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**Datasheet for the decision  
of 15 September 2011**

**Case Number:** T 2210/10 - 3.2.02

**Application Number:** 05251472.6

**Publication Number:** 1576929

**IPC:** A61B 17/12

**Language of the proceedings:** EN

**Title of invention:**

Multi-layer braided structures for occluding vascular defects

**Patentee:**

AGA Medical Corporation

**Opponent:**

Occlutech GmbH

**Headword:**

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**Relevant legal provisions:**

EPC Art. 108

EPC R. 101(1), 126 (2)(4)

**Relevant legal provisions (EPC 1973):**

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**Keyword:**

"Admissibility of appeal (no)"

**Decisions cited:**

T 0743/05, T 1535/10

**Catchword:**

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Case Number: T 2210/10 - 3.2.02

**DECISION**  
of the Technical Board of Appeal 3.2.02  
of 15 September 2011

**Appellant:**  
(Opponent)

Occlutech GmbH  
Wildenbruchstrasse 15  
D-07745 Jena (DE)

**Representative:**

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Krahbichler  
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**Respondent:**  
(Patent Proprietor)

AGA Medical Corporation  
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Plymouth, MN 55442-2204 (US)

**Representative:**

Charig, Raymond Julian  
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**Decision under appeal:**

Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
10 August 2010 concerning maintenance of  
European patent No. 1576929 in amended form.

**Composition of the Board:**

**Chairman:** M. Noël  
**Members:** P. L. P. Weber  
M. J. Vogel

## Summary of Facts and Submissions

- I. The appeal of the opponent is against the interlocutory decision of the Opposition Division that account being taken of the amendments made by the patent proprietor during the opposition proceedings, the European patent EP-B-1576929 and the invention to which it relates were found to meet the requirements of the EPC.
- II. The decision was posted on 10 August 2010 with an advice of delivery. On the address label the addressee was mentioned in the following way : Name of the representative, name of its office, address.

According to the advice of delivery received at the EPO on 19 August 2010, the decision was received at the office of the representative on 17 August 2010. The advice of delivery had been signed by an employee of the representative's office.

The acknowledgement of receipt (EPO Form 2936) of the decision (EPO Form 2327) was received at the EPO on 3 September 2010. It bears the signature of the representative and the date of 3 September 2010.

- III. The appellant filed a notice of appeal on 3 November 2010 and a statement setting out the grounds of appeal on 3 January 2011.
- IV. With communication of 13 January 2011 the Board informed the appellant that it was to be expected that the appeal would be rejected as inadmissible pursuant to Article 108, first sentence, EPC in conjunction with Rule 101(1) EPC.

V. On 22 March 2011 the appellant filed observations on the Board's communication and filed as Exhibit 1 copies of authorisations of two employees of the representative's office entitled to accept mail in the name of this office, including that of the employee who signed the advice of delivery.

The representative further referred to two articles of the Swedish Code of Judicial Procedure Chapter 33 which read as follows in their English translation:

"If service is to be done to a single person, the document is handed over to him. If there is a substitute for him and if this person is authorized to represent him in the proceedings of the case the document is handed over to him.

If a single person is sought for service on his place for employment but is not to be met there during his normal working time, the document may be handed over to the employer of the sought person. By employer is meant a person in an executive position or in a position comparable with this or the manager of the human resource administrative department on the workplace of the person sought".

VI. On 18 April 2011 the patentee (respondent) took position on the admissibility of the appeal and requested an extension of the time limit for filing substantive observations on the appellant's statement setting out the grounds of appeal.

VII. Oral proceedings were held on 15 September 2011 on the sole question of the admissibility of the appeal.

The appellant requested that the decision under appeal be set aside and that the European patent No 1576929 be revoked. In the event that the appeal be rejected as inadmissible it requested that questions filed during the oral proceedings be referred to the Enlarged Board of Appeal.

The respondent requested that the appeal be rejected as inadmissible. In the event that the appeal be regarded as admissible it requested subsidiary that the question formulated in its letter of 15 August 2011 be referred to the Enlarged Board of Appeal.

VIII. The arguments of the appellant can be summarised as follows:

Because on the address label of the mail containing the decision the name of the representative appeared in the first line and the name of the representative's office only in the second line, the mail had to be considered as addressed to the representative in person and not to the representative's office. Therefore the employee having accepted the mail acted in breach of its authorisation to do so, since the employee was only authorised to accept mail for the representative's office. Likewise the Swedish post office should not have handed out the decision to the said employee because under Swedish law such mail should be handed out to the person named on the mail only, or to a person authorised to accept mail in the name of this very person.

Hence, the decision had to be considered as delivered to a non-authorized person. The date of notification to be taken as the starting day for the calculation of the time limit had therefore to be the date on which the representative became aware of the decision upon returning from holiday. This was 3 September 2011 as indicated on form 2936 sent back to the office on that very day.

The case law decisions cited by the Board and by the respondent were not relevant because all of them referred to cases where the decision was delivered to a duly authorized person.

Therefore the appeal had to be considered as admissible.

IX. The arguments of the respondent can be summarised as follows:

The present case was similar to that decided in case T 743/05 in which the representative wrongly considered, as in the present case, that the day of notification of the decision had to be the day on which he came back from holidays and took knowledge of the decision. The Board however confirmed that the day of notification was an earlier date, on which the decision had reached the representative's office.

Swedish law was not applicable since according to Rule 126(4) EPC, national law was only applicable to the extent that notification by post was not covered by the preceding paragraphs of the same rule. In the present case, the requirements of the preceding paragraphs were clearly met and national law was not applicable.

Therefore the appeal was not admissible.

X. Questions filed by the appellant during oral proceedings to be referred to the Enlarged Board of Appeal:

- What is proper destination of an addressee?
- What is the correct address format the EPO should use?
- Can mail be regarded notified if a non-authorized person receives mail, even if the addressee never actually should receive the mail?

### **Reasons for the Decision**

1. In the case under consideration the decision of the Opposition Division was notified by registered mail with an advice of delivery pursuant to Rule 126(1) EPC on 10 August 2010. As a representative was designated, the decision was sent to him (Rule 130(1) EPC) and, according to the advice of delivery, received at his office on 17 August 2010.

Undisputedly the decision was accepted there by an employee of the representative who was authorised to accept all mail delivered to the representative's office.

Thus, the decision was notified within ten days following its posting, so that the fiction of Rule 126(2) EPC applies for the calculation of the

starting day of the time limit and the decision is deemed to have been notified on 20 August 2010. Hence, the time limit for filing a notice of appeal ended on Wednesday 20 October 2010 and the time limit for filing a statement setting out the grounds of appeal ended on Monday 20 December 2010, respectively.

The appellant, however, filed a notice of appeal on 3 November 2010 and a statement setting out the grounds of appeal on 3 January 2011, respectively. Both dates are late, i.e. after expiry of the corresponding time limits.

2. The appellant submitted that because the name of the representative appeared first on the address label of the mail, the decision could only be considered notified when the representative himself took knowledge of the decision.

The Board cannot accept this argument. Pursuant to Rule 130 EPC the decision was addressed to the representative at his office. For organisational reasons, it is clear that in the representative's office, one or several employees are entitled to accept mail addressed to the representatives working there. The employee who took over the impugned decision had an authorisation to do so in the name of the representative's office. This is not disputed by the appellant. What happened there is no longer as much the responsibility of the EPO, but rather that of the representative (see T 743/05, point 1.6 ; T 1535/10, point 1.5.2).



In addition, unless otherwise provided for, if an employee has an authorisation to accept over mail for the representative's office this means that the employee has a right to take in mail for any one of the representatives working there, at least as long as the representative's office name is on the address label. Any other interpretation would not make any sense. As a matter of fact in any of a granting, opposition or appeal procedure, when a representative is designated, this is in general a single natural person (representative) of a bigger law firm with a certain number of representatives. If the representative in the present case were right in his assumption, this would mean that the mail sent by the EPO would never be notified until the particular representative was informed of it. This would lead to inextricable difficulties for determining the date of notification, and the representative could pick and choose at will the day on which it would like the notification to have taken place.

3. The appellant further submitted that in Sweden, where notification by post is concerned, it makes a difference whether on the address label the name of the representative is mentioned first and the name of the representative's office second, or vice-versa. In the first case, the mail must be delivered to the very person named and in the second case it can be delivered to its office. In the present case this would mean that the decision was delivered to a person not authorised to accept it.

Pursuant to Rule 126(2) EPC last part of the only sentence, "in the event of any dispute, it shall be

incumbent on the EPO to establish that the letter has reached its destination or to establish the date on which the letter was delivered to the addressee, as the case may be."

In the opinion of the Board, this, however, cannot mean that it is the duty of the EPO to start enquiries as soon as a party, against the evidence on file, considers that the mail has not been properly notified. The EPO, and the Boards of appeal in particular, cannot be expected to undertake exhaustive investigations to establish on their own the date of notification in the absence of serious doubts. This would de facto amount to allowing any party to request the EPO to prove that notification has duly been effected whenever the party feels it advantageous to do so. This cannot be the aim of this rule.

In the present case, the Board considers that no serious doubts exist. Once again, the advice of delivery has been returned to the EPO in due time, the date of reception of the mail is duly indicated (17 August 2010) on the advice of delivery and the employee who accepted the mail was indisputably authorised to accept mail for the representative's office.

In such a case, if the representative still considers that notification has not been correctly effected it is up to him to bring convincing evidence as to the contrary.

But the appellant did not file any convincing evidence to back up its allegations. In its letter of 22 March 2011, it mentioned two articles of the "Swedish Code of Judicial Procedure Chapter 33", which according to it

would require that "If service is to be done to a single person, the document is handed over to him."

In the absence of any argument in this respect from the appellant's side, the Board fails to see why the Swedish Code of Judicial Procedure would have any relevance when it comes to deciding to whom a registered letter of an administrative body should be delivered by the postal services.

It is further to be noted that case T 743/05 also concerned a Swedish representative, that the name of the representative and the representative's office name and address were in the same format as in the present case, and that this issue did not play any role. This casts further doubts as to the relevance of the representative's argument.

Moreover, if the two articles of the Swedish Code of Judicial Procedure cited by the appellant were applicable, they do not make any reference to a difference of treatment between pieces of mail having either the name of the person or the name of the person's place of employment cited first on the address label. In other words even if they were applicable to registered letters of an administrative body, the cited articles fail to deal with the present situation.

Hence, in the present case, on the basis of the filed evidence, the Board cannot see any difference, when it comes to notification, between an address label with either the name of the representative or the name of his office in the first position, as in both cases the name of the representative's office is on the label.

4. The appellant further submitted that the date of notification to be considered should be the date indicated by him on the EPO Form 2936, namely the 3 September 2011.

This form was introduced by the EPO in order to facilitate the establishment of the date of notification in cases in which the advice of delivery is either not returned to the EPO or is returned but without being completed at the receiving end (see Notice of the European Patent Office dated 10 June 2010 in Official Journal EPO 7/2010, page 377).

In the present case the advice of delivery was duly completed and returned to the EPO, so that the date on Form 2936 is of no importance.

5. Hence, pursuant to Rule 101(1) EPC in combination with Articles 106 to 108 EPC, the appeal must be considered inadmissible.

6. Questions to the Enlarged Board of appeal

At the oral proceedings the appellant filed a set of questions to be referred to the Enlarged Board of appeal, should the Board intend to dismiss the appeal as inadmissible.

It is within the discretionary power of the Board to refer questions, ex officio or filed by the parties, to the Enlarged Board of Appeal, if it considers it necessary to ensure uniform application of the law or if a point of law of fundamental importance arises (Article 112 (1) EPC). In this case the Board sees no

convincing arguments to do so. The questions, submitted by the appellant, are neither of fundamental importance nor can the Board identify a non uniform application of the law. In fact, the opposite is correct, as is clear from the established case law of the Boards of Appeal. Even the appellant could not substantiate during the oral proceedings, why his questions justify a referral.

For this reason the Board decided not to admit the submitted questions into the proceedings.

## **Order**

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

1. The appeal is rejected as inadmissible.
2. The appellant's request to refer questions to the Enlarged Board of Appeal is not admitted.

The Registrar:

The Chairman:

D. Hampe

M. Noël