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D E C I S I O N
of 12 January 2005

Case Number: T 0968/03 - 3.2.2

Application Number: 94915234.2

Publication Number: 0653927

IPC: A61F 2/38

Language of the proceedings: EN

Title of invention:
Knee Prosthesis with femoral, tibial conformity

Patentee:
Walker, Peter Stanley, et al

Opponent:
Aesculap AG

Headword:
-

Relevant legal provisions:
EPC Art. 100(a)

Keyword:
"Novelty - (no)"

Decisions cited:
-

Catchword:
-

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Case Number: T 0968/03 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 12 January 2005

Appellant: (Proprietor of the patent)
Walker, Peter Stantley, et al
13 Pembroke Road
Moor Park
Middlesex HA6 2HP (GB)

Representative:
Woodcraft, David Charles
Brookes Batchellor
102-108 Clerkenwell Road
London EC1M 5SA (GB)

Respondent: (Opponent)
Aesculap AG
Am Aesculap-Platz
D-78532 Tuttlingen (DE)

Representative:
Böhme, Ulrich, Dr. Dipl.-Phys.
HOEGER, STELLRECHT, & PARTNER Patentanwälte
Uhlandstrasse 14c
D-70182 Stuttgart (DE)

Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted 17 July 2003 revoking European patent No. 0653927 pursuant to Article 102(1) EPC.

Composition of the Board:

Chairman: T. K. H. Kriner
Members: D. Valle
E. J. Dufrasne

Summary of Facts and Submissions

I. The appellant (patentee) lodged an appeal on 16 September 2003, against the decision of the opposition division, posted on 17 July 2003, on the revocation of the European patent No. 653927. The fee for appeal was paid simultaneously and the statement setting out the grounds of appeal was received on 8 November 2003.

II. The opposition division held that the subject-matter of claim 1 filed on 8 July 2003 was not new with respect to:

E1 = EP - A - 0 472 475.

III. Oral proceedings took place on 12 January 2005.

At the end of the oral proceedings the appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of claim 1 filed as auxiliary request 1 with letter dated 30 October 2003 (main request) or, in the alternative, on the basis of claim 1 filed as second auxiliary request with letter dated 25 May 2004 (auxiliary request).

The respondent (opponent) requested that the appeal be dismissed.

IV. Claim 1 of the main request reads as follows:

"Prosthesis which comprises a bicondylar femoral component (41), a tibial component (72) and at least

one meniscal component (42) interposed between the femoral and tibial components, the femoral component including a pair of condyles (46) separated by a patella bearing surface (44) which in use provides a normal anatomical patella lever arm, and formed with condylar bearing surfaces (51), characterized in that the femoral component is formed with notches (43) anteriorly in the condylar surfaces, and the sagital profiles of the conylar bearing surfaces have a substantially uniform radius over the whole condylar bearing surface from terminal superior regions (70) into the notches (43) for substantial conformity with corresponding tibial bearing surfaces (47) of the meniscal component over the normal range of flexion, said notches providing close conformity in extension without affecting the patella bearing surface."

Claim 1 of the auxiliary request differs from claim 1 of the main request in that the features:

"notches anteriorly in the condylar surfaces", and

"the sagittal profiles of the condylar bearing surfaces"

are replaced by the features:

"notch anteriorly in each condylar surface", and

" the sagittal profile of each condylar bearing surface".

V. In support of his requests the appellant relied essentially on the following submissions:

The feature of claim 1 of the present requests, according to which the sagittal profiles of the condylar bearing surfaces have a substantially uniform radius over the whole condylar bearing surface from terminal superior regions into the notches meant that the outline of the condylar bearing surfaces, i.e. the extreme peak value had such a uniform radius. This was supported by the first complete paragraph of page 8, and by Figure 4(b) (which showed the "sagittal profile") of the published application (WO 94/26212).

E1 did not disclose sagittal profiles which had a uniform radius over the whole condylar bearing surface from terminal superior regions into the notches. E1 merely showed, in particular in its Figures 6 and 7, that a condylar contour had a uniform radius extending into the notches. The sagittal profiles, however did not extend into the notches, as it was clearly shown be the dashed line in Figure 6.

Accordingly, the subject-matter of claim 1 of the present requests was novel over the prosthesis disclosed in E1.

VI. The respondent disputed the views of the appellant. His arguments can be summarized as follows:

The term "sagittal profile" contained in claim 1 of the present requests was not originally disclosed and could be interpreted only as meaning the curvature of the condyles over the whole bearing surface in longitudinal direction. Since Figures 6 and 7 of E1 showed exactly such a curvature, which had a uniform radius and

extended into the notch, the subject-matter of claim 1 of the present request was not novel over E1.

Reasons for the Decision

1. The appeal is admissible.

2. *Amendments*

As agreed by the appellant, the expression "sagittal profiles(s)" is not explicitly comprised in the disclosure of the originally filed documents. Therefore it has to be evaluated whether it is implicitly disclosed and, the case being, the meaning of this expression.

With respect to the features referring to the sagittal profile, and according to which the sagittal profile of each condylar bearing surface has a substantially uniform radius over the whole condylar bearing surface from terminal superior regions into the notches (see claim 1 of the main and auxiliary request), page 8, lines 15 to 18 of the published application describes that the curvature of the condyles over the whole bearing surface from the region 70 to the notch 43 has a substantially uniform sagittal radius R. However, there is no information in the published application which could support the appellant’s statement that this curvature unequivocally is defined by the extreme peak value of the condylar bearing surfaces. On the contrary, the curvature over the whole bearing surface from the region 70 to the notch 43 means any curvature over the whole bearing surface in longitudinal

direction. This definition includes as well the curvature shown in Figure 4(b) as also the one as for example shown in Figure 6 of E1. Therefore, the expression "sagittal profile" is disclosed in the original filed application, but has the meaning as evaluated above.

3. *Novelty*

Under consideration of the above findings, E1 discloses a prosthesis which comprises a bicondylar femoral component (3), a tibial component (2) and at least one meniscal component (21) interposed between the femoral and tibial components, the femoral component including a pair of condyles (31) separated by a patella bearing surface (32) which in use provides a normal anatomical patella lever arm, and formed with condylar bearing surfaces, whereby the femoral component is formed with notches (43) anteriorly in the condylar surfaces, and the sagittal profiles of the condylar bearing surfaces have a substantially uniform radius over the whole condylar bearing surface from terminal superior regions into the notches for substantial conformity with corresponding tibial bearing surfaces of the meniscal component over the normal range of flexion, said notches providing close conformity in extension without affecting the patella bearing surface (see in particular Figures 6 and 7 and column 8 of the description, lines 4 to 18).

It is true, as the appellant pointed out, that the sagittal profiles of the condylar bearing surfaces of E1 are not completely circular. However, the same applies for the prosthesis according to the invention.

The board does not see any apparent difference between the sagittal profiles of the Figures 3 (a) to (d) of the patent in suit and those of Figures 3 to 8 of E1. In particular, also the sagittal profiles disclosed in E1 have a substantially uniform radius over the whole condylar bearing surface extending into the notches (see in particular Figure 6).

Accordingly the subject-matter of claim 1 of the main request is not novel.

Since E1 also discloses a notch (43) anteriorly in each condylar surface, and that the sagittal profile of each condylar bearing surface has a substantially uniform radius over the whole condylar bearing surface (see in particular Figure 5), the subject-matter of claim 1 of the auxiliary request is also not novel.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

V. Commare T. Kriner