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**D E C I S I O N**  
**of 11 July 2006**

**Case Number:** T 0068/05 - 3.2.01

**Application Number:** 96305654.4

**Publication Number:** 0757192

**IPC:** F16H 59/10

**Language of the proceedings:** EN

**Title of invention:**  
Vehicle transmission shift lever

**Patentee:**  
JSJ Corporation

**Opponent:**  
ZF Lemförder Metallwaren AG

**Headword:**

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**Relevant legal provisions:**  
EPC Art. 108 third sentence, 122(2)

**Keyword:**  
"Re-establishment of rights (no)"  
"Restitutio - all due care - standard of care - assistant -  
isolated mistake - evidence missing"

**Decisions cited:**  
G 0001/86, J 0005/80, J 0002/86, J 0003/86, T 0428/98,  
T 0166/87, T 0223/88, J 0031/90, T 0072/99

**Catchword:**

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Case Number: T 0068/05 - 3.2.01

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.01  
of 11 July 2006

**Appellant:** ZF Lemförder Metallwaren AG  
(Opponent) Postfach 12 20  
D-49441 Lemförde (DE)

**Representative:**

**Respondent:** JSJ Corporation  
(Patent Proprietor) 1250 South Beechtree Street  
Grand Haven  
Michigan 49417 (US)

**Representative:** Miller, James Lionel Woolverton  
Kilburn & Strode  
20 Red Lion Street  
London WC1R 4PJ (GB)

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 15 November 2004  
rejecting the opposition filed against European  
patent No. 0757192 pursuant to Article 102(2)  
EPC.

**Composition of the Board:**

**Chairman:** S. Crane  
**Members:** G. Weiss  
P. L. P. Weber

## **Summary of facts and Submissions**

- I. The appellant (opponent) on 17 January 2005 filed a notice of appeal against the decision by the opposition division, dated 15 November 2004. The appeal fee was paid on the same day.
  
- II. It was informed by the board by a communication dated 3 May 2005 that it appeared from the file that no statement of grounds of appeal had been filed in due time and that it was expected that the appeal would be rejected as inadmissible. Attention was drawn to the provisions of Article 122 EPC.
  
- III. In response the appellant filed on 24 May 2005 an application for re-establishment of rights (Article 122 EPC) and at the same time completed the omitted act, filing a statement of grounds. He paid the prescribed fee.
  
- IV. As grounds for its application the appellant submitted that due to a clerical error of the secretary of the appellant the time limit for filing the statement of grounds of appeal was missed. The secretary, who in 1994 had qualified as a patent agent assistant had, by mistake, noted the internal time limit as 16 May 2005 instead 16 March 2005. Due to her training she was completely familiar with the calculation and supervision of time limits and apart from that occurrence which has to be considered as an isolated mistake, she always worked satisfactorily. With regard to choosing and supervising the person responsible for the time limits everything possible to prevent the

- missing of time limits had been undertaken. Therefore, the appellant's could not be held liable for this fault.
- V. On 23 December 2005 the board issued a communication pursuant to Article 110(2) EPC, inviting the appellant to submit missing written evidence in support of its request for re-establishment, which should be available in connection with the alleged events, for example an unsworn declaration ("eidesstattliche Versicherung") from the secretary.
- VI. With letter received on 21 February 2005 the respondent (patentee) has taken position on the request of re-establishment.
- VII. The appellant did not reply to the invitation in the fixed two months time limit. After expiry of the set time limit which elapsed on 2 March 2006 it asked with letter received on 3 March 2006 for an extension of term. With a communication dated 10 March 2006 the board informed the appellant that the requested extension was refused and that any reply filed outside the time limit would be considered at the board's discretion. No reply has been filed.

### **Reasons for the Decision**

1. Under Article 108, third sentence EPC, a written statement setting out the grounds of appeal must be filed within four months of the date of notification of the decision. In the present case this time limit elapsed on 29 March 2005 (Rule 78(2), Rule 83(1), (2) and (4), Rule 85(1) EPC). As no statement of grounds

- has been filed in this time limit, the appeal should be rejected as inadmissible in application of Rule 65(1) EPC, unless the request for re-establishment of rights, filed by the appellant on 24 May 2005 is granted.
2. According to the wording of Article 122(1) EPC, only the applicant for or proprietor of a European Patent who was unable to observe a time limit vis-à-vis the European Patent Office shall, upon application, have his rights re-established. The Enlarged Board of Appeal, however, held in its decision G 1/86 (OJ EPO 1987, 447) that an Appellant may as opponent also have his rights re-established under Article 122 EPC if he has failed to observe the time limit for filing the statement of grounds of appeal. Therefore, Article 122 EPC is applicable in the present case.
  3. The application for re-establishment complies with the formal requirements of Article 122(2) EPC. The cause of non-compliance with the time limit was removed on 4 May 2005 by the actual receipt of the board's communication pursuant to Article 108 and Rule 65 (1) EPC dated 3 May 2005 which informed the appellant that the statement of grounds had not been filed. Therefore, the starting point for calculating the two months time limit, within which, according to Article 122(2), first sentence EPC, the request must be filed, is 4 May 2005. The time limit was complied with the letter received on 24 May 2005 containing the application for re-establishment of rights, the grounds and facts on which the application was based together with the payment of the fee for re-establishment. The omitted act, i.e. failure to file the statement of grounds of appeal was also completed

