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**Datasheet for the decision
of 27 January 2009**

Case Number: T 0617/06 - 3.2.04

Application Number: 99935262.8

Publication Number: 1100312

IPC: A01J 5/013

Language of the proceedings: EN

Title of invention:

A device for a method of detecting a disease of the udder of an animal

Patentee:

DeLaval Holding AB

Opponent:

Octrooibureau Van der Lely N.V.
WestfaliaSurge GmbH

Headword:

Disease (DELAVAL)

Relevant legal provisions:

-

Relevant legal provisions (EPC 1973):

EPC Art. 54, 56

Keyword:

"Inventive step (no)"
"Long felt need (not substantiated)"

Decisions cited:

-

Catchword:

-



Case Number: T 0617/06 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 27 January 2009

Appellant: Octrooibureau Van der Lely N.V.
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Respondent: DeLaval Holding AB
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
28 March 2006 concerning maintenance of
European patent No. 1100312 in amended form.

Composition of the Board:

Chairman: M. Ceyte
Members: P. Petti
T. Bokor

Summary of Facts and Submissions

- I. Two oppositions were filed against the European patent No. 1 100 312. The opposition division by its interlocutory decision dated 28 March 2006 found that the patent in an amended version submitted by the patent proprietor met the requirements of the EPC.
- II. On 21 April 2006 opponent I (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 27 July 2006.
- III. Oral proceedings took place on 27 January 2009 before the board of appeal.

By letter dated 5 September 2006 opponent II, who had been duly summoned, informed the board that he was no longer interested in continuing the appeal proceedings. He did not appear at the oral proceedings which, according to Rule 115(2) EPC, were continued without him.
- IV. The appellant requested that the decision under appeal be set aside and the patent be revoked.
- V. The patent proprietor (hereinafter respondent) requested that the decision under appeal be set aside and the patent be maintained on the basis of claims 1, 2 and 5 to 7 of the main request or, alternatively, on the basis of claims 1 and 2 of the auxiliary request, both filed with letter dated 19 December 2008.

Claim 1 of the main request reads as follows:

"1. A device for detecting a disease of the udder of an animal, comprising means (9) for appreciating a parameter related to the quantity of milk extracted from a first teat and a second teat of said animal during one milking operation, means (6) arranged to determine a deviation of said parameter of the first teat from a comparison value, and means (7) arranged to display said deviation as an indication of an inflammation of the first teat at least in the case that said deviation exceeds a certain level, characterized in that the determining means (6) is arranged to define said comparison value by the level of said parameter regarding said second teat during said one milking operation."

Claim 1 of the auxiliary request reads as follows:

"1. A device for detecting a disease of the udder of an animal, comprising a milk measuring device (9) for appreciating the quantity of milk extracted from a first teat and the quantity of milk extracted from a second teat of said animal during one milking operation, a processing unit (6) arranged to determine a deviation of said quantity of the first teat from a comparison value, and a display member (7) connected to the processing unit (6) and arranged to display said deviation as an indication of an inflammation of the first teat at least in the case that said deviation exceeds a certain level, characterized in that the processing unit (6) is arranged to define said comparison value by the level of said quantity

regarding said second teat during said one milking operation."

VI. The appellant essentially submitted that document JP-5-317 343 (D1) prejudiced the novelty of the subject-matter of claim 1 of both requests and that the article by W. Beuche and J. Schultz, *Mastitis und Milchleistung*, in *Monatshefte für Veterinärmedizin*, 1975, pages 410 to 415 (document D2) prejudiced the novelty of claim 1 of the main request.

He also submitted that the claimed subject-matter of both requests lacked an inventive step with respect to document D2 and the common general knowledge of the skilled person.

VII. With respect to inventive step, the respondent essentially submitted that the skilled person starting from D2

(i) would have not found in the prior art any hint for automation, and

(ii) had to perform a choice among different methods of detecting a decrease in the milk yield due to a disease which are referred to on page 411 (left-hand column) of D2.

He also submitted that

(iii) the skilled person would not have started from D2 due to the presence of discrepancies between the investigation results shown in Tables 1, 2 and 4

as well as due to a reference to the necessity of further investigations,

(iv) D2 is a theoretical article from 1975, whose age is an indication that the claimed solution was not obvious,

(v) the simplicity of the claimed solutions is also an additional indication of inventive step.

Reasons for the Decision

1. The appeal is admissible.
2. *Novelty (main and auxiliary requests), Article 54 EPC 1973*

The claimed subject-matter (main and auxiliary requests) is novel over document D1 because it does not disclose a comparison between the quantity of milk extracted from a first teat and that extracted from a second (single) teat during the same milking operation.

Having regard to the following considerations concerning inventive step, the claimed subject-matter is also novel over document D2.

3. *Inventive step (main and auxiliary requests), Article 56 EPC 1973*
 - 3.1 Document D2 concerns investigations made in order to analyze the relationship between milk yield impairment and mastitis.

According to this citation, which refers to different methods of detecting a decrease in the milk yield due to a disease of the animal, the comparison between different udder quarters is the most specific and advantageous method (see page 411, left-hand column, 6th paragraph).

