Commissioner of Patents and Trademarks
Patent and Trademark Office (P.T.O.)

SWEATS FASHIONS, INC., PETITIONER,
v.
PANNILL KNITTING COMPANY, INC., RESPONDENT.
Opposition No. 69,983
March 3, 1987

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Deputy Commissioner of Patents and Trademarks

ON RECONSIDERATION

Petitioner, Sweats Fashion, Inc. (Sweats), has filed a REQUEST FOR RECONSIDERATION OF DECISION DENYING PETITION. Sweats requests reconsideration of an October 9, 1986, decision denying Sweats' petition to extend the time for filing a notice of appeal to the United States Court of Appeals for the Federal Circuit. Upon reconsideration, Sweats' petition is granted.

Background

The Trademark Trial and Appeal Board (TTAB) issued an Order in Opposition No. 69,983 granting respondent's (Pannill Knitting Company, Inc.) motion for summary judgment on May 9, 1986. No request for reconsideration was filed. Accordingly, a notice of appeal was due on July 8, 1986, sixty days after May 9, 1986. 37 CFR 2.145(d).

On July 9, 1986, the day following the end of the period for filing an appeal, Sweats filed its notice of appeal, accompanied with a

petition under 37 CFR 2.145(d) (Rule 2.145(d)) to extend the time for filing a notice of appeal to the United States Court of Appeals for the Federal Circuit. That petition was denied. Sweats Fashions, Inc. v. Pannill Knitting Co., 231 USPQ 560 (Comm'r Pat. 1986).

Petitioner filed a REQUEST FOR RECONSIDERATION on November 19, 1986. Petitioner's REQUEST FOR RECONSIDERATION did not include a Certificate of Service showing the papers had been served on counsel for respondent. On December 17, 1986, the REQUEST was denied without prejudice with leave to renew the REQUEST within ten days from the date of the decision provided proper service was made on counsel for respondent.

On December 29, 1986, petitioner filed a copy of a Certificate of Service certifying that on November 12, 1986, the REQUEST FOR RECONSIDERATION OF DECISION DENYING PETITION was served via first class mail to counsel for respondent. In addition, petitioner submitted a copy of respondent's RESPONSE TO REQUEST FOR RECONSIDERATION, opposing a one-day extension of time, mailed by respondent to petitioner on November 24, 1986. The original RESPONSE was apparently filed by mail but did not reach the Commissioner's file.

In view of petitioner's representation that petitioner's REQUEST FOR RECONSIDERATION was served on counsel for respondent on the same date it was filed in the Patent and Trademark Office, as evidenced by the Certificate of Service, the Commissioner's November 17, 1986, ORDER DISMISSING REQUEST FOR RECONSIDERATION WITHOUT PREJUDICE TO RENEWAL is hereby vacated.

Opinion

***2** In Sweats' petition, the reason given for filing the Notice of Appeal one day late was stated to be due to an inadvertent miscalculation by Sweats' counsel of the 'due date' for filing such a Notice of Appeal; Sweat's counsel believed the 60-day period ended on July 9, 1986, instead of the correct date of July 8, 1986. Pursuant to Rule 2.145(d), the time to file a notice of appeal 'may be extended . . . upon a showing of sufficient cause.' 37 CFR 2.145(d). In the Decision Denying Petition, 231 USPQ 560 (Comm'r Pat. 1986), the Commissioner determined that Sweats had failed to make a showing of 'sufficient cause'. The petition was, therefore, denied.

The standard for 'sufficient cause' used in the initial decision was considered to be comparable to the standard for 'excusable neglect.' 'In effect, a showing of sufficient cause under 37 CFR 2.145(d) should establish excusable neglect in those cases where an appeal is belatedly filed.' Id. at 561. Upon reconsideration, the Commissioner has determined that (a) those standards are not equivalent and (b) 'excusable neglect' is not the appropriate standard in deciding petitions requesting an extension of time under Rule 2.145.

Prior to amendment of Rule 2.145 in 1976, leave to file a late notice of appeal could be granted only by means of a petition to waive the time requirement under 37 CFR 2.148. [FN1] Thus, prior to 1976, a petitioner was required to show that the failure to comply with the

time requirements of Rule 2.145(d) occurred as a result of an 'extraordinary situation.' When Rule 2.145 was amended in 1976, a provision was added permitting the Commissioner to extend the time period for filing a notice of appeal upon the showing of 'sufficient cause.' As 'sufficient cause' is a less stringent standard than 'extraordinary situation,' the 1976 amendment of Rule 2.145(d) represents a liberalization of the showing necessary for the Commissioner to exercise his discretion to grant an extension of time to file a notice of appeal. There is no indication that the amendment was intended to substitute the standard of 'excusable neglect,' even though the 'excusable neglect' standard is specifically used in 37 CFR 1.304(a) with respect to extending the time for seeking judicial review of a decision of the Board of Patent Appeals and Interferences. [FN2] Accordingly, what constitutes a showing of 'sufficient cause' will not be determined by comparison with the standard of 'excusable neglect.'

Sweats' Request For Reconsideration includes two affidavits [FN3] that describe the facts and circumstances relating to the late filed Notice of Appeal. The affidavit filed by Sweats' counsel details an established procedure for docketing 'due dates' for all papers received by the firm. Also submitted was an affidavit of the firm's chief Docket Clerk. This affidavit confirms that the usual docketing process was followed upon receipt of the Order from the TTAB. [FN4] However, for an as yet unexplained reason, the chief Docket Clerk not only failed to note the 'due date' for taking further action in the matter, but also failed to enter the 'due date' into the docket system. Those failures to complete the docketing procedure are described as an 'aberration and an inadvertent error' which could not be specifically explained or excused.

***3** In addition to the central docket system, counsel for Sweats states in her affidavit that she follows a practice of noting deadlines on her own calendar for cases in which she is involved. This is essentially a back-up system to the firm's established practice of centrally docketing 'due dates' for the firm. The miscalculation of the sixty-day appeal period referred to in the Sweats' petition specifically deals with counsel's calculations with respect to her personal calendar, the back-up system. The one-day error in calculating the due date is not incapable of belief. Moreover, the Notice of Appeal was filed on the erroneously calculated date.

Under all the facts and circumstances as further explained in Sweats' Request For Reconsideration, the Commissioner has determined that petitioner has made an adequate showing of sufficient cause for the Commissioner to exercise his discretion and grant a one-day extension of the time for filing a notice of appeal to the United States Court of Appeals for the Federal Circuit.

The petition for extension of time is, therefore, granted. The certified list called for by 15 U.S.C. 1071(a)(3) will be transmitted to the United States Court of Appeals for the Federal Circuit in due course.

FN1. 37 CFR 2.148 Commissioner may suspend certain rules.
In an extraordinary situation, when justice requires and no other party is injured thereby, any requirement of the rules in this part not

being a requirement of the statute may be suspended or waived by the Commissioner.

FN2. 37 CFR 1.304(a) concerns appeals from an interference when a request is untimely filed after expiration of the prescribed time for appeal.

FN3. In the Commissioner's view, the affidavits should have been presented with the original petition for the extension of time. The Commissioner will, however, invoke his discretion to consider the affidavits at this stage of the proceeding.

FN4. A copy of the first page of the TTAB's order, submitted with counsel's affidavit, indicates that the order was initialed by the appropriate individuals in the firm's Docketing department as required by the established practice.

2 U.S.P.Q.2d 1380

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