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**Datasheet for the decision
of 18 May 2010**

Case Number: T 1472/07 - 3.2.04

Application Number: 02075381.0

Publication Number: 1230850

IPC: A01K 29/00

Language of the proceedings: EN

Title of invention:

A device for and a method of milking an animal

Patentee:

Lely Enterprises AG

Opponent:

DeLaval International AB

Headword:

Stress/LELY

Relevant legal provisions:

EPC Art. 56, 112(1)

Relevant legal provisions (EPC 1973):

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Keyword:

"Inventive step (no)"

"Request for referral (no) - immaterial to the Board's decision"

Decisions cited:

G 0003/98, J 0016/90, T 1138/02

Catchword:

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Case Number: T 1472/07 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 18 May 2010

Appellant:
(Patent Proprietor)

Lely Enterprises AG
Bützenweg 20
CH-6300 Zug (CH)

Representative:

Corten, Maurice Jean F.M.
Octrooibureau Van der Lely N.V.
Weverskade 110
NL-3147 PA Maassluis (NL)

Respondent:
(Opponent)

DeLaval International AB
P.O. Box 39
S-147 21 Tumba (SE)

Representative:

Schmidt, Karsten
Albihns.Zacco
Bayerstrasse 83
D-80335 München (DE)

Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 23 July 2007
revoking European patent No. 1230850 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: P. Petti
C. Heath

Summary of Facts and Submissions

I. The opposition division, by its decision dispatched on 23 July 2007, revoked the European patent No. 1 230 850.

II. The patent proprietor (hereinafter appellant) lodged an appeal against this decision on 28 August 2007 and simultaneously paid the appeal fee.

A statement setting out the grounds of appeal was received on 30 November 2007.

III. Oral proceedings before the board were held on 18 May 2010.

IV. The appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of either the main request filed with the grounds of appeal or the auxiliary request filed during oral proceeding before the board. The appellant further requested that two questions be referred to the Enlarged Board of Appeal.

The main request comprises three amended independent claims (claims 1 to 3) for a device as well as a method claim 31 which is identical with granted claim 33.

Claims 1 and 31 of the main request read as follows:

"1. A device for milking an animal, in particular a cow (2), provided with a stress measuring device for determining the degree of stress of the animal and for supplying stress measurement data to a storage device for storing stress measurement data, the device being

adapted to measure and store stress measurement data before and during milking and provided with a central unit (20) comprising a computer having a memory for processing measurement data measured by the stress measuring device, **wherein** the central unit (20) comprises a correspondence table, said correspondence table containing per animal stress related data, such as limit values, historical data and tolerance ranges, **characterized in that** the device is provided with means for determining milk related data, and in that the storage device is suitable for storing the stress measurement data together with the milk related data."

"31. A method of milking an animal, in particular a cow, comprising the step of determining stress of the animal before and during milking and storing the determined stress measurement data, **characterized in that** said method comprises the step of determining milk related data, and storing the stress measurement data together with the milk related data."

The auxiliary request contains a single independent claim 1 for a device, which is identical with claim 2 of the main request and reads as follows:

"1. A device for milking an animal, in particular a cow (2), provided with a stress measuring device for determining the degree of stress of the animal and for supplying stress measurement data to a storage device for storing stress measurement data, the device being adapted to measure and store stress measurement data before and during milking and provided with a central unit (20) comprising a computer having a memory for processing measurement data measured by the stress

measuring device, wherein the central unit (20) comprises a correspondence table, said correspondence table containing per animal stress related data, such as limit values, historical data and tolerance ranges, **characterized in that** the central unit (20) comprises a comparing device for comparing the measurement data with the data in the correspondence table and for comparing the stress measurement data obtained before, during, and preferably also after milking during a milking run."

The two questions the appellant requested to refer to the Enlarged Board of Appeal read as follows:

1. "In case in opposition or appeal proceedings, the main claim of a granted European patent falls due to a ground of opposition, and there are two or more patentable combinations with a subclaim possible, can the patentee be forced to give up patentable subject-matter under Rule 57a EPC by having to choose between said combinations and not being allowed to defend said combinations in parallel with a single request containing a certain number of such combinations replacing the granted main claim?"

2. "If the answer to the above question depends on said certain number, what would be an allowable number of combinations?"

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

VI. The appellant submitted inter alia that

- the subject-matter of claim 1 and that of claim 31 of the main request were novel over WO-A-99/01026 (D2) and involved an inventive step starting from this document and combining it with "*Automatic Milking: Reality, Challenges and Opportunities*", by O. Lind et al, in "*Robotic Milking*", First published 2000, pages 19 to 31 (D5),
- the subject-matter of claim 1 of the auxiliary request involved an inventive starting from D2 and combining it with "*Side preference of dairy cows in the milking parlour and its effect on behaviour and heart rate during milking*", by H. Hopster et al, in "*Coping Strategies in Dairy Cows*", Lelystad 1998 (D8),
- and the two questions to be referred to the Enlarged Board of Appeal related to an important point of law of general interest.

The respondent contested the appellant's arguments concerning novelty and inventive step of the claimed subject-matter.

Reasons for the Decision

1. The appeal is admissible.

2. *Inventive step (claims 1 and 31 of main request)*

2.1 D2 discloses a device for and a method of milking animals, the device comprising a milking robot 6 and being provided with a control means 5 connected to either a microphone for determining the breathing rate of the animal or a sensor for determining the movement rate of the animal.

D2 discloses a stress measuring device for determining the degree of stress of the animal in so far as it makes clear that an increased breathing rate as well as an increased movement rate are signs of stress, the stress measuring device being adapted to perform the measurement during milking or before milking (see particularly page 8, lines 21 to 28).

The control means 5 calculates an average value of the measured data and compares it with a reference value (see page 9, lines 8 to 11). This implies that there is a central unit comprising a computer having a memory for processing measurement data measured by the stress measuring device, i.e. a storage device for storing stress measurement data, the central unit comprising a correspondence table containing per animal stress related data, i.e. reference values (see particularly page 2, lines 13 to 20 and page 9, lines 8 to 14).

2.2 The subject-matter of claim 31 differs from the method of D2 by the steps of determining milk related data and storing the milk related data together with the stress measurement data.

The subject-matter of claim 1 differs from the device of D2 by features which correspond to these steps, namely in that the device is provided with means for determining milk related data and in that the storage device is suitable for storing the stress measurement data together with the milk related data.

Determining and storing milk related data, concerning e.g. the milk yield of an animal or the quality of the milk, provides additional information concerning the milk production of the animal, while the determined milk related data are stored together with the stress measurement data in the same storage device.

Thus, the problem to be solved by the invention as defined in claims 1 and 31 may be seen in providing a method or a device for milking animals in which more detailed information on the status and performance of the animals is made available to the farmer without using an additional storage device.

- 2.3 According to D5 (see page 23; paragraph "Udder health monitoring"), in automatic milking systems available at the end of the 20th century, data concerning e.g. the milk yield of a milking animal were commonly recorded at each milking in order to compare them with previous recording and other data stored in the herd management data base so as to provide information which may be taken into account before reaching a decision or taking action in the management of the respective animal.

Thus, D5 not only points towards the technical problem to be solved, in so far as it refers to milk related information, but also suggests the claimed solution, in

so far as it discloses that milk related data are determined and stored and that these data are stored in a common management data base together with other data.

Starting from D2 as closest prior art, in which stress measurement data are stored in a storage device, the skilled person, seeking for a solution to the above mentioned technical problem, would accordingly apply the D5 teaching to the method or the device of D2 and therefore arrive at a system in which milk related data are determined and stored in the existing storage device. In doing so, the skilled person would arrive at the claimed