on that day. The application complies also with Article 122(3) EPC and is, therefore, admissible.

4. As to the allowability of the request, Article 122(1) EPC makes it a condition for re-establishment of rights that the person applying for re-establishment shows that "all due care required by the circumstances" was taken.

4.1 If the appellant has entrusted to an assistant the performance of routine tasks, the same strict standards of care are not expected of the assistant as are expected of the representative (cf. J 5/80, point 6 of the reasons). Hence, a culpable error on the part of the assistant made in the course of carrying out routine tasks is not to be imputed to the representative if the latter has himself or herself shown that he or she exercised the necessary due care in dealing with the assistant. In this respect, it is incumbent upon the representative:

- to choose for the work a suitable person,
- to properly instruct the person in the tasks to be performed, and
- to exercise reasonable supervision over the work (cf. J 5/80, point 7 of the reasons).

In the present case, the first two requirements have been complied with.

The assistant, entrusted with noting and controlling the time limits was a carefully trained and experienced person.

The fact that she had passed the examination as a patent agent assistant (Patentanwaltsgehilfin) is sufficient to establish that she was indeed familiar with all the time limits of the EPC and their calculation. To this the experience of several years of practice is to be added. It can thus be assumed that she was qualified for her work.

As to the third requirement of exercising reasonable supervision over the work of the assistant it has to be concluded that random controls were apparently not performed.

- 4.2 The appellant based its request on the ground that, pursuant to the established case law of the Boards of Appeal Article 122 EPC is intended to ensure that, in appropriate cases, the loss of substantive rights does not result from an isolated procedural mistake within a normally satisfactory system (J 2 and 3/86, OJ EPO 1987, 362). An isolated mistake in a normally satisfactory system is excusable provided that it can be plausibly shown that a normally effective system for monitoring time limits prescribed by the EPC existed in the office in question at the relevant time. Such a system is normally satisfactory if it can be shown that it operated efficiently for many years. This generally implies the existence of an effective cross-check mechanism. In a large firm where a large number of deadlines have to be monitored daily (more than a hundred time limits) it is to be expected that an

independent cross-check is built into the system in order to counterbalance human errors (see the case law references in: Case law of the Boards of Appeal, 4th edition 2001, VI.E.5.1.2 c); see for example T 428/98 of 23 February 2001, OJ EPO 2001,494). However, in a relatively small patent department, normally working in an efficient and personal manner, employing normally reliable personnel, a cross-check mechanism for monitoring time limits may be dispensed with without offending against the duty of all due care as laid down in Article 122(1) EPC (see the case law references in: Case law of the Boards of Appeal, 4th edition 2001, VI.E.5.1.2 b); see also T 166/87, T 223/88, J 31/90 and T 72/99 not published in the OJ). In the present case it seems that the appellant's patent department is "a relatively small patent department" (4 employees); thus, an effective extensive cross-check is normally not required.

- 4.3 The alleged isolated mistake of the secretary has not been supported by any evidence, for example an unsworn declaration ("eidesstattliche Versicherung") from the secretary. The appellant has not provided written evidence, e.g. a copy of the entries in the time-limit calendar and the time-limit flag on the file. Also for example the file memorandum ("Notiz des Sachbearbeiters") which allegedly led to the entry by the secretary of the wrong time limit into the calendar has not been filed. Thus, the required standard for establishing all due care is not fulfilled (Article 122(3), first sentence EPC). The appellant did not submit any written evidence available in connection with the alleged events. In particular also, the application does not contain any information as to why



the "Sachbearbeiter" did not note the alleged mistake. Failure to submit such written evidence in support of the appellant's submission permits to conclude by the board as a sign that no tangible confirmation of events leading to the failure to comply with the deadline exists. Therefore, the application for re-establishment of rights has to be refused.

5. Consequently, the appeal has to be rejected as inadmissible because the statement of grounds have not been filed in due time.

## **Order**

### **For these reasons it is decided that:**

1. The application for re-establishment of rights is refused.
2. The appeal is rejected as inadmissible.

The Registrar:

The Chairman:

A. Vottner

S. Crane