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D E C I S I O N
of 3 May 2000

Case Number: T 0848/99 - 3.2.2

Application Number: 96302704.0

Publication Number: 0738587

IPC: B31B 5/74

Language of the proceedings: EN

Title of invention:
Pressure closing mechanism

Applicant:
ELOPAK SYSTEMS AG

Opponent:
-

Headword:
Re-establishment of rights/ELOPAK SYSTEMS AG

Relevant legal provisions:
EPC Art. 97(1), 108, 122
EPC R. 51(4), 51(5)

Keyword:
"Fee for re-establishment of rights - notice of appeal - payment of appeal fee"

Decisions cited:
J 0026/95

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0848/99 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 3 May 2000

Appellant: ELOPAK SYSTEMS AG
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CH-8152 Glattbrugg (CH)

Representative: Burrows, Anthony Gregory
Business Centre West
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted 31 May 1999 refusing European patent application No. 96 302 704.0 pursuant to Article 97(1) and Rule 51(5) EPC.**

Composition of the Board:

Chairman: W. D. Weiß
Members: R. T. Menapace
M. G. Noël

Summary of Facts and Submissions

I. By decision posted on 31 May 1999 European patent application No. 96 302 704.0 was refused pursuant to Article 97(1) and Rule 51(5) EPC despite the fact that the applicant's representative had duly given his approval of the text for grant of the European patent within the applicable time limit.

II. The representative then wrote to the Office (letter dated 14 July 1998) that the decision to refuse was apparently issued in error. With reference to the enclosed copy of his letter of approval and the respective acknowledgement of receipt issued by the Office the representative drew attention to the fact that his letter of 1 April 1998 approving the text was received by the Office on 9 April 1999 and thus well within the extended time limit for response to the communication pursuant to Rule 51(4) EPC of 14 October 1998. In a telephone conversation with the formalities officer in charge on 27 July 1999 it was explained to the representative that in the given situation he could file either a request for further processing or an appeal.

III. By telecopy dated 10 August 1999 the representative appealed against the decision of 31 May 1999 "upon the grounds set out in my letter of 14th July 1999" and transmitted a debit order for the appeal fee. The telecopy reached the Office in Munich at 00.27 a.m. local time on 11 August 1999.

IV. By communication posted on 1 October 1999 the representative was informed that the appeal was not filed and the appeal fee was not paid in time because

the relevant telecopy was only received on 11 August 1999, 0.27 hrs.

V. On 25 November 1999 a request for re-establishment of rights was filed "in respect of this application" and the prescribed fee was paid. The representative submitted that the filing of the appeal on the present application was one of the many matters which he intended to deal with over the weekend of 7 and 8 August 1999. Unfortunately, on the evening of Friday 6 August 1999 he severely twisted his left ankle, so that he had great difficulty getting around for some days and, owing to the pain, he slept very poorly for some nights afterwards. As a result, he did not get much work done over the weekend and became extremely tired and distracted. When he finally got round to attending to this and many other urgent matters on the evening of Tuesday 10 August 1999, he must have overlooked that Munich is one hour ahead of London which is why the notice of appeal was filed 27 minutes too late.

VI. As evidence in support of these submissions photocopies of the representative's diary for the period from 6 to 10 August 1999 and three affidavits were filed.

Reasons for the Decision

Re-establishment of rights

1. The request for re-establishment of rights fulfills all formal requirements including the payment of the fee for re-establishment of rights (Article 122(3) EPC: Contrary to the situation underlying decision J 26/95

(OJ 1999, 668), Article 108 EPC does not provide for two separate time limits for filing the notice of appeal and for paying the appeal fee; rather the two months available under said provision are to be construed as one single time limit whose observance requires the performance of two procedural acts, namely a written declaration and a payment - "The notice shall not be deemed to have been filed until after the fee for appeal has been paid." (Article 108, second sentence EPC). Thus, the payment of one fee for re-establishment of rights was sufficient here.

2. As regards taking all due care required by the circumstances (Article 122(1) EPC), it is to be concluded from the facts and evidence submitted that the applicant's representative, because of an unforeseeable incident, was put under serious strain and time pressure shortly before expiration of the time limit in question and that this was the cause for the non-observance of the time limit for filing the notice of appeal and for payment of the appeal fee (transmission of the telecopy 27 minutes too late). The Board is satisfied that he had taken all due care, specifically also in view of the fact that the representative, in order to recover the working time he had lost the days before, was forced to work late into the night from 10 to 11 August 1999 in which the time limit in question expired and that at that late hours the usual office support was no longer available to him; he can be excused for having overlooked that it was necessary to send off the notice of appeal by telecopy before 11.00 p.m. London local time the latest.

3. The Board wishes to underline that this finding is

based on the special circumstances of the present case; it should not be construed as meaning that it could not be normally expected from a professional representative to be aware that the local time at his working place may differ from that at the premises of the EPO and that it is the latter which is relevant for the expiration of a time limit.

Admissibility of the appeal

4. The applicant having had his rights reestablished as regards the time limit for filing the notice appeal, and all relevant requirements having been met, including those of Article 108, last sentence and Rule 64(b) EPC, the appeal is admissible.

The decision under appeal

5. The file now contains the original of the written approval pursuant to Rule 51(4) EPC received on 9 April 1999 and thus within the (extended) time limit of six months which expired only on 26 April 1999. This fact was not taken into account when the decision to refuse pursuant to Rule 51(5) EPC was dispatched on 31 May 1999, apparently because the letter of approval had not yet reached the file at that time. Thus the impugned refusal was unfounded and the appeal has to be allowed.

Reimbursement of appeal fee

6. The issuance of a decision pursuant Rule 51(5) EPC despite the written approval of the text proposed for grant having been received by the Office several weeks before and well within the applicable time limit, constitutes a substantial procedural violation. The

appellant having been successful on appeal to the extent requested and in view of the fact that if said procedural violation had not occurred, an appeal would have been unnecessary, in the Board's judgement it is equitable to reimburse the appeal fee pursuant to Rule 67 EPC.

Order

For these reasons it is decided that:

1. The appellant's request for re-establishment of rights is allowed and the notice of appeal is to be considered as having been filed in due time.

2. The decision under appeal is set aside.

3. The case is remitted to the Examining Division for further prosecution.

4. Reimbursement of the appeal fee is ordered.

The Registrar: The Chairman:

V. Commare W. D. Weiß