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D E C I S I O N
of 18 March 2005

Case Number: T 0302/03 - 3.2.4

Application Number: 95201261.5

Publication Number: 0682861

IPC: A01J 5/08

Language of the proceedings: EN

Title of invention:

A construction including an implement for milking animals and
a method of automatically doing same

Patentee:

MAASLAND N.V.

Opponent:

I: DeLaval International AB Patent & Trademark Department

II: Prolion B.V.

Headword:

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Relevant legal provisions:

EPC Art. 56, 100(a)

EPC R. 71(2)

Keyword:

"Novelty (yes)"

"Inventive step (no)"

Decisions cited:

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Catchword:

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Case Number: T 0302/03 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 18 March 2005

Appellant: MAASLAND N.V.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 3 February 2003
revoking European patent No. 0682861 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: C. Scheibling
T. Bokor

Summary of Facts and Submissions

- I. By its decision dated 3 February 2003 the Opposition Division revoked the patent for lack of novelty of the subject-matter of claim 1 with respect to D2: DE-A-36 09 275. On 26 February 2003 the Appellant (patentee) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 10 June 2003.

- II. The opposition was founded on Article 100(a) (Articles 54 and 56 EPC), (b) and (c) EPC. Additionally, a fresh ground for opposition based on Article 52(4) EPC was raised by Respondent I (opponent I).

- III. Oral proceedings took place on 18 March 2005. Although duly summoned, Respondent II (opponent II) did not appear. Indeed he informed the Board that he will not attend the oral proceedings by facsimile dated 16 December 2004. According to the provisions of Rule 71(2) EPC the proceedings were continued without him.

- IV. The Appellant (patentee) requested that the decision under appeal be set aside and that the patent be maintained on the basis of a sole request comprising claims 1 and 2 filed with letter of 10 June 2003.

- V. The independent Claim 1 reads as follows:

"1. A method of automatically milking animals, in which use is made of pressure adjustment means and of teat cups provided with a teat cup lining which separates the teat chamber of a teat cup from one or more

chambers in the teat cup, wherein an alternating underpressure is applied, the pressure in each of the chambers or in the milk line connected to the teat cup being controlled by a computer in dependence on the animal and/or on the udder quarter, said method comprising the step of updating the milk yield and the physical circumstances of the animal such as they were found in previous milking runs, characterized in that the pressure in one or more chambers or in the milk line connected to the teat cup depends on the fact whether or not mastitis has been established in a relevant udder quarter."

- VI. The Appellant mainly argued as follows: In D2 there is no teaching of the pressure being dependent of the fact whether or not mastitis has been established. Therefore, novelty of claim 1 is given. Since mastitis is not established in D2, and since reduced milk flow is not indicative of mastitis, a skilled person starting from D2 would not arrive at the subject-matter of claim 1.
- VII. Respondent I (opponent I) contested the arguments of the Appellant mainly by arguing as follows:
D2 discloses all the features of the prior art portion of claim 1. Mastitis which is part of the physiology of the animal is known beforehand and is not established by the claimed method. However, since mastitis infection reduces the milk flow and D2 discloses adapting the vacuum in the milk line in dependence of the milk flow, the pressure in the milk line and in the teat cup will depend on whether or not the relevant udder quarter has mastitis. Therefore, the subject-matter of claim 1 is not new or at least does not involve an inventive step.

VIII. Respondent I requested that the appeal be dismissed.

IX. In its written submission, Respondent II referred to the arguments presented in the notice of opposition having regard to claim 2 as granted and requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

2. *Novelty:*

2.1 In D2 there is no disclosure of the pressure being dependent on the fact that mastitis has been established or not in a relevant udder quarter.

2.2 Respondent I argued that the method of the patent in suit does not comprise the step of "establishing mastitis" and that therefore, mastitis had to be established beforehand. The fact that a particular cow has been infected by mastitis is a physiological fact which has no influence on the milking machine.

