitioner, that the invoked procedural defect (see point III, supra) might fall under the ground of Article 112a(2)(c) EPC, the petition complies with the provisions of Article 112a(1) and (2) EPC.

2. The written decision in case T 0520/09 was notified by registered letter posted on 26 February 2010. The two months period for filing the petition for review expired on Saturday, 8 May 2010. It extended, according to Rule 134 EPC, to Monday, 10 May 2010. This is the day on which the petition was filed and the fee was paid. The petition therefore also complies with Article 112a(4) EPC.
3. The Enlarged Board of Appeal composed according to Rule 109(2)(a) EPC will decide on the basis of the petition for review (Rule 109(3) EPC).

A petition for review under Article 112a(2)(a) to (d) EPC is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board except where such an objection could not be raised during the appeal proceedings (Rule 106 EPC). It therefore has to be examined whether the petitioner complied with this requirement.

- 3.1 The petitioner has not commented on the issue of Rule 106 EPC. The petition neither contains any indication that an objection was raised during the appeal proceedings nor any explanation why such an objection could not have been raised.

- 3.2 In view of the procedural defect invoked by the petitioner, the objection under Rule 106 EPC should have concerned the fact that the Board of Appeal intended to decide on the appeal without previously hearing the witness "as requested". However, neither in the minutes of the oral proceedings before the Board of Appeal nor in any other part of the file is there any indication that the appellant had objected to the closure of the debate by the Board without having heard the witness. It does not emerge from the file whether and, in the affirmative, in which form the appellant had requested that the assistant be heard as a witness and to which facts she should testify. In this connection it is observed that the Board of Appeal assumed in favour of the appellant that the assistant had health problems.
- 3.3 The petitioner has not submitted that the minutes of the oral proceedings before the Board of Appeal and/or the facts and submissions in the written decision were wrong or incomplete.
- 3.4 It must therefore be concluded that the petitioner indeed failed to raise an objection under Rule 106 EPC during the appeal proceedings. As a consequence, the obligation under Rule 106 EPC has not been met for the procedural defect invoked by the petitioner under Article 112a(2)(c) EPC. Therefore, as far as this ground is concerned, the present petition for review is clearly inadmissible.
4. According to Rule 107(2) EPC the petition shall indicate the reasons for setting aside the decision of the Board of Appeal, and the facts and evidence on

which the petition is based. If the petition does not comply with this provision within the period under Article 112a(4) EPC, it shall be rejected as inadmissible.

4.1 Regarding the second ground for review under Article 112a(2)(d) EPC raised "as an auxiliary measure" (see point III, supra), the petitioner neither specified any of the grounds a) or b) as defined in Rule 104 EPC nor indicated any facts and evidence concerning one of these grounds, as required by Rule 107(2) EPC.

4.2 Thus, as far as the second ground for review is concerned, the petition does not meet the requirements of Rule 107(2) EPC and is clearly inadmissible for this reason.

Order

For these reasons it is unanimously decided that:

The petition for review is rejected as clearly inadmissible.

The Registrar:

The Chairman:

W. Roepstorff

J.-P. Seitz