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NIXON & VANDERHYE, PC
901 NORTH GLEBE ROAD, 11TH FLOOR
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OFFICE OF PETITIONS

In re Patent of Blecher et al. :
Patent No. 5,395,347 :
Issue Date: March 7, 1995 : Decision on Petition
Application No. 07/972,013 :
Filing Date: November 6, 1992 :
Attorney Docket No. JHN-5484-3 :

This is a decision on the renewed petition under 37 C.F.R. § 1.378(b), filed June 30, 2010, to reinstate the above-identified patent.

The petition is **DENIED**. This decision is a final agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review. *See* Manual of Patent Examining Procedure § 1002.02. The terms of 37 C.F.R. § 1.378(e) *do not apply* to this decision and no further consideration will be given to this matter.

Since this patent will not be reinstated, the Office will schedule a refund of the maintenance fee and the surcharge submitted by petitioner. Therefore the Office has credited the $4,110 payment for the 11.5 year maintenance fee and the $700 payment for the surcharge back to the credit card used to pay the fees. The fee for requesting reconsideration is not refundable.

Procedural History

The instant patent issued March 7, 1995.

The 11.5 year maintenance fee could have been timely paid for Patent 1 from March 7, 2006, to September 7, 2006, or with a surcharge from September 8, 2006, to March 7, 2007. The fee was not timely paid. As a result, the instant patent expired March 8, 2007.

A petition under 37 C.F.R. § 1.378(b) was filed November 2, 2009. A decision dismissing the petition was mailed April 30, 2010.

Applicable Statutes and Regulation

35 U.S.C. § 41(b) states in pertinent part that, "Unless payment of the applicable maintenance fee is received . . . on or before the date the fee is due or within a grace period of six months thereafter, the patent shall expire as of the end of such grace period."

35 U.S.C. § 41(c)(1) states, with emphasis added, "The Director may accept the payment of any maintenance fee . . . after the six month grace period *if the delay is shown to the satisfaction of the Director to have been unavoidable*."

37 C.F.R. § 1.378(b)(3) states a petition to accept delayed payment of a maintenance fee must include:

> A showing that . . . reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee . . . became aware of . . . the expiration of the patent. The 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.

Summary of Facts

The instant decision will refer to Patent No. 5,395,347 as "Patent 1," and Reissue Patent No. 36,885 as "Patent 2."

Patent 1 issued on March 7, 1995.

Patent No. 5,755,699 issued on May 26, 1998. A reissue application based on the patent was filed July 1, 1999. The reissue application issued as Patent 2 on September 26, 2000.

The 11.5 year maintenance fee could have been timely paid for Patent 1 from March 7, 2006, to September 7, 2006, or with a surcharge from September 8, 2006, to March 7, 2007. The fee was not timely paid. Accordingly, Patent 1 expired March 8, 2007.

The 7.5 year maintenance fee could have been timely paid for Patent 2 from May 26, 2005, to Monday, November 28, 2005, or with a surcharge from November 29, 2005, to May 26, 2006. The fee was not timely paid. Accordingly, Patent 2 expired May 27, 2006.

A petition under 37 C.F.R. § 1.378(b) was filed in Patent 1 on November 2, 2009. A decision dismissing the petition was mailed April 30, 2010.

A petition under 37 C.F.R. § 1.378(b) was filed in Patent 2 on November 2, 2009. A decision dismissing the petition was mailed April 30, 2010.

Facts

MBO Laboratories, Inc. ("MBO") owns Patent 1 and Patent 2. William McCormick is the president of MBO.

The declarations filed in the applications which issued as Patent 1 and Patent 2 gave Warren Low and Renee Rutkowski power of attorney. Both Low and Rutkowkhi worked at the law firm of Low & Low.

Rutkowski states she only engaged in "adminstrative-like" tasks related to a group of MBO's applications/patents which includes Patent 1 and Patent 2.[1] All docketing of patent maintenance fees were made by Warren Low since he kept his own docket records which were not shared with petitioner.

Rutskowski states,

> Response dates for all materials related to the McCormick et al. applications, [which included Patent 1 and Patent 2,] were personally docketed manually by Warren Low, in his desk calendar and in a "docket book" which he kept.
>
> Dates for client matters of "my own clients" were kept manually by me in a desk calendar and a docket notebook. As McCormick et al. were not "my" clients, I did not docket any dates relating to prosecution of their applications.[2]

McCormick's states,

> MBO provided an ongoing instruction to Mr. Low to timely pay the maintenance fees for [Patent 1] and [Patent 2]....
>
> MBO instructed Mr. Low to obtain reimbursement for his payment for maintenance fees from Sherwood Medical Company ("Sherwood"), which has a license under [Patent 1, Patent 2,] and other patents assigned to MBO. The license agreement between MBO and Sherwood requires Sherwood to reimburse MBO for payment of maintenance fees for the licensed patents. It was standard practice for Mr. Low to send to Sherwood reminders and invoices related to payment of maintenance fees and for Sherwood to pay these invoices directly to Mr. Low. MBO received copies of correspondence from Mr. Low's law firm to Sherwood. Based on a recent review of MBO's files, the last correspondence received by MBO from Mr. Low's law firm was in October 2004.[3]

On November 9, 1994, Low sent a letter regarding Patent 1 to Attorney David Warmbold, an employee in Sherwood's Patent Department. Low also sent a courtesy copy of the letter to McCormick. The letter stated Low had just received formal drawings from a draftsman and that Low had "received the Sherwood remittance."

On May 19, 1998, Rutkowski sent a letter to Attorney David Warmbold at Sherwood, Davis & Geek ("Sherwood Davis").[4] Rutkowski also sent a courtesy copy of the letter to McCormick.

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[1] Rutkowski Declaration, ¶¶ 4-6.

[2] Id. at ¶¶ 7-10.

[3] October 31, 2009 McCormick Declaration, ¶¶ 3-4 (footnote omitted).

[4] The Office assumes Sherwood Davis is the equivalent, at least for purposes of this decision, of Sherwood Medical Company.

The letter states it is accompanied by an invoice for "fees associated with preparing and filing the documents necessary to maintain [Patent 1] in force."

On May 27, 1998, Low sent a letter to Attorney David Warmbold at Sherwood Davis. Low also sent a courtesy copy of the letter to McCormick. The letter stated,

> [Patent 2] issued this week and we received the same today.... As with prior MBO patents, we have sent the original grant to William McCormick.... The first Maintenance fee in this patent will become due May 26, 2001 and we will advise you.

The law firm paid the 3.5 year maintenance fee for Patent 1 on June 9, 1998.

On June 11, 1998, Low sent Attorney David Warmbold at Sherwood Davis a letter confirming the 3.5 year fee had been paid for Patent 1 and stating, "We have docketed [the next maintenance fee] matter for attention in 2002."

Due to marital difficulties between Rutkowski and Low, Rutkowski moved out of the home in April of 2000. In late 2000, Low asked Rutkowski to continued working at Low & Low because he wished to reduce the number of hours he was working. She agreed to stay at the firm. Thereafter, Low worked at the firm on a part-time basis. Low worked from both the office and from home.

On November 12, 2001, Hans Vesterling, an employee at Sherwood Services AG and Tyco Healthcare ("Sherwood/Tyco") sent the law firm a letter indicating Sherwood/Tyco's database indicated the first maintenance fee was due for Patent No. 5,755,699.[5] The letter stated, "We kindly ask you to pay this maintenance fee in the name of the registered owner before the upcoming due date."

Low sent an e-mail to Hans Vesterling on November 13, 2001, informing Hans Vesterling that Patent No. 5,755,699 "has been supplanted ... by [Patent 2]." The letter stated the firm would pay the maintenance for the Patent 2.

The law firm paid the 3.5 year maintenance fee for Patent 2 on November 23, 2001.

On November 23, 2001, the law firm sent Sherwood/Tyco an invoice for fees related to services for Patent 2 including, "advancing payment and timely filing" of the maintenance fee and "docketing next payment due by November 26, 2005."

On March 14, 2002, Rutkowski sent Hans Vesterling a letter informing him the 7.5 year maintenance fee was due on or before September 7, 2002, for Patent 1.

The law firm paid the 7.5 year maintenance fee for Patent 1 on June 10, 2002.

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[5] The Office assumes Sherwood/Tyco is the equivalent, at least for purposes of this decision, of Sherwood Medical Company.

On September 14, 2002, Rutkowski sent Hans Vesterling a letter indicating the 7.5 year maintenance fee had been paid for Patent 1.