D2 also refers to an udder quarter milking machine (see Figure 1) which was used to perform the investigations, this milking machine being provided with four teat cups, associated with a milk measuring device for appreciating the quantity of milk extracted by means of each teat cup.

In order to perform the investigations (see particularly Table 1 on page 412), the quantity of milk extracted from a first teat of a cow (e.g. from the rear right udder quarter HL, on 09.01.1972 or on 12.01.1972) was measured and compared with the quantity extracted from a second teat (e.g. from the rear left udder quarter HR, on the same dates) during the same milking operation in order to determine a deviation, which is displayed in the tables ("see columns "Vergleich zum Parallelviertel: Differenz, Minderleistung %") and correlated with the diagnosis of mastitis of the first teat (see the rows "klin. Befund" corresponding to the measurements made on 09.01.1972 or on 12.01.1972).

Thus, D2 discloses a method of detecting a disease of the udder of an animal, comprising the steps of

- (i) appreciating the quantity of milk extracted from a first teat and the quantity of milk extracted from a second teat during one milking operation,
- (ii) determining a deviation of said quantity of milk extracted from the first teat from a comparison value, which is defined by the level of said quantity regarding said second teat during said one milking operation,
- (iii) displaying said deviation as an indication of an inflammation of the first teat.

It can be understood from D2 that the measurement of the milk quantity according to step (i) was carried out by means of the measuring device associated with the teat cups of the udder quarter milking machine shown in Figure 1, while the determination of the deviation according to step (ii) and the displaying of this information according to step (iii) were performed manually by an operator.

- 3.2 The subject-matter of claim 1 of the main request differs from this prior art in that it relates to a device for detecting a disease of the udder of an animal, i.e. a device for carrying out the method disclosed in D2, which comprises a determining means arranged to carry out step (ii) and a display means arranged to carry out step (iii).

Claim 1 of the auxiliary request defines the determining means as a processing unit and the display means as a display member connected to the processing unit.

3.3 Starting from D2 as closest prior art, the objective technical problem to be solved may be seen in providing a device which permits the automatic implementation of the known method, especially the automation of steps (ii) and (iii) which up to then had been performed manually.

The formulation of this problem does not contribute to the inventive character of the claimed solution because the mere automation of functions which were previously performed manually is a general trend in technology. In this respect, it has to be noted that before the priority date of the patent in suit the automation of milking functions by means of milking robots was also a trend in the field of milking.

3.4 Before the priority date of the patent in suit the skilled person was in particular familiar with the use of a processing unit, such as the processor of a computer processing data originating from measuring devices and performing calculations on the basis of this data. It was also common practice for a skilled person to connect a display device, such as a monitor screen or a printer, to a processing unit in order to automatically display the results of the calculations.

This common general knowledge is reflected for instance by document D1 which relates to the technical field of milking. This citation (see particularly Figure 1) discloses a milking apparatus provided with a processing unit (21, 22), in which data originating from measuring devices (17, 18, 19) are processed in order to calculate a deviation from a comparison value,

and a display member connected to the processing unit arranged to display said deviation in the case that the deviation exceeds a certain level.

3.5 Thus, starting from D2, the skilled person on the basis of his general knowledge would develop - without exercising any inventive skill - a device for detecting a disease of the udder of an animal which is provided with a processing unit (i.e. a determining means) connected to the device for measuring the quantities of the milk extracted from two teats, respectively, and arranged to perform the above mentioned step (ii), the device for detecting a disease being also provided with a display member connected to the processing unit and arranged to perform the above mentioned step (iii). In this way the skilled person would arrive at the claimed subject-matter of main and auxiliary requests.

3.6 The respondent's arguments (see section VII above) cannot be accepted for the following reasons:

The skilled person does not necessarily need to find in the available prior art a suggestion towards automation because automating is a general *desideratum* for the skilled person. Moreover, it has to be noted that also D2 refers to the development of methods of automatically controlling the state of health of an animal's udder (see page 414, left-hand column, last paragraph).

(i) The argument concerning the choice among the different methods referred to in D2 is irrelevant since the method based upon the comparison between the milk quantities extracted from single

udder quarters is clearly referred to as being the preferred method not only on page 411 (left-hand column) but also in the conclusions on page 414, right-hand column, paragraph "Schlussfolgerungen", 2nd point). Thus, the skilled person reading D2 would immediately understand that this method is a realistic starting point from which a device for detecting a disease can be further developed.

- (ii) The fact that in D2 some of the results shown in Tables 1, 2 and 4 of D2 are apparently inconsistent is not sufficient to consider its disclosure as non-enabling. On the contrary, the presence of some inconsistencies is a sign that this study has been made seriously without falsification or fabrication of results.
- (iii) The existence of a long-felt need is only a secondary indication of inventive step. In the present case, the age of document D2 (1975) alone is - in the absence of further evidence - not sufficient to demonstrate a long-felt need or the blindness of the persons skilled in the art.
- (iv) Also the presence of a "simple invention" may be a secondary indication of inventive step. In the present case, the invention in essence lies in the automation of steps (ii) and (iii) which up to then had been performed manually. As has been explained, the mere automation of these steps corresponds to the general trend in this technical field and cannot as such be considered as involving an inventive step.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The European patent is revoked.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte