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D E C I S I O N
of 22 May 2002

Case Number: T 1004/00 - 3.2.4

Application Number: 97111768.4

Publication Number: 0808641

IPC: A62B 18/08

Language of the proceedings: EN

Title of invention:
Convenient drop-down respirator

Applicant:
MINNESOTA MINING AND MANUFACTURING COMPANY

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 76(1), 111(1)

Keyword:

"Extension of subject-matter beyond content of earlier
application - no"
"Remittal to first instance"

Decisions cited:

-

Catchword:

-



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Boards of Appeal

Chambres de recours

Case Number: T 1004/00 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 22 May 2002

Appellant: MINNESOTA MINING AND MANUFACTURING COMPANY
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Representative: VOSSIUS & PARTNER
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 16 May 2000
refusing European patent application
No. 97 111 768.4 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: C. A. J. Andries
Members: M. G. Hatherly
H. Preglau

Summary of Facts and Submissions

- I. On 26 July 2000 the appellant (applicant) filed a notice of appeal against the examining division's decision of 16 May 2000 refusing the European patent application No. 97 111 768.4 (a divisional application of European patent application 94 925 780.2) for contravention of Article 76(1) EPC.

The appeal fee was paid simultaneously and the statement of grounds of appeal was received on 5 September 2000.

- II. Provisionally considering that the divisional application indeed contravened Article 76(1) EPC, the board summoned the appellant to oral proceedings and gave reasons in the annex to the summons.

The appellant replied with a new set of claims to overcome the Article 76(1) EPC objections.

The oral proceedings were then cancelled.

- III. The independent claim 1 now reads:

"A device (15) through which a fluid passes to enter a person's breathing track, the device (15) comprising:

(a) a body that is sized to fit over the nose and mouth of the person; and

(b) a harness (10) for supporting the body (20) from the wearer's head, the harness (10) being attached to the body (20), and comprising:

(i) a flexible strap (14);

(ii) an element (12) having a curved elongated slot (16) through which the strap (14) slidably passes, the strap (14) frictionally engaging the element (12) as the strap (14) slidably passes therethrough so that the body can be provisionally supported over the person's nose and mouth by the frictionally engagement between the element (12) and strap (14) without further support from another source, the frictional engagement also allowing for selective suspended positioning of the body on the strap (14) and for deliberate sliding of the strap (14) through the element (12); and

(iii) a fastener other than the element (12) (ii) attached to the strap (14) to support the body over the person's nose and mouth more snugly than provided by the frictional engagement between the element (12) and the strap (14)."

IV. The appellant requests that the decision of the examining division be set aside and that the case be remitted to the first instance for further prosecution on the basis of the following version:

- claims 1 and 2 filed with the letter of 16 May 2002,
- description pages 1 to 6 as originally filed on 10 July 1997, and
- drawings sheets 1/3 to 3/3 as originally filed on 10 July 1997.

Reasons for the Decision

1. The appeal is admissible.
2. The present European patent application 97 111 768.4 is a divisional application of European patent application 94 925 780.2 (the parent application) which has the European publication number EP-A-0 719 165 and was published by WIPO under International publication number WO-A-95/07734.

Article 76(1) EPC states that the "European divisional application ... may be filed only in respect of subject-matter which does not extend beyond the content of the earlier application as filed".

Therefore the divisional application as originally filed on 10 July 1997 needs to be compared with WO-A-95/07734.

3. The examining division refused the divisional application for contravention of Article 76(1) EPC because claim 1 as originally filed on 10 July 1997 did not specify:

a1 that the strap is flat

a2 that the strap is flexible, and

b that the element contains a curved elongated slot.

4. The current claim 1 filed with the letter of 16 May 2002 is the same as that originally filed on 10 July 1997 except that

- a2 section (i) is amended from "a strap (14)" to "a flexible strap (14)", and
 - b the words "having a curved elongated slot (16)" are added in the first line of section (ii) to describe element (12).
5. The examining division's objections set out in the above section 3.a2 and 3.b are overcome by the current claim 1. There remains only objection 3.a1.
6. *Objection 3.a1*
- 6.1 While each of the independent claims 1 and 9 of WO-A-95/07734 specifies that the strap is flat, there is a further independent claim in WO-A-95/07734, i.e. claim 12, which reads:

"A method of placing a respirator body over the nose and mouth of a person, which comprises:
pulling on a strap that assumes a tortuous configuration as the strap passes through a curved elongated slot in an element that is part of a harness assembly of a respirator, the assumed tortuous configuration causing the strap to frictionally engage the element, the strap being pulled through the curved elongated slot to an extent sufficient to position the respirator body over the nose and mouth of the person, the frictional engagement of the strap with the element being sufficient to allow the respirator to maintain the position over the nose and mouth of the person without further support from another source."

- 6.2 Thus the independent claim 12 of WO-A-95/07734 does not require the strap to be flat, therefore this feature is not an essential feature of WO-A-95/07734 and so does not have to be contained in the independent claim of the present divisional application. Its omission from the claim 1 filed with the letter of 16 May 2002 therefore does not contravene Article 76(1) EPC.
7. Claim 2 filed with the letter of 16 May 2002 is the same as that originally filed on 10 July 1997 against which the examining division made no objection.
8. Accordingly each valid objection given for refusing the application has been overcome by the present claim 1.
9. The board will not itself examine the application further but, in order to preserve the right of the appellant to argue before two instances, will remit the case to the first instance for further prosecution (Article 111(1) EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution on the basis of the following version of the application:
 - claims 1 and 2 filed with the letter of 16 May 2002,
 - description pages 1 to 6 as originally filed on 10 July 1997, and
 - drawings sheets 1/3 to 3/3 as originally filed on 10 July 1997.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries