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**Datasheet for the decision
of 4 March 2009**

Case Number: T 1515/06 - 3.2.02

Application Number: 95916308.0

Publication Number: 0827417

IPC: A61M 37/00

Language of the proceedings: EN

Title of invention:
Apparatus for conditioning gas

Patentee:
Lexion Medical, LLC

Opponents:
I - Pall Corporation
II - Trudell Medical International

Headword:
-

Relevant legal provisions:
EPC Art. 56, 108

Relevant legal provisions (EPC 1973):
-

Keyword:
"Admissibility of the appeal (yes)"
"Inventive step (no)"

Decisions cited:
T 0613/91

Catchword:
-



Case Number: T 1515/06 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 4 March 2009

Appellant: Trudell Medical International
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
16 August 2006 concerning maintenance of
European patent No. 0827417 in amended form.

Composition of the Board:

Chairman: M. Noel
Members: D. Valle
M. J. Vogel

Summary of Facts and Submissions

- I. The appellant (opponent II) lodged an appeal on 27 September 2006 against the decision of the opposition division posted on 16 August 2006 maintaining the European patent No. 0 827 417 in amended form. The fee for the appeal was paid simultaneously and the statement setting out the grounds for appeal was received on 22 December 2006.
- II. Opponent I is no longer part of this proceedings, since he withdrew his opposition with letter of 7 July 2008.
- III. The patent was opposed for lack of novelty and of inventive step (Article 100(a) EPC) and for insufficiency of disclosure (Article 100(b) EPC). The opposition division held that the subject-matter of claim 1 of the patent as amended met the requirements of the EPC.
- IV. The following documents are relevant for the present decision:
- E18 Koninckx, P., Vandermeersch, E.: The Persufflator, Human Reproduction 6 (9) 1991, p. 1288 - 1290,
E25 AU - A - 74 564.
- V. Oral proceedings took place on 4 March 2009 upon request of both parties and after a communication with the provisional opinion of the Board had been sent.
- The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patentee) requested that the appeal be rejected as inadmissible. If the appeal were to be admitted, that the appeal be dismissed and the patent be maintained as in the contested decision (main request), or according to the auxiliary request filed on 4 February 2009; furthermore, he requested that the late-filed documents be not admitted into the proceedings and, if admitted, that the case be remitted to the first instance for further prosecution and an apportionment of costs be ordered.

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

"An apparatus (12) for treating gas (21) prior to the use of the gas (21) in an endoscopic procedure involving a patient (10), the gas being received into the apparatus (12) from a gas source, and the gas exiting the apparatus (12) being in flow communication with a means for delivering (11) the gas (29) to the interior of the patient, comprising;

- a) a housing (16) having an inlet and an outlet;
- b) a means (5) for communicating the outlet of an insufflator (1) with the inlet of the housing (16);
- c) a chamber (6) within the housing (16) and having an entry port (33) and an exit port (34), the entry port of the chamber being in flow communication with the inlet of the housing;
- d) a heating means (20) for heating the gas to a predetermined temperature
- e) a means (23) in the housing adjacent the exit port of the chamber for sensing the temperature of the gas (21); and
- f) a means connected to the sensing means for controlling the heating means, whereby upon the

determination by the sensing means of the temperature of the gas (21) being at a predetermined level, the controlling means (4) regulates the amount of heat applied by the heating means (20) to the gas (21) within the chamber (6), characterized in that the apparatus comprises a humidification means (28) in the chamber (6) and an insufflator (1), having an outlet being in communication with the inlet of the housing (16), wherein the insufflator (1) receives the gas from a gas source, and that the humidification means (28) is in the path of travel of the gas through the chamber, in that the heating means (20) is disposed within the humidification means (28), and in that the gas is pressure- and volumetric flow rate-controlled by the insufflator (1), wherein the means for delivering (11) the gas to the interior of the patient is a trocar or a needle, wherein the endoscopic procedure is a laparoscopic procedure and wherein the predetermined temperature is approximately 36 °C to 38 °C."

Claim 1 of the first auxiliary request is made of a combination of the features of claim 1 with those of claims 6 and 7 as granted.

