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**Datasheet for the decision
of 11 September 2008**

Case Number: T 0128/07 - 3.2.02

Application Number: 98914842.4

Publication Number: 0981311

IPC: A61F 5/441

Language of the proceedings: EN

Title of invention:
An ostomy appliance

Patentee:
COLOPLAST A/S

Opponent:
Bristol-Meyers Squibb Company

Headword:
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Relevant legal provisions:
-

Relevant legal provisions (EPC 1973):
EPC Art. 52(1), 56

Keyword:
"Inventive step (yes)"

Decisions cited:
-

Catchword:
-



Case Number: T 0128/07 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 11 September 2008

Appellant: Bristol-Myers Squibb Company
(Opponent) 345 Park Avenue
New York NY 10154 (US)

Representative: Holmes, Miles Keeton
First Thought IP
35 New Broad Street House
New Broad Street
London WC2M 1NH (GB)

Respondent: COLOPLAST A/S
(Patent Proprietor) Holtedam 1
DK-3050 Humlebaek (DK)

Representative: Hammond, Andrew David
Valea AB
Lindholmospiren 5
S-417 56 Göteborg (SE)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 28 November 2006
rejecting the opposition filed against European
patent No. 0981311 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: T. Kriner
Members: S. Chowdhury
C. Vallet

Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the decision of the opposition division relating to European patent No. 0 981 311, rejecting its opposition to the grant thereof. The decision was dispatched on 28 November 2006.

The appeal was received on 26 January 2007 and the fee for the appeal was paid on the same date. The statement setting out the grounds of appeal was received on 2 April 2007.

II. The opposition was filed against the entire patent and based on Article 100(a) EPC 1973 (lack of inventive step). The opposition division decided that the patent met the inventive step requirement of the EPC and rejected the opposition, accordingly.

III. Oral proceedings were held before the Board on 11 September 2008, at which the following requests were submitted:

The appellant (opponent) requested that the decision under appeal be set aside and that the European patent No. 0 981 311 be revoked.

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

IV. The following documents were of particular interest in the appeal procedure:

E1: EP-A-0 607 028

E3: EP-A-0 235 928
E4: EP-A-0 829 514
E5: US-A-5 342 434
E6: WO-A-93/08019.

V. Independent claim 1 of the patent as granted reads as follows:-

"A deodorising filter device (9) especially apt for an ostomy appliance or the like, the filter comprising an elongated, substantially flat filter body (10) of a porous filter material interposed between gas and liquid impervious first and second walls which are sealed to the body along its longitudinal side edges; gas inlet and outlet openings being provided in communication with the filter material adjacent to its respective longitudinal end regions in the first and second wall, respectively, wherein both of the gas and liquid impervious walls are sealed to the upper and lower surfaces of the filter body, the arrangement being so that in use gas flows longitudinally through the filter from the inlet opening to the outlet opening, such gas flow being confined to said filter element, wherein the inlet opening (15) is covered by a water impervious sheet, wherein the filter is interposed between gas and liquid impervious walls (11, 12) forming a filter device (4) having gas inlet (15) and outlet (16) openings in communication with the filter, characterised in that the sheet is a microporous hydrophobic and oleophobic membrane (17), that said membrane (17) is covered with a third wall (6,18) secured to the first wall (11) having the Inlet opening (15) and defining a space wherein a foam (5) material is placed between the third wall (6,18) and the first

wall (11) and covering the inlet opening (15) of the filter and that the third wall has one or more inlet openings (7,20) leading to the space comprising the foam material (5)".

Claims 2 to 12 are dependent claims.

VI. The parties argued as follows:

Appellant

Starting from E3 as the closest prior art document there were two partial objective problems, that of blocking of the filter inlets and that of wetting of the filter, and it was fair to consult different prior art documents for the respective solutions.

E1 addressed the first problem and provided an open cell foam and a microporous film to protect the filter while keeping the gas path open. While E1 disclosed a specific example of a radial flow filter its teaching of protecting the filter was generally applicable and nothing in E1 limited the application of this idea to a radial flow filter.

E3 stressed that the openings to the filter must be kept open because the absorbent material saturated and blocked the entrance. The foam used in E1 would not saturate so there was no need to avoid its covering the apertures.

The solution to the second partial problem was given by any one of E4 to E6. The use of a microporous hydrophobic and oleophobic membrane to protect parts of

a filter which contact the body while allowing gas flow was well known.

Respondent

The appellant used hindsight in invoking the teaching of E1 and combining it with E3. The thrust of E3 was that a higher pressure drop should occur in the filter of an ostomy bag than in known filters, but not so great as to cause over inflation of the bag. To this end the openings of the filter and of the cover sheet must not be covered. E3 already provided a solution to the problem of filter wetting, in the form of a liquid absorbing material which did not cover the inlet openings of the filter.

Reasons for the decision

1. The appeal is admissible.
2. The question of novelty was not an issue in the appeal procedure.
3. *Inventive step*
 - 3.1 It is common ground amongst the parties, and the Board concurs, that E3 is the closest prior art document and that this document discloses a deodorising filter device having all the features of claim 1 of the patent in suit, except for the following:

a) The inlet opening of the filter is covered by a water impervious sheet which is a microporous hydrophobic and oleophobic membrane.

b) A foam material is placed between the third wall and the first wall and covers the inlet opening of the filter.

3.2 These features solve respective partial problems as follows:

a) To reduce blockage of the inlet to the filter by the visceral contents of an ostomy bag.

b) To reduce the risk of wetting of the filter.

3.3 According to the appellant the person skilled in the art would invoke the teaching of E1 for solving the problem a), which involves placing a foam material upstream of the filter.

The object of E3 is to create a pressure drop across a filter for an ostomy bag, which is not so great as to cause over inflation of the bag (column 4, lines 1 to 6). It is stated (column 6, lines 36 to 41) that the dimensions of the openings of the filter determine the pressure drop through the filter.

Various embodiments are described including one with a cover sheet with openings 34 to protect the filter against clogging (the embodiment described with reference to Figure 4), and some with a liquid absorbing layer (the embodiments described with reference to Figures 5 and 6). Whichever arrangement is

used it is repeatedly stressed that the openings must not be covered (column 10, lines 45 to 51 and column 11, lines 4 to 7 and 22 to 24). The description with reference to Figures 7 and 8 of E3 states that satisfactory values of pressure drop were attained with the embodiments described.

3.4 Given that it is important in the various arrangements of E3 to ensure that the openings upstream of the filter must not be closed, the person skilled in the art would be dissuaded from applying the foam material of E1 to the arrangement of E3 such that the foam covered the opening to the filter (as required by claim 1 of the patent in suit) because this would be against the express teaching of D3. The foam would inevitably cause resistance to air flow and affect the pressure drop.

3.5 Therefore, the person skilled in the art would not combine the teachings of E3 and E1.

3.6 For these reasons, the subject-matter of claim 1 of the main request involves an inventive step. It is not necessary to investigate whether the problem b) is also solved in a manner which involves an inventive step.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar

The Chairman

V. Commare

T. Kriner