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D E C I S I O N
of 27 June 2006

Case Number: T 0384/05 - 3.2.02

Application Number: 96300456.9

Publication Number: 0722748

IPC: A61M 16/18

Language of the proceedings: EN

Title of invention:
Anesthetic vaporizer

Patentee:
GE Healthcare Finland Oy, et al

Opponent:
Drägerwerk AG

Headword:

Relevant legal provisions:
EPC Art. 54

Keyword:
"Novelty (no)"

Decisions cited:
T 0455/03

Catchword:
-

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Case Number: T 0384/05 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 27 June 2006

Appellant: (Patent Proprietor)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 14 January 2005 revoking European patent No. 0722748 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: T. Kriner
Members: D. Valle
E. Dufrasne

Summary of Facts and Submissions

I. The appellant (patentee) lodged an appeal on 14 March 2005 against the decision of the opposition division posted on 14 January 2005 revoking the European patent 0 722 748. The fee for the appeal was paid simultaneously and the statement setting out the grounds for appeal was received on 12 May 2005.

II. The opposition division held that the subject-matter of claim 1 of the patent as granted (main request) and of the auxiliary request then on file did not meet the requirement of Art. 54 EPC (lack of novelty) having the regard to the teaching of:

E1 = US - A - 4 770 168.

III. Oral proceedings took place on 27 June 2006 upon request of both parties.

The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request filed with letter dated 24 May 2006 or, in alternative, of the auxiliary request filed with letter dated 21 June 2006.

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

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

"Apparatus for mixing an anaesthetic with fresh gas to form a breathing gas for a patient and for controlling the concentration of anaesthetic in the breathing gas and comprising:
a vaporizer (2) for vaporizing an anaesthetic;
conduit means couplable to a source of fresh gas for providing a flow stream of fresh gas;
means (7) connected to said conduit means for supplying the anaesthetic to the fresh gas for mixing therewith to form a patient breathing gas containing vaporous anaesthetic;
means (10) for controlling the supply of anaesthetic to the fresh gas to establish a concentration of anaesthetic in the breathing gas;
means (8) for sensing ambient air pressure;
comparing means (9) for comparing the ambient air pressure sensed by said sensing means with a reference air pressure value to determine the difference therebetween, whereby said comparing means is coupled to the means (10) for controlling the supply of anaesthetic for causing said means (10) to alter the supply of anaesthetic to the fresh gas responsive to said air pressure difference so that the concentration of anaesthetic in the breathing gas for the patient is adjustable in relation to the variation in the ambient air pressure, characterized in that the comparing means (9) is arranged to control the means (10) for controlling the supply of anaesthetic so that the anaesthetic agent concentration increases when the ambient pressure decreases."

Claim 1 of the auxiliary request reads as follows:

"Apparatus for mixing an anaesthetic with gas to form a breathing gas for a patient and for controlling the concentration of anaesthetic in the breathing gas and comprising a vaporizer (2) based on injection of an anaesthetic agent having means for injecting and vaporizing an anaesthetic agent into gas flow for mixing the anaesthetic agent with the gas to form a patient breathing gas containing vaporous anaesthetic, means for controlling the supply of anaesthetic to the gas to establish a concentration of anaesthetic in the breathing gas, characterized in that the apparatus further comprises means (8) for sensing ambient air pressure, comparing means (9) for comparing the ambient air pressure sensed by the sensing means (8) with a reference air pressure value to determine the difference therebetween, the comparing means (9) being coupled to the means for controlling the supply of anaesthetic to control the means for controlling the supply of anaesthetic so that the anaesthetic agent concentration increases when the ambient pressure decreases."

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

E1 referred to an apparatus as described in the preamble of claim 1 of the main request. However it did not disclose the features of the characterizing part of this claim. While claim 1 required that the anaesthetic agent concentration increased when the ambient pressure decreased E1 taught that the anaesthetic concentration had to be decreased, when the external pressure

decreased so that the anaesthetic vapour concentration C could be maintained constant, independent of the ambient pressure (see E1, column 5, lines 16 to 25).

Claim 1 of the auxiliary request had been filed in order to clarify the gist of the invention.

VI. The respondent contested the arguments of the appellant and stated that the subject-matter of claim 1 of the main request was not novel over E1. The passage of E1 cited by the appellant did not disclose a teaching contradictory to the invention. What was meant in the disputed passage was that the amount of anaesthetic delivered to the patient per unity of time, the concentration of anaesthetic vapour, should be maintained constant independently of the atmospheric pressure. This purpose was achieved by adapting the concentration of anaesthetic volume percent C' to the variation of atmospheric pressure P' according to the formula: $C' = C(P/P')$, wherein C (the wanted anaesthetic volume percent) and P (the barometric pressure for which the vaporizer was calibrated) were constant. Therefore E1, like the patent in suit, taught to increase the anaesthetic agent concentration C' when the ambient pressure P' decreased.

The auxiliary request should not be admitted into the proceedings since it was late filed and did clearly not comply with Article 123(3) EPC.

Reasons for the Decision

1. The appeal is admissible.

2. Novelty of the subject-matter of the main request

E1 undisputed discloses (see in particular Figure 2) an apparatus for mixing an anaesthetic with fresh gas to form a breathing gas for a patient and for controlling the concentration of anaesthetic in the breathing gas and comprising:
a vaporizer (40, 42, 43, 45) for vaporizing an anaesthetic;
conduit means (34) couplable to a source of fresh gas for providing a flow stream of fresh gas;
means (conduit 59) connected to said conduit means for supplying the anaesthetic to the fresh gas for mixing therewith to form a patient breathing gas containing vaporous anaesthetic;
means (pump 55) for controlling the supply of anaesthetic to the fresh gas to establish a concentration of anaesthetic in the breathing gas;
means (124) for sensing ambient air pressure;
comparing means (60) for comparing the ambient air pressure sensed by said sensing means with a reference air pressure value to determine the difference therebetween, whereby said comparing means is coupled to the means for controlling the supply of anaesthetic for causing said means to alter the supply of anaesthetic to the fresh gas responsive to said air pressure difference so that the concentration of anaesthetic in the breathing gas for the patient is adjustable in relation to the variation in the ambient air pressure (see column 5, lines 10 to 32).

Furthermore, in one embodiment, the apparatus of E1 may be designed so that the anaesthetic concentration is dependent upon barometric pressure in accordance with the formula:

C' = C(P/P'), wherein:

C is the wanted concentration in anaesthetic volume percent set in the controller,
P is the barometric pressure for which the vaporizer is calibrated,
P' is the barometric pressure for which C' has to be established, and
C' is the output concentration in anaesthetic volume percent at the pressure P' (see column 5, lines 16 to 32).

Since CP is a constant value, C' is inversely proportional to P'. That means that, in contradiction to the appellant's opinion, the wanted concentration C' increases when the ambient pressure P' decreases, so that the anaesthetic vapour concentration which is different to C' can be maintained at a constant level independent of the ambient pressure.

Therefore the comparing means disclosed in E1 is arranged to control the means for controlling the supply of anaesthetic so that the anaesthetic agent concentration increases when the ambient pressure decreases.

Consequently, the subject-matter of claim 1 is not novel.

3. The auxiliary request

The auxiliary request is not admitted into the proceedings for the following reasons:

The request has been filed on 21 June 2006, that is six days before the date of the oral proceedings. This is in disregard of the time limit of one month set in the communication of the Board attached to the summons for oral proceedings (see last paragraph). Furthermore, it appears prima facie that the new claim 1 contains substantial amendments, in particular by deletion of features of claim 1 as granted, which raise serious doubts whether the request complies with Article 123(2) and (3) EPC. Finally, the scope of the protection appears to be substantially shifted with respect to the main request.

Therefore, in accordance with the Rules of procedure of the Boards of Appeal, Article 10b(1) and to the established case law (see in particular T 455/03, Point 2.1 of the reasons) the auxiliary request is not admitted into the proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

V. Commare T. Kriner