VII. In support of his request the appellant relied essentially on the following grounds of appeal:

The subject-matter of claim 1 of the main request did not imply an inventive activity in the light of a combination of the teaching of E18 and E25.

The auxiliary request should not be admitted into the proceedings since it had been filed too late and without any justification.

VIII. The respondent contested the arguments of the appellant and stated that:

The appeal was not admissible because it failed to comply with Article 108 and Rule 64 EPC since the name and the address of the appellant were not included in the notice of appeal. There were initially two opponents in the case. It was therefore not possible on the basis of the notice of appeal to establish without doubt which one of the opponents had filed the appeal. It was not correct to state that the appellant should have been the opponent II on the ground that the representative filing the appeal was the representative of the opponent II, since changes of representative were not unusual in the proceedings before the EPO.

All the late-filed documents should not be admitted into the proceedings. In particular, the documents filed in the appeal proceedings were all long known by the appellant and therefore there was no justification for such late-filing.

A combination of the teaching of E18 with that of E25 could not lead the skilled person to the invention in an obvious way. The documents concerned different technical areas, namely E18 the field of laparoscopy and E25 that of respiratory devices. The technical features of the devices in the two areas were also completely different. Starting from E18, E25 did not disclose all the distinguishing features of the

invention: there was a substantial difference between the claimed regulation of the amount of heat applied by the heating means to the gas and the alteration of the rate of heating of the electric heating element disclosed in E25.

The auxiliary request has been filed as soon as the representative received instruction from the patent proprietor. The amendments made have been introduced as a reaction to the attack on the inventive step of the claim of the main request within the time limit set by the communication of the Board in preparation for the oral proceedings. For these reasons the auxiliary request should be introduced into the procedure.

IX. In response to the submission of the respondent, the appellant put forward that the appeal should be deemed to be admissible since the omissions objected to in the notice of appeal could be easily remedied from the opposition file.

The newly filed documents should be introduced into the procedure because they are highly relevant and have been filed as a direct reaction to the adverse decision.

Reasons for the Decision

1. Admissibility of the appeal

The objection of the respondent regarding the admissibility of the appeal is not well founded.

It is right that Rule 64(a) EPC requires that the notice of appeal shall contain the name and address of the appellant. However, the EPC provides in Rule 65(2) that a deficiency in that sense can be remedied.

This has been done by the appellant with letter of 11 September 2007, point I, explaining that the missing formal information could be drawn from the opposition file. This is sufficient according to the conclusions in case T 613/91.

Moreover, in the highly improbable case that the representative of the opponent II would have filed an appeal on behalf of the opponent I a new authorisation should have been filed by the opponent II, and the EPO would have been aware of it. Therefore, there was no other possibility than that the present appeal being lodged by the opponent II. The fact that opponent I withdrew his opposition, subsequently, is a confirmation of its lack of interest in the present appeal proceedings.

Accordingly, the appeal is admissible.

2. Late-filed documents, remittal to the first instance and apportionment of costs.

Of the two documents relevant for the present decision, only E25 has been filed late, that is with the statement of the grounds of appeal of 22 December 2006.

E25 is regarded by the Board as highly relevant. It has been filed at the earliest stage of the appeal proceedings as a direct reaction to the adverse

decision and in order to reinforce the line of argumentation already brought forward during the opposition proceedings. Therefore it is admissible and is introduced into the proceedings. The fact that the appellant long knew about the document is irrelevant to its admissibility since the appellant could have become fully aware of the relevance of this document only after the adverse decision was issued.

The request for remittal of the case to the first instance is conditional on the admittance of the late-filed documents. However, this request lies within the discretionary power of the Board. In the present case the Board considers that a remittal is not appropriate since the respondent was given sufficient time during the oral proceedings to comment on document E25 and the arguments put forward by the appellant. Moreover, E25 was submitted in the appeal stage from the very beginning. Therefore, both parties' right to a fair hearing has been respected and a remittal is not justified.

Since the request for apportionment of costs is conditional on the remittal of the case to the first instance, this request cannot succeed.