During late 2003, Rutkowski moved forward with steps to obtain a divorce and the relationship between her and Low became "substantially hostile."[6]

During late 2003 or early 2004, Low and Rutkowski divided up various client matters. Rutkowski states, "The McCormick et al. patents [which included Patent 1 and Patent 2] remained under [Low's] sole control from late fall 2003 or winter of 2004 and onward."[7]

Dr. M. Anthony Casolaro states,

> [Low] had a history of diabetes, which was diagnosed in the late 1990s.... Beginning in 2003, [Low] began having difficulty with balance and developed peripheral neuropathy, decreased energy, and a gait disturbance..... He subsequently underwent surgery for bowel obstruction in early 2004. He has a partial colon removal and was found to have B-cell lymphoma. It was high grade consistent with a large cell lymphoma. [Low] was treated with CHOP therapy and Rituxan with a reasonably good response at that time. Unfortunately, he continued to have difficulty with side effects from chemotherapy with regard to his energy level and poorly controlled diabetes with sugars in the 300 range.[8]

The instant petition states, with emphasis added,

> As discussed in the Rutkowski declaration, *and in the attached note from Warren Low's doctor*, between 2003 and 2004 [Low] began experiencing *persistent forgetfulness*, decreased energy, and peripheral neuropathy manifested by difficulties with walking and balancing."[9]

The instant petition also states, with emphasis added,

> [Low and Rutkowski] separated their respective files in 2003.... Ms. Rutkowski *and Dr. Casolaro* have indicated that prior to this point [Low] had been experiencing *persistent forgetfulness*, and other neurological problems.[10]

Ms. Rutkowski states, with emphasis added, "[During] 2003, Low began to suffer *persistent amnesia* and other neurological symptoms. These symptoms are described in further detail *in the attached letter from his doctor*."[11]

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[6] Rutkowski declaration, ¶ 15.

[7] Id. at ¶17.

[8] Casolaro letter, p. 1.

[9] June 30, 2010 petition, p. 4.

[10] Id. at 5-6.

Dr. Caslolaro's letter does *not* state Low experienced persistent, or even temporary, amnesia or forgetfulness during 2003, 2004, or any other year.

Low underwent 5 months of chemotherapy during 2004.[12] Rutkowski states the chemotherapy left Low "very thin, and perpetually exhausted, with low energy levels" and Low became "constantly angry and depressed."[13]

Rutkowski states,

> While [Low] was undergoing chemotherapy throughout 2004, and subsequently recovering from it from 2004 and on, our relationship remained strained and our law practices remained separate. I did not have access to his docketing system, and performed administrative tasks for him very rarely, and only when specifically requested. Our interactions during this time were very formal, and limited to office contact, and telephone conversations concerning our daughter.
>
> Throughout this point in time, Warren began to work fewer hours, at least in the office. His presence in the office decreased over time.[14]

The time period during which the 7.5 year maintenance fee could have been paid for Patent 2 began during May of 2005. Specifically, the 7.5 year maintenance fee could have been timely paid for Patent 2 from May 26, 2005, to Monday, November 28, 2005, or with a surcharge from November 29, 2005, to May 26, 2006. The Office did not mail the law firm a Maintenance Fee Reminder for Patent 2

During late 2005 or early 2006, Low's eldest daughter, from his previous marriage, was diagnosed with breast cancer and Low "was distracted and depressed by his daughter's health circumstances for a number of months."[15]

The 7.5 year maintenance fee was not paid for Patent 2 on or before May 26, 2006. As a result, Patent 2 expired May 27, 2006. The Office did not mail the law firm a Notice of Patent Expiration for Patent 2 or publish a notice of the expiration of Patent 2 in the Official Gazette.

The time period during which the 11.5 year maintenance fee could have been paid for Patent 1 began during March of 2006. Specifically, the 11.5 year maintenance fee could have been timely paid for Patent 1 from March 7, 2006, to September 7, 2006, or with a surcharge from September 8, 2006, to March 7, 2007.

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[11] Rutkowski declaration, ¶ 18.

[12] Id. at 4.

[13] Rutkowski declaration, ¶ 20.

[14] Id. at ¶¶ 21-22.

[15] Id. at ¶ 23.

On September 20, 2006, the Office mailed a Maintenance Fee Reminder for Patent 1 to the law firm.

"As of the spring of 2006, [Low's] gastrointestinal symptoms had returned, particularly nausea, inability to eat much, constantly feeling full, and excessive gas."[16]

During June 2006, Low sold the building where the law firm had been located. Low moved his files to his home and Rutkowski rented office space in Arlington, Virginia. Rutkowski states, "[Low's] practice had been winding down up to that point. He may have continued to do some work at home, but I am not aware to what extent."[17]

The 11.5 year fee maintenance fee was not paid for Patent 1 on or before March 7, 2007. As a result, Patent 1 expired March 8, 2007.

Dr. Casolaro states

> [As time passed, Low's] peripheral neuropathy progressed, and despite attempts at tight control of his diabetes, he continued to have variable fluctuating sugars ranging from the normal range up to the 250-350 range. It was recommended that he again go back to neurology, although at that time he unfortunately had a recurrence in 2007 with nausea, vomiting, and a mass near the duodenum, which was felt to represent a recurrence of his tumor. He was biopsied again in March 2007, which definitely [indicated a recurrence of his cancer]. Subsequent to that, [Low] was a candidate for salvage chemotherapy. By May of 2007, [Low] had progressed and at discharge on May 1, 2007, he was recommended to continue his therapy. Unfortunately, he continued to have multiple admissions from May through December related to chemotherapy, chemotherapy side effects, and infections. [Low] was finally admitted on December 3, 2007, after a 9-month difficult treatment regimen and was discharged to hospice.[18]

Low passed away on an unspecified date shortly after being discharged to hospice.

Jacob Blecher is a co-inventor for Patent 1 and Patent 2 and is the Treasurer of MBO. While reviewing the status of Patent 2 using the USPTO's Patent Application Information Retrieval system, Blecher discovered Patent 2 had expired. Blecher subsequently informed McCormick of the expiration of the patents on October 8, 2009.

McCormick states,

> When I attempted to contact Mr. Low, I was advised by his widow (Renee Rutkowski) that Mr. Low had terminal cancer in 2005 and died in December 2007.... Based on my

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[16] Id. at ¶ 24.

[17] Id. at ¶ 25.

[18] Casolaro letter, p. 1.

> discussions with Ms. Rutkowski, I understand that during much or all of the period from mid-2005 to 2007, Mr. Low was incapacitated due to his illness and did not make arrangements for payment of the maintenance fees for [Patent 1 and Patent 2].... Until 2009, MBO was unaware ... Mr. Low had been incapacitated and died.[19]

During October 2009, Rutkowski supplied the law firm of Nixon & Vanderhye PC with copies of all the materials related to MBO cases she was able to locate in files in Low's home. The petition is accompanied by a copy of all the materials related to maintenance fees for Patent 1 and Patent 2 except for one item. Alexa T. Papadimos, an attorney at Nixon & Vanderhye states,

> In Mr. Low['s] file for [Patent 2], there is a letter between Bill McCormick and [Low] dated June 26, 2004. The letter is being withheld as privileged, but the purpose of the letter was to inform Mr. McCormick that Mr. Low was deposed in connection with litigation relating to these matters. An invoice was included.

Discussion

35 U.S.C. § 41(c)(1) states, with emphasis added, "The Director may accept the payment of any maintenance fee . . . after the six month grace period if the delay is *shown to the satisfaction of the Director* to have been unavoidable." Since the statute requires a "showing" from petitioner, petitioner bears the burden of proof.

In order for a party to show unavoidable delay, the party must show "reasonable care was taken to ensure that the maintenance fee would be promptly paid."[20] The level of "reasonable care" required to be shown is the same as the level of "care or diligence ... generally used and observed by prudent and careful men in relation to their most important business."[21] When determining if a period of delay has been shown to have been unavoidable, the Office will take "all facts and circumstances into account" and will decide each petition "on a case-by-case basis."[22]

MBO relied on Low to pay maintenance fees for Patent 1 and Patent 2 and to obtain reimbursement for the fees from the licensee.

Reliance on a third party representative does not, per se, constitute "unavoidable" delay. When a party relies on an agent to take certain steps, the petition must address not only the party's actions *but also* must address the agent's actions or inactions.[23] A showing is insufficient if it

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[19] October 31, 2009 McCormick Declaration, ¶ 8.

[20] 37 C.F.R. § 1.378(b).

[21] *In re Mattulath*, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912). *See also Ray v. Lehman*, 55 F.3d 606, 34 U.S.P.Q.2d (BNA) 1786 (Fed. Cir. 1995) (citations omitted) ("[I]n determining whether a delay in paying a maintenance fee was unavoidable, one looks to whether the party responsible for payment of the maintenance fee exercised the due care of a reasonably prudent person.")

[22] *Smith v. Mossinghoff*, 671 F.2d 533, 538, 213 U.S.P.Q. (BNA) 977 (D.C. Cir. 1982).

[23] *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship.*, 507 U.S. 380, 396, 397 (1993) ("The [Circuit] court also appeared to focus its analysis on whether respondents did all they reasonably could in policing the conduct of

merely establishes that petitioner did everything petitioner could to monitor the agent's actions and inactions, but fails to address the agent's conduct.[24]

A party is bound by errors made by the party's representative. The Supreme Court has stated, with emphasis added,

> Petitioner voluntarily chose his attorney as his representative in the action and he cannot now avoid the consequences of the acts or omissions of this freely selected agent ... Each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'[25]

The United States Court of Appeals for the Federal Circuit has stated,

> If we were to hold that an attorney's negligence constitutes good cause for failing to meet a PTO requirement, the PTO's rules could become meaningless. Parties could regularly allege attorney negligence in order to avoid an unmet requirement.[26]

As a threshold matter, the Office notes a proper showing of unavoidable delay must demonstrate steps were taken to ensure a maintenance fee would be timely paid. *See* 37 CFR 1.378(b) (A party must "enumerate the steps taken to ensure timely payment of the maintenance fee."). The requirement for a party to demonstrate steps were taken to ensure a fee would be timely paid is a reasonable requirement. *See Ray v. Lehman*, 55 F.3d 606, 609, 34 U.S.P.Q.2d (BNA) 1786 (Fed. Cir. 1995). Petitioner has failed to demonstrate Low took steps to ensure the 11.5 year maintenance fee would be timely paid. Although petitioner states Mr. Low entered due dates for maintenance fees into a "desk calendar" and a "docket book," petitioner has failed to provide a copy of the desk calendar or the docket book. In other words, petitioner has not shown the due date for the 11.5 year maintenance fee was entered into the desk calendar or the docket book. Thus it cannot be stated that petitioner has demonstrated that the delay in payment of the maintenance fee was unavoidable.

Even if the record established the due date was properly entered into Low's system, relief would not be warranted because the record fails to establish Low's health difficulties rendered him incapable of performing work-related tasks involving the patent or of notifying MBO he would no longer be performing such tasks on behalf of MBO.

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their attorney, rather than on whether their attorney, as respondents' agent, did all he reasonable could to comply with the court-order bar date. In this, the court erred. . . . [I]n determining whether respondents' failure to file their proof of claim prior to the bar date was excusable, the proper focus is upon whether the neglect of respondents *and their counsel* was excusable." (emphasis in original)).

[24] *See Id.*

[25] *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-634 (1962) (*quoting Smith v. Ayer*, 101 U.S. 320, 326 (1880)).

[26] *Huston v. Ladner*, 973 F.2d 1564, 1567, 23 U.S.P.Q.2D (BNA) 1910 (Fed. Cir. 1992).

The petition states,

> Due to [Low's] physical, mental, and emotional condition from 2003 until his death, Warren Low was not able to pay the maintenance fees for [Patent 1 and Patent 2]. His sickness and deteriorating condition prevented him from corresponding with Petitioner regarding the maintenance fees, or acting on Petitioner's standing instructions to pay these fees.... Petitioner respectively submits that Warren Low's terminal cancer caused an unavoidable delay in his paying the maintenance fees for the patents at issue.[27]

The 11.5 year maintenance fee could have been timely paid for Patent 1 from March 7, 2006, to September 7, 2006, or with a surcharge from September 8, 2006, to March 7, 2007. The record fails to establish Low's physical, mental, and/or emotional health rendered Low incapable from March 7, 2006, to March 7, 2007, of timely paying the 11.5 year maintenance fee for Patent 1 or of notifying MBO or the licensee of the need to pay the fee.

The petition states Dr. Casolaro's letter and Rutkowski's declaration discuss Low's persistent forgetfulness which began prior to Low and Rutkowski separating their files during 2003. Dr. Casolaro does *not* state Low experienced any degree of forgetfulness during 2003 or during any other year. Although Rutkowski states Low began to suffer from "persistent amnesia" during 2003, Rutkowski does not state the persistent forgetfulness continued to affect Low beyond 2003 and does not state the persistent forgetfulness impaired Low's ability to perform any work-related tasks during 2003 or any other year.

Dr. Casolara's letter indicates Low had fluctuating sugar levels and problems controlling his diabetes during 2006 and experienced nausea and vomiting in early 2007. However, the letter does *not* state these problems rendered Low incapable of performing work-related activities during any portion of the time period from March 7, 2006, to March 7, 2007.

Rutkowski asserts Low was distracted and depressed for several months after his eldest daughter passed away during late 2005 or early 2006. However, Rutkowski does *not* state Low was distracted and/or depressed to such an extent Low was incapable of performing work-related activities during any portion of the time period from March 7, 2006, to March 7, 2007.

Rutkowski states, "[a]s of the spring of 2006, [Low's] gastrointestinal symptoms had returned, particularly nausea, inability to eat much, constantly feeling full, and excessive gas."[28] However, Rutkowski does *not* assert these symptoms rendered Low incapable of performing work-related activities during any portion of the time period from March 7, 2006, to March 7, 2007.

Rutkowski states Low "may have continued to do some work at home" after selling the law firm's building during June 2006.[29] The fact Rutkowski believes Low may have continued to

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[27] Petition, p. 11.
[28] Rutkowski Declaration, ¶ 24.

[29] Id. at ¶ 25.

work supports a conclusion Rutkowski believes Low was capable of continuing to perform work as late as *at least* June 2006.

The record fails to establish Low's physical, mental, and/or emotional health rendered Low incapable of recognizing the patent had expired and contacting MBO concerning the matter during the entire period March 8, 2007, the date the patent expired, to December 3, 2007, the date Low was admitted to hospice. Specifically, neither Dr. Casolaro nor Rutkowski have alleged Low was incapable of performing work-related activities such as checking the status of a patent or contacting a client, during any portion of the time period from March 8, 2007, to December 3, 2007.

Even if the record established Low was not able to pay the 7.5 year maintenance fee for the patent, notify MBO or the licensee when the fee became due, or notify MBO of the patent's expiration, the record would be insufficient to establish unavoidable delay. A reasonable attorney, treating his obligation to pay a maintenance fee or notify a client of the need to pay a fee with the same level of care normally used by prudent and careful individuals when handling their most important business, would notify a client or obtain co-counsel for assistance if the attorney's ability to effectively represent a client became impaired. The petition fails to establish Low was incapable of taking either of the following actions upon his ability to represent MBO becoming impaired,

1. Notify MBO that MBO should independently monitor maintenance fee due dates for its patents, or obligate another party to monitor the maintenance fee due dates, because Low would no longer be performing such a task, or
2. Obtain co-counsel to assist him in handling his legal obligations or refer the need to ensure the 11.5 year fee was timely paid for Patent 1 to another attorney.

A petition under 37 C.F.R. § 1.378(b) must demonstrate the *entire* delay in submission of the maintenance fee was unavoidable. Petitioner has *not* shown steps were taken by Low to ensure the 11.5 year fee would be timely paid. Petitioner has *not* shown the initial failure to timely pay the maintenance fee was unavoidable. Petitioner has *not* shown the entire delay between the expiration of the patent and the date Low was admitted to hospice (December 3, 2007) was unavoidable. Since Petitioner has failed to establish the entire period of delay prior to December 3, 2007, was unavoidable, the Office need not determine if the record is sufficient to establish the period of delay after December 3, 2007, was unavoidable.

Decision

The prior decision, which refused to accept under 37 C.F.R. § 1.378(b) the delayed payment of a maintenance fee for the instant patent, Patent 1, has been reconsidered. For the reasons stated herein, Petitioner has failed to establish the entire delay in the submission of the 11.5 year maintenance fee was unavoidable within the meaning of 35 U.S.C. § 41(c)(1) and 37 C.F.R. § 1.378(b). Therefore, the petition is **denied**.

As stated in 37 C.F.R. § 1.378(e), the Office will not further consider or review the matter of the reinstatement of the patent.

The patent file is being forwarded to Files Repository.

Telephone inquiries may be directed to Petitions Attorney Steven Brantley at (571) 272-3203.

Anthony Knight
Director
Office of Petitions