The Board does not share this point of view, since the step of establishing whether there is mastitis or not is used in the claimed method to regulate the pressure in one or more chambers or in the milk line connected to the teat cup and is thus, an essential step of the claimed method.

2.3 Thus, subject-matter of claim 1 is novel with respect to D2.

3. *Inventive step:*

3.1 D2 is the closest prior art document.

D2 discloses a method of automatically milking animals (column 2, lines 26, 27), in which use is made of pressure adjustment means (column 6, lines 37 to 48) and of teat cups provided with a teat cup lining which separates the teat chamber of a teat cup from one or more chambers in the teat cup (Figure 1); in this known method an alternating underpressure is applied, the pressure in each of the chambers or in the milk line connected to the teat cup being controlled by a computer in dependence on the animal and/or on the udder quarter (column 7, lines 5 to 15); the milk yield and the physical circumstances of the animal such as they were found in previous milking runs are updated (column 7, lines 33 to 37 and 46, 47); furthermore, the pressure in one or more chambers or in the milk line connected to the teat cup depends on the calculated milk yield and the actual milk flow (column 4, lines 5 to 11; claim 1).

3.2 Thus, the method of automatically milking animals according to claim 1 differs from that of D2 in that the pressure in one or more chambers or in the milk line connected to the teat cup depends on the fact whether or not mastitis has been established in a relevant udder quarter.

- 3.3 The problem to be solved by the European patent may be seen in providing a method of automatically milking animals, in which an agreeable situation is created even for individual animals having mastitis whilst simultaneously an optimum milk production can be obtained (see paragraph [0003] of the patent specification).
- 3.4 However, the problem solved by D2 is also to adapt the milking parameters so that, under the given circumstances a speedy and gentle milking operation and a complete milk release can be obtained (column 4, lines 1 to 11).
- 3.5 A skilled person knows that symptoms of mastitis are, among others, swollen or irritated udder and teats, so that a gentle treatment of the teats is more particularly required.

Therefore, it lies within the normal capabilities of a skilled person to adjust the pressure during milking in one or more chambers of the teat cups or in the milk line connected to the teat cups as indicated in D2, when mastitis has been established, so as to avoid or reduce irritation and to obtain a speedy and gentle milking operation.

- 3.6 The Appellant argued that even if mastitis results in reduced milk flow, such reduced milk flow alone is not indicative of mastitis. Therefore, in D2 mastitis cannot be established by deduction. Moreover, the aim of D2 is to avoid mastitis by providing for a gentle and harmless milking operation. D2 does not give any

indication as to how to proceed, should a cow be infected by mastitis.

The Board cannot agree to this. The aim of D2, as indicated page 3, line 63 to page 4, line 11, is to adapt the milking parameters so that, under the given circumstances (and there is no indication that they are specifically limited to healthy animals) a speedy and gentle milking operation and a complete milk release can be obtained. Even if D2 does not specifically indicate how to proceed when mastitis has been detected, since mastitis results in a reduced milk flow, even in D2, mastitis will ultimately result in having the milking parameters of the infected cow adapted accordingly.

Furthermore, the detection of mastitis infection is a standard control operation, which is normally carried out at the beginning of every milking operation. As already stated, any skilled person in this technical field knows the symptoms of mastitis in particular swollen or irritated udder and teats. Consequently if mastitis has been established possibly routinely, he would immediately realise that swollen or irritated teats require a particular gentle treatment. Accordingly it would be obvious for him to adjust the pressure during milking in one or more chambers of the teat cups as taught by D2 so as to avoid or reduce irritation and to obtain a speedy gentle milking operation.

- 3.7 For the above reasons, the subject-matter of claim 1 of the patent in suit does not involve an inventive step.

4. Thus, the Appellant's sole request is not allowable. Consequently, the question as to whether or not the remaining grounds for opposition are admissible and/or prejudice the maintenance of the patent in suit is irrelevant to the outcome of the present proceedings and therefore, needs not to be investigated any further.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte