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D E C I S I O N
of 19 February 2003

Case Number: T 1274/01 - 3.2.4

Application Number: 97904657.0

Publication Number: 0824309

IPC: A01K 29/00

Language of the proceedings: EN

Title of invention:
A method of treating animals, in particular feeding same

Patentee:
MAASLAND N.V.

Opponents:
DeLaval International AB
Prolion B.V.

Headword:
Weight pattern/MAASLAND

Relevant legal provisions:
EPC Art. 100(c), 123, 111(1)
EPC R. 71(2)

Keyword:
"Main request: subject-matter extending beyond the content of the application as filed"
"Auxiliary request: remittal for further prosecution"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1274/01 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 19 February 2003

Appellant: (Proprietor of the patent)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 23 November 2001 revoking European patent No. 0 824 309 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: C. A. J. Andries
Members: P. Petti
C. Holtz

Summary of facts and submissions

I. The European patent No. 824 309, against which two oppositions (based *inter alia* upon Article 100(c) EPC) were filed, was revoked by the decision of the opposition division dispatched on 23 November 2001.

During the opposition proceedings the opposition division dealt with the ground for opposition according to Article 100(c) EPC. In its decision the opposition division found that the amendments made by the proprietor of the patent during the opposition proceedings contravened the requirements of Article 123 EPC.

II. On 3 December 2001 the proprietor of the patent (hereinafter appellant) lodged an appeal against this decision and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 28 March 2002.

III. Oral proceedings were held on 19 February 2003.

Opponent II (hereinafter respondent II), who had not replied to the statement setting out the grounds of appeal and who had been duly summoned to the oral proceedings, informed the board with the letter dated 15 January 2003 that he would not attend the oral proceedings. Respondent II indeed did not appear at the oral proceedings which, according to Rule 71(2) EPC, were continued without him.

IV. During the oral proceedings the appellant filed two amended independent claims which were indicated respectively as "Claim 1 of the main request" and

"Claim 1 of the first auxiliary request".

Claim 1 of the main request reads as follows:

"1. An implement for treating animals, comprising a computer (4), in the memory of which a predetermined desired weight pattern for the animals or groups of animals is stored over a relatively long period of time, as well as weighing means (17, 18,19) suitable for weighing an animal one or more times per 24 hours, such that in the computer (4), on the basis of the measured weight of an animal and earlier established weight values, there is determined an average, and a weight interval taking into account the weight of a varying contents of the digestive tract and the udder around this average value, while there is additionally provided an automatic feeding installation (5) for automatically supplying fodder to the animal, such that, when the weight value stored in the memory being applicable for that moment falls outside the established weight interval, the quantity of feed to be distributed to the animal will be adjusted, characterized in that, when there occurs a sudden decrease in weight of an animal because of which the upper limit of the weight interval (J) comes below the weight value desired and in a number of consecutive times a further decreasing weight below the lower limit of weight interval (J) has been measured, an attention signal is supplied by a computer (4) indicating that the animal may be ill which can be combined in the computer with other signals indicating similar phenomena, such as signals supplied by a mastitis detector, or with signals supplied by a pedometer."

Claim 1 of the first auxiliary request reads as follows:

"1. An implement for treating animals, comprising a computer (4), in the memory of which a predetermined desired weight pattern for the animals or groups of animals is stored over a relatively long period of time, as well as weighing means (17, 18,19) suitable for weighing an animal one or more times per 24 hours, such that in the computer (4), on the basis of the measured weight of an animal and earlier established weight values, there is determined an average, and a weight interval taking into account the weight of a varying contents of the digestive tract and the udder around this average value, while there is additionally provided an automatic feeding installation (5) for automatically supplying fodder to the animal, such that, when the desired weight value stored in the memory being applicable for that moment falls outside the established weight interval, the quantity of feed to be distributed to the animal will be adjusted, characterized in that, when there occurs a sudden decrease in weight of an animal because of which the upper limit of the weight interval (J) comes below the weight value desired and in a number of consecutive times a further decreasing weight below the lower limit of weight interval (J) has been measured, then, without increasing immediately the supply of feed, an attention signal is supplied by a computer (4) indicating that the animal may be ill which can be combined in the computer with other signals indicating similar phenomena, such as signals supplied by a mastitis detector, or with signals supplied by a pedometer."

V. The appellant requested that the impugned decision be set aside and a patent be maintained on the basis of Claim 1 of either the main request or the first auxiliary request (as filed during the oral proceedings) and of Claims 2 and 3 as submitted with the letter of 26 September 2001.

Opponent I (hereinafter respondent I) requested that the appeal be dismissed.

VI. The appellant argued that the independent claims of both the main and the auxiliary requests did not contravene the requirements of Articles 100(c) and 123 EPC.

Respondent I argued that the ground for opposition mentioned in Article 100(c) EPC prejudiced the maintenance of the patent on the basis of the independent claims of both requests of the appellant and that the amendments made to arrive at these independent claims contravened the requirements of Article 123 EPC.

Reasons for the decision

1. The appeal is admissible.

2. *The claimed subject-matter*

2.1 The independent claims of both requests of the appellant have been derived from Claim 8 of the patent as granted which contains a reference to the preceding method claims 1 to 7 but which is itself directed to an implement for treating animals, having

the following features:

(A^{PG}) in the implement, the method as claimed in any of the preceding claims can be applied;

(B^{PG}) the implement comprises a computer (4), in the memory of which a predetermined weight pattern for the animals or groups of animals is stored over a relatively long period of time;

(C^{PG}) the implement comprises weighing means (17, 18, 19), such that in the computer (4), on the basis of the measured weight of an animal and earlier established weight values, there is determined an average, and a weight interval taking into account the weight of a varying contents of the digestive tract and the udder around this average value;

(D^{PG}) there is additionally provided an automatic feeding installation (5) for automatically supplying fodder to the animal, such that, when the weight value stored in the memory being applicable for that moment falls outside the established weight interval, the quantity of feed to be distributed to the animal will be adjusted;

(E^{PG}) a further decreasing weight below a limit weight interval (J) results in an attention signal supplied by a computer (4) indicating that the animal may be ill or on heat which can be combined in the computer with other signals indicating similar phenomena, such as signals supplied by a mastitis detector, or with signals

supplied by a pedometer.

2.1.1 According to Claim 8 as granted (see feature A^{PG}), in the implement "the method as claimed in **any** of the preceding claims can be applied" (emphasis added). This implies that each component of the implement defined by Claim 8 has to be suitable for carrying out a corresponding activity or function as defined either by Claim 1 or by each of the possible combinations defined by dependent Claims 2 to 7 (due to the fact that Claim 2 refers to Claim 1, Claim 3 to Claims 1 or 2 and Claim 4 to 7 to any one of the preceding claims).

2.1.1.1 Respondent I argued that the expression "in any of the preceding claims" as well as the expression "in any one of the preceding claims" imply that the implement defined by Claim 8 has to be suitable for carrying out the functions defined not only by Claim 1 but also by dependent Claims 2 to 7, ie the functions referred to in all preceding Claims 1 to 7.

Having regard to the following reasons, this argument of the respondent is based upon an incorrect interpretation of the expression "any of the preceding claims" which is not supported by the description of the patent as granted:

(i) The expression "any of the preceding claims" does not indicate in a clear way the number of claims to which is referred to. The common meaning of the word "any" is "one, some or all indiscriminately of whatever quantity" (see for instance "Webster's Ninth New Collegiate Dictionary", Springfield, Mass, 1983). Thus, the

above mentioned expression can be interpreted as relating to at least Claim 1.

(ii) The patent as granted contains an independent Claim 1 directed to a method and claims 2 to 7, each of which contains a reference to one or several previous claims. These references to a previous claim define a plurality of combinations of features, each of which concerns a particular embodiment of the method defined by Claim 1.

The introductory part of the description of the patent as granted defines the problem to be solved (column 1, line 58 to column 2, line 2) and contains three passages referring to the invention as claimed in Claims 1 to 7 (see column 2, line 3 to column 3, line 17), wherein the first passage (column 2, lines 3 to 11) refers to Claim 1 while the remaining passages refer to Claims 2 to 7. It can be clearly understood from these passages that the dependent claims 2 to 7 define "preferred" features, ie features which are not essential to the solution of the problem as defined in the paragraph bridging columns 1 and 2, see for instance column 2, lines 24 to 27 ("... it is preferred to establish ...") and lines 28 to 38 ("The period ... will preferably comprise at least the period of lactation ...").

The above mentioned passages are followed by a sentence relating to Claim 8 and stating that "the invention also relates to an implement ... in which implement **the above-described method**

can be applied" (column 3, lines 18 to 21; emphasis added). Since the preceding passages define the features of the dependent Claims 2 to 7 as "preferred" features, it is clear that "the above described method" referred to in relation to Claim 8 cannot be interpreted as the method comprising all the features specified in Claims 1 to 7.

