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**D E C I S I O N**  
**of 24 September 2001**

**Case Number:** T 0768/01 - 3.2.1

**Application Number:** 95115032.5

**Publication Number:** 0706004

**IPC:** F16K 17/04

**Language of the proceedings:**EN

**Title of invention:**

Relief valve

**Applicant:**

Bayer Corporation

**Opponent:**

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**Headword:**

-

**Relevant legal provisions:**

EPC Art. 109, 113(1)

EPC R. 67

**Keyword:**

"Right to be heard (yes) - passage of document not mentioned  
in the communication"

"Interlocutory decision reimbursement of appeal fee (no)"

**Decisions cited:**

J 0032/95, T 0162/82

**Catchword:**

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Boards of Appeal

Chambres de recours

**Case Number:** T 0768/01 - 3.2.1

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.1**  
**of 24 September 2001**

**Appellant:** Bayer Corporation  
100 Bayer Road  
Pittsburg, PA 15205-9741 (US)

**Representative:** Burkert, Frank  
Bayer AG  
Konzernbereich RP  
Patente und Lizenzen  
D-51368 Leverkusen (DE)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 30 November 2000  
refusing European patent application  
No. 95 115 032.5 pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** F. Gumbel  
**Members:** S. Crane  
G. Weiss

## **Summary of Facts and Submissions**

- I. European patent application No. 95 115 032.5 was refused by the Examining Division with its decision posted 30 November 2000.

The reason given for the decision was that the subject-matter of claim 1 under consideration lacked novelty with respect to the document DE-A-3 209 643 (D2).

- II. A notice of appeal against this decision was filed on 8 February 2001 and the fee for appeal paid at the same time. The statement of grounds of appeal was filed on 9 April 2001.

The appellants (applicants) argued that the taking of the decision under appeal had violated their right to be heard, but did not contest its substantial validity. They requested the grant of a patent on the basis of a new set of claims filed with the statement of grounds of appeal and reimbursement of the appeal fee

- III. With a communication posted on 16 July 2001 the Examining Division indicated that rectification of the decision under appeal had been ordered but that the request for reimbursement of the appeal could not be allowed. This request would therefore be forwarded to the Board of Appeal for a decision.

## **Reasons for the Decision**

1. The appeal meets the formal requirements of Article 106 to 108 and Rules 1(1) and 64 EPC. It is therefore

admissible.

2. In accordance with the findings of decision J 32/95 (OJ EPO 1999, 713) the case has been forwarded to the Board to deal solely with the request for reimbursement of the appeal fee, interlocutory revision having been granted by the Examining Division

The appellants base their request for reimbursement on two complaints about the way the Examining Division operated. The first is that the application was refused after a single communication "without preliminary warning" thus allegedly not conforming with the practice set out in the Guidelines C-VI, 4.3. The second is that the decision was based on a document only briefly mentioned in the communication and on a passage of this document not mentioned in the communication at all.

Since the Boards have repeatedly stated that refusal after one communication is in order providing that the requirement of Article 113(1) EPC of the right to be heard is met, see for example T 162/82 (OJ EPO 1987, 533), it is only the second complaint which needs to be considered in any detail.

In the communication of the Examining Division posted on 24 June 1999 the objection of lack of novelty of the subject-matter of claim 1 as originally filed was raised with respect to both US-A-3 844 529 (D1) and document D2. The objection with respect to document D1 is fully argued, that with respect to document D2 less extensively, but in the opinion of the Board is nevertheless clear in its terms, particular reference being made to Figure 1 and page 4 of the description

with certain features of the claimed subject-matter being correlated by means of the corresponding reference numerals to elements found in the prior art disclosure. It is to be noted in this context that document D2 is quite short, there is only one Figure and the description of it extends to little more than half a page.

In response to this communication the appellants filed an amended main claim which had been put into two-part form but otherwise corresponded in content to that originally filed. With respect to the document D2 it was argued that this did not disclose a passively acting relief valve as closure was by pressure of a spring and opening by vacuum.

In its decision refusing the application the Examining Division countered this argument of the appellants by referring to the last paragraph of page 4 of document D2. It is the contention of the appellants that the contents of this paragraph constitutes evidence on which they had no opportunity of presenting their comments. Given the nature of the cited prior art document as explained above and the way it was referred to in the communication of the Examining Division the Board cannot agree. The passage involved is not hidden away in a lengthy document, referred to only cursorily in the communication, but is instead an integral part of the short piece of text specifically cited therein ("page 4"). In the circumstances it cannot therefore be reasonably argued that the appellants were not previously made aware of the evidence on which the contested decision relied. The requirement of Article 113(1) EPC was accordingly met.

**Order**

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

The request for reimbursement of the appeal fee is rejected

The Registrar:

The Chairman:

S. Fabiani

F. Gumbel