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Datasheet for the decision of 11 February 2009

Case Number: T 0842/06 - 3.2.02

Application Number: 98923814.2

Publication Number: 0986329

IPC: A61B 17/02

Language of the proceedings: EN

Title of invention:
Vascular retractor

Applicant:
GENERAL SURGICAL INNOVATIONS, INC.

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 123(2), 56

Relevant legal provisions (EPC 1973):
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Keyword:
"Extended subject-matter (no after amendments)"
"Inventive step (yes, after amendments)"

Decisions cited:
-

Catchword:
-

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Case Number: T 0842/06 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 11 February 2009

Appellant: GENERAL SURGICAL INNOVATIONS, INC.
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Norwalk
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Representative: HOFFMANN EITLE
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted 29 November 2005 refusing European application No. 98923814.2 pursuant to Article 97(1) EPC.**

Composition of the Board:

Chairman: M. Noël
Members: D. Valle
C. Vallet

Summary of Facts and Submissions

I. The appellant (applicant) lodged an appeal on 2 February 2006 against the decision of the examining division posted on 29 November 2005 to reject the European patent application No. 98923814. The fee for appeal was paid simultaneously and the statement setting out the grounds for appeal was received on 10 April 2006.

II. The examining division held that the application did not meet the requirements of Article 123(2) EPC and Article 56 EPC.

III. The following documents, which have been submitted during the examination proceedings, are relevant for the present decision:

D1 = EP - A - 0761 171
D2 = EP - A - 0769 270.

IV. Oral proceedings took place on 11 February 2009.

The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the version of the application filed at the oral proceedings, comprising:

- claims 1 to 4
- description: pages 1 to 24
- drawings: Figures 1 to 23.

V. Claim 1 reads as follows:

"A retractor (10) for holding open an anatomic space developed in a patient for performing an endoscopic procedure therein, the retractor (10) comprising: a rigid elongate member (12) having proximal and distal ends (14; 16), an arcuate cross-section and longitudinal edges (22); at a distal region a hood (80) having a substantially rounded distal surface (82), the hood being provided with circumferentially extended edges (84) integrally formed along a portion of said edges (22) and extending peripherally from said edges (22) characterized in that a passage (18) is defined above a longitudinal working window (20) defined between the longitudinal edges (22) of said elongate member (12) and extends between said proximal and distal ends (14; 16) and wherein the hood encloses the passage (18) at said distal end (16) of said elongate member (12) wherein said passage (18) provides an enlarged cross-section above said longitudinal working window (20) at said distal region."

Reasons for the Decision

1. The appeal is admissible.

2. *Amendments*

The features according to which a hood is provided with circumferentially extended edges integrally formed along the longitudinal edges of the elongate member and extending peripherally from said edges is disclosed on page 7, lines 3 to 13 and on page 14, lines 3 to 7 of

the application as filed. From these passages it is also clear that the hooded portion provides a working window having an enlarged cross-section at the distal region. The feature that the hood encloses the passage at said distal end of said elongate member is disclosed on page 13, lines 21 to 23.

Therefore, the requirements of Article 123(2) EPC are met.

3. *Inventive step*

D2 (see in particular Figures 2 and 5) discloses a retractor for holding open an anatomic space developed in a patient for performing an endoscopic procedure therein, the retractor comprising a rigid elongate member 21 having proximal and distal ends, an arcuate cross section and longitudinal edges; at a distal region a hood 26 having a substantially rounded distal surface, the hood being provided with circumferentially extending edges integrally formed along a portion of the edges of the elongate member, and extending peripherally from said edges.

However, D2 does not disclose the characterizing part of claim 1, according to which a passage is defined above a longitudinal working window defined (transversally) between the longitudinal edges of said elongate member and extending (longitudinally) between said proximal and distal ends, wherein the hood encloses the passage at said distal end of said elongate member and wherein said passage provides an enlarged cross-section above said longitudinal working window at said distal region.

The problem underlying the present invention can therefore be seen in improving the accessibility to the body parts during a surgical intervention, in particular in providing a retractor having an enlarged working space. The solution is given by providing the retractor with a working window along the whole length of the elongate member and in particular a wider working window within the hooded section of the distal end of the elongate member.

D2 fails to disclose a working space extending over the whole length of the elongate member. The schematic representation of Figure 17 is unable to change the above conclusion since the guide rails described in this embodiment are connected to and extend away from the underside of the elongate member. Therefore, the underside does not form a hollow window within the meaning of the present application but a flat surface, as clearly shown in either of Figures 2, 5 or 17, which are used to describe the same embodiment (see D2, column 6, line 12).

D1, see in particular Figures 29 to 38, discloses a rigid elongate member having an arcuate cross-section, thereby defining a passage above a longitudinal working window defined between longitudinal edges of said elongate member and extending between the proximal and distal ends. The further claimed feature of forming an enlarged cross-section above the longitudinal working window at the distal region is, however, not disclosed.

The device of D1 is principally designed to be used as an opened cavity maintaining tool, having two ends projecting through skin cut portions, as shown in particular in Figures 14A and 14B, so that a treatment tool such as forceps 91 (see Figure 15A) or an endoscope portion 218 (see Figures 31A and 31B) can be inserted from either side into the cavity maintaining tool (see column 24, line 1 to 5; column 32, lines 16 to 26).

According to another embodiment of D1 (see Figures 60 to 64 and 94) the elongate cavity maintaining tool is provided at one end with an insertion helper such as 287 or 675a. But this end portion has no extended edges and does not suggest an enlarged working space at the distal region, within the meaning of the present invention. What is more, D1 teaches away from combining D2 with D1 since a number of disadvantages of using a hood are listed from column 3, line 30 to column 4, line 43 of D1.

Therefore, the subject-matter of claim 1 involves an inventive step in compliance with the requirements of Article 56 EPC.

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 with the order to grant a patent on the basis of the following application documents filed during the oral proceedings:

   – claims 1 to 4
   – description pages 1 to 24
   – Figures 1 to 23.

The Registrar: The Chairman:

D. Sauter M. Noël