2.1.2 It is clear from feature B^{PG} that there is "a predetermined weight pattern for the animals or groups of animals" and that this pattern is stored in the memory of a computer. Moreover, in feature B^{PG} the expression "over a relatively long period of time" follows the expression "a predetermined weight pattern for the animals or groups of animals is stored".

Since feature D^{PG} refers to "the weight value stored in the memory being applicable for that moment", it must be understood that there is a period of time over which the weight pattern has been determined (ie a predetermined period of time).

The introductory part of the description of the patent (column 3, lines 18 to 24) refers to the implement according to Claim 8 and defines the implement as being "provided with a computer, in the memory of which ... a predetermined weight pattern over a relative long period of time is stored". Moreover, this weight pattern is represented by the curve C in Figures 2A to 2D as a pattern extending over a period of time. Furthermore, the part of the description of the patent which specifically refers to these figures (see column 5, lines 36 to 39)

refers either to a "desired weight pattern over the whole year" or to a "desired weight pattern over the lactation period". In other words, the description of the patent consistently refers to a "weight pattern" over a period of time, in so far as the expression "weight pattern" is followed either from the expression "over a relative long period of time" or from the expression "over the whole year" or from the expression "over the lactation period".

Therefore, the expression "over a relatively long period of time" in feature B^{PG} has to be interpreted as defining the period of time over which the weight pattern has been determined.

2.1.2.1 According to the respondent, it is clear from feature B^{PG} that the expression "over a relatively long period of time" relates solely to the storage of the pattern, ie to the period of time over which the weight pattern is stored and there is no need to use the description and drawings of the patent to interpret Claim 8 of the patent as granted since the claim is clear. In this respect, the appellant argued that according to the Protocol on the Interpretation of Article 69 EPC the description and drawings of the patent have to be employed **only** for the purpose of resolving an ambiguity found in a claim.

The board cannot accept this argument for the following reasons:

Article 69 EPC relates to the interpretation of the claims in order to determine the extent of protection conferred by the terms of the claims. Article 69(1) EPC refers to "the terms of the claims" as well as to

the description and drawings ("The extent of protection ... shall be determined by the terms of the claims. Nevertheless, the description and drawings shall be used to interpret the claims"). According to the Protocol on Interpretation, "Article 69 should not be interpreted in the sense that the extent of the protection ... is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawing being employed only for the purpose of resolving an ambiguity found in the claims".

Thus, already Article 69 EPC itself states that - in order to determine the scope of protection of a claim - the description and drawing shall be used to interpret the claim. The Protocol on Interpretation adds the clarification that they shall be used to interpret the claim even if there is no ambiguity in the claim.

Moreover, it has to be noted that the claims of a patent application represent generalisations of specific embodiments of an invention as disclosed in the description of the patent application and that, therefore, they cannot be considered as being isolated from the context of the description and drawings from which they are derived. The presence of a link between claims and description can also be deduced from Article 84 EPC in so far as this article requires that the claims shall be not only "clear" but also "supported by the description".

2.1.3 According to feature D^{PG}, the quantity of feed to be distributed is adjusted when the desired value falls

outside of the weight interval. Having regard to the description of the patent (see column 2, lines 50 to 57), it has to be understood that the quantity of feed is decreased when the weight of the animal (as represented by the average) is increasing (ie when the lower limit of the weight interval has come above the desired weight value) and is increased when the weight of the animal (as represented by the average) is decreasing (ie when the upper limit of the weight interval has come below the desired weight value).

2.2 Claim 8 of the patent as granted has been derived from Claim 8 of the application as filed (WO-A-97/31526) which is directed to an "implement for treating animals, in which implement the method as claimed in any one of the preceding claims can be applied" (feature A^{Aaf}) and which specifies, instead of feature B^{PG}, C^{PG} and D^{PG}, the following features:

(B^{Aaf}) there is provided a computer (4), in the memory of which for the animals or groups of animals a predetermined weight pattern over a relatively long period of time is stored;

(C^{Aaf}) there is provided a weighing means (17, 18, 19), whereby in the computer (4), on the basis of the measured weight of an animal and earlier established weight values, there is determined an average, and a weight interval taking into account the weight of a varying contents of the digestive tract and the udder around this average value,

(D^{Aaf}) there is additionally provided an automatic feeding installation (5) for automatically

supplying fodder to the animal, whereby, when the weight value stored in the memory being applicable for that moment falls outside the established weight interval, the quantity of feed to be distributed to the animal will be adjusted.

2.3 The independent Claim 1 of the **main request** is directed to an implement for treating animals, having features C^{PG} and D^{PG} as mentioned above as well as the following features B, C1 and E (wherein features B and E replace features B^{PG} and E^{PG} and feature C1 is an additional feature to feature C^{PG}):

(B) the implement comprises a computer (4), in the memory of which a predetermined desired weight pattern for the animals or groups of animals is stored over a relatively long period of time;

(C1) the weighing means (17, 18, 19) are suitable for weighing an animal one or more times per 24 hour;

(E) when there occurs a sudden decrease in weight of an animal because of which the upper limit of the weight interval (J) comes below the weight value desired and in a number of consecutive times a further decreasing weight below the lower limit of weight interval (J) has been measured, an attention signal is supplied by a computer (4) indicating that the animal may be ill which can be combined in the computer with other signals indicating similar phenomena, such as signals supplied by a mastitis detector, or with signals supplied by a pedometer.

2.4 The independent Claim 1 of the **first auxiliary request** differs from Claim 1 of the main request in that features D^{PG} and E have been replaced by the following features:

(D') there is additionally provided an automatic feeding installation (5) for automatically supplying fodder to the animal, such that, when the **desired** weight value stored in the memory being applicable for that moment falls outside the established weight interval, the quantity of feed to be distributed to the animal will be adjusted;

(E') when there occurs a sudden decrease in weight of an animal because of which the upper limit of the weight interval (J) comes below the weight value desired and in a number of consecutive times a further decreasing weight below the lower limit of weight interval (J) has been measured, **then, without increasing immediately the supply of feed,** an attention signal is supplied by a computer (4) indicating that the animal may be ill which can be combined in the computer with other signals indicating similar phenomena, such as signals supplied by a mastitis detector, or with signals supplied by a pedometer.

3. *Admissibility of amendments (main request)*

3.1 Claim 1 of the main request differs from Claim 8 of the patent as granted *inter alia* in that feature E has replaced feature E^{PG}.

This amendment substantially introduces the notion of "sudden decrease in weight of an animal" and defines this "sudden decrease" as a circumstance occurring when two conditions are met, namely when the weight interval (J) comes below the weight value desired (first condition) and when - as already defined by feature E^{PG} - in a number of consecutive times a further decreasing weight below the lower limit of weight interval (J) has been measured (second condition).

It has to be noted that, according to feature D^{PG}, when the first condition is met the quantity of feed supplied to the animal should normally be adjusted, ie be increased (see section 2.1.3 above).

The notion of "sudden decrease in weight of an animal" can only be found in the first sentence of the last paragraph of the description of the application as filed (see page 8, lines 3 to 26). According to this first sentence, "when there occurs a sudden decrease in weight of an animal because of which the upper limit of the weight interval J comes below the weight value desired, then **it is not advisable to increase immediately the supply of food**" (emphasis added). In other words, this first sentence refers to the first condition. The second sentence of this paragraph (page 8, lines 7 to 10: "In Figure 2C the situation is shown in which in a number of consecutive times there has been measured a further decreasing weight ... ") is clearly related to the first one and defines more specifically the "sudden decrease" referred to in the first sentence. The third sentence (page 8, lines 10 to 13: "In that case there has to be supplied ... an attention signal

..."") is clearly related to the first and second sentences and refers to the attention signal.

Thus, it has to be understood from the description of the application as filed that when there occurs a "sudden decrease in weight of an animal" the attention signal is supplied by the computer without increasing immediately the supply of feed, although the condition determining an increase of the feed quantity to be supplied is met.

In other words, the description of the application as filed discloses the generation of an attention signal as the result of a sudden decrease in weight of the animal only in combination with the provision that the feed quantity to be supplied is not immediately increased.

Since feature E encompasses the possibility of generating an attention signal and immediately increasing the supply of feed when both the first and second conditions are met, this feature defines a subject-matter going beyond the content of the application as filed.

3.2 Having regard to the above comments, Claim 1 of the main request contravenes the requirements of Article 123(2) EPC.

Therefore, the main request of the appellant has to be rejected.

4. *Admissibility of amendments (auxiliary request)*

4.1 Claim 1 of the first auxiliary request differs from

Claim 8 of the patent as granted in that

(i) the word "desired" has been added before the expression "weight pattern" in features B^{PG} and before the expression "weight value stored in the memory ..." in feature D^{PG} (see features B and D');

(ii) feature C1 has been added;

(iii) feature A^{PG} been deleted;

(iv) feature E' has replaced feature E^{PG}.

4.1.1 The expressions "desired weight pattern" and "weight value desired" have a clear basis in the application as filed (see for instance page 2, lines 5 and 6 as well as line 14; page 6, lines 28 and 30; page 7, line 26; page 8, line 5).

4.1.2 Feature C1 has a basis in Claim 1 of the application as filed in so far as this claim specified that "an animal is weighed one or more times per twenty-four hours".

4.1.3 Having regard to the comments in section 2.1.1 above the implement according to Claim 8 as granted is suitable for carrying out the method according to at least Claim 1 as granted. The implement according to Claim 1 of the auxiliary request is provided with components (computer, weighing means, feeding installation) each performing one or more functions. Since all the functions specified in Claim 1 of the patent as granted are also specified in Claim 1 of the auxiliary request, the suppression of feature A^{PG}

does not result in an extension of the protection.

The respondent argued that the suppression of feature A^{PG} resulted in an extension of the scope of Claim 1 beyond that of Claim 8 of the patent as granted, because the implement according to Claim 8 as granted was suitable for carrying out the method as defined in all the preceding claims 1 to 7, while the implement according to Claim 1 of the auxiliary request is defined as being suitable for performing only the functions defined in Claim 1 of the patent as granted.

The board cannot accept this argument because, having regard to comments in section 2.1.1.1 above, it is based upon an incorrect interpretation of the expression "as claimed in any of the preceding claims".

4.1.4 Feature E' is more specific than feature E^{PG} and has a clear basis in a passage of the description of the application as filed, see page 8, lines 3 to 13.

4.2 Therefore, the amendments concerning Claim 1 of the auxiliary request do not contravene the requirements of Articles 123(2) and (3) EPC.

5. *The ground of opposition according to Article 100(c)* EPC

5.1 Claim 1 of the auxiliary request differs from Claim 8 of the application as filed,

not only in that

(i) the word "desired" has been added before the expression "weight pattern" in features B^{Aaf} and before the expression "weight value stored in the memory ..." in feature D^{Aaf} (see features B and D'),

(ii) feature C1 has been added,

(iii) feature A^{Aaf} has been deleted,

(iv) feature E' has replaced feature E^{Aaf},

but also in that

(v) the expression "a predetermined desired weight pattern for the animals or groups of animals is stored over a relatively long period of time" (in feature B) has replaced the expression "for the animals or groups of animals a predetermined weight pattern over a relatively long period of time is stored" (in feature B^{Aaf}),

and

(vi) the expression "such that" (in features C^{PG} and D) has replaced the expression "whereby" (in features C^{Aaf} and D^{Aaf}.

5.1.1 Having regard to the comments in sections 4.1.1 to 4.1.4 above, the amendments according to items 5.1.(i) to 5.1.(iv) have a basis in the application as filed.

5.1.2 Having regard to the comments in sections 2.1.2

and 2.1.2.1 above, the expression "a predetermined weight pattern for the animals or groups of animals is stored over a relatively long period of time" has the same meaning in the patent in suit as the expression "for the animals or groups of animals a predetermined weight pattern over a relatively long period of time is stored". Therefore, feature B has a basis in Claim 8 of the application as filed.

5.1.3 The expression "such that" in the context of either feature C^{PG} or feature D is equivalent to the expression "whereby" in features C^{Aaf} and D^{Aaf} in so far the expression does not change the meaning of the respective feature.

5.2 Therefore, the ground for opposition according to Article 100(c) EPC does not prejudice the maintenance of the patent on the basis of Claim 1 of the auxiliary request.

6. The respondents also referred in their notices of opposition to the grounds for opposition according to Articles 100(a) and (b) EPC, these grounds not having been dealt with in the decision under appeal.

Therefore, the Board exercising the discretional power according to Article 111(1) EPC remits the case to the opposition division for further prosecution on the basis of the first auxiliary request of the appellant.

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 Claim 1 of the first auxiliary request as submitted in the oral proceedings and of Claims 2 and 3 as filed with the letter dated 26 September 2001.

The Registrar: The Chairman:

G. Magouliotis C. Andries