3. Main request

E18 (see page 1288, Figure 1 and text referred to) discloses an apparatus (persufflator) suitable for treating gas prior to the use of the gas in an endoscopic, more specifically a laparoscopic procedure involving a patient, the gas being received into the apparatus from a gas source, and the gas exiting the

apparatus being in flow communication with a means for delivering the gas to the interior of the patient, comprising;

- some sort of a housing having an inlet and an outlet and a chamber within the housing, having an entry port and an exit port, the entry port of the chamber being in flow communication with the inlet of the housing (also in the present patent the chamber is formed by the housing)
- a means for communicating the outlet of an insufflator (the persufflator is an insufflation device) with the inlet of the housing;
- a heating means for heating the gas to a predetermined temperature, and
- a humidification means wherein the insufflator receives the gas from a gas source, the humidification means is in the path of travel of the gas through the chamber, and the means for delivering the gas to the interior of the patient is a trocar or a needle (see Figure 1).

Moreover, the gas is pressure- and volumetric flow rate-controlled by the insufflator wherein the predetermined temperature is approximately 36°C to 38°C (see section "Materials and methods", pages 1288-1289).

E18 does not disclose explicitly

- a means in the housing adjacent the exit port of the chamber for sensing the temperature of the gas;
- a means connected to the sensing means for controlling the heating means, whereby upon the determination by the sensing means of the temperature of the gas being at a predetermined

level, the controlling means regulates the amount of heat applied by the heating means to the gas within the chamber;

- the humidification means being in the chamber, and the heating means being disposed within the humidification means.

The problem underlying the invention is therefore to be seen in providing an efficient, compact means for delivering heated and humidified gas to a patient such that heat loss in transfer of the gas is minimized, in accordance with the problem defined in the contested patent, page 3, lines 35 to 38.

The person skilled in the art looking for a solution to the stated problem will look at the teaching of E25. This document belongs to the same field of medical humidifiers (compare patent, page 2, point 0001 and E25, page 2, line 1). E25 serves essentially the same purpose as in the present invention and discloses practically all the above distinguishing features of claim 1, that is:

- a means 9 in the housing (1 to 3) adjacent the exit port of the chamber within the housing for sensing the temperature of the gas
- a means connected to the sensing means for controlling the heating means, whereby upon the determination by the sensing means of the temperature of the gas being at a predetermined level, the controlling means regulates the amount of heat applied by the heating means to the gas within the chamber (see E25, page 4, last full paragraph)

- a humidification means 5 within the chamber, and
- heating means 7 disposed within the humidification means.

The objection of the respondent that D25 did not belong to the same field of the invention is not convincing since the patent as granted (see paragraph [46]) states that the apparatus may be used for many medical procedures, including laparoscopy, as now specified in claim 1, and artificial respiration (breathing), which is the subject of E25. The fact that the paragraph [46] of the patent was amended in opposition so as to restrict the use of the apparatus to a laparoscopic procedure does not change the very nature of the information originally disclosed and is not feature-limiting.

The further objection of the respondent that a substantial difference exists between the regulation of the amount of heat applied by the heating means to the gas, as claimed in claim 1, and the alteration of the rate of heating of the electric heating by the control means, as disclosed in E25 (see page 6, second paragraph), is not convincing. The alleged difference, if any, is merely of formal nature: in both situations, the regulation of the rate of heating provided by the heating means has necessarily a consequence on the amount of heat transferred to the gas through the humidifier, thereby simultaneously heating and humidifying the gas.

The subject-matter of claim 1 does not therefore imply an inventive step within the meaning of Article 56 EPC.

4. Auxiliary request

The auxiliary request has been filed on 4 February 2009 in response to the summons to attend oral proceedings. Claim 1 has been amended by incorporating the features of claims 6 and 7 of the patent as granted. However, the accompanying letter did not contain any justification for the late-filing nor any comments on the merits of the amendments and the new combination of features. This results in presenting at a late stage of the proceedings new subject-matter, which is not substantiated and has never been looked at. Therefore, and also for reasons of procedural economy, the Board has decided to exercise its discretion according to Article 13 of the Rules of Procedure of the Boards of Appeal and not to admit this auxiliary request into the proceedings.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:

D. Sauter

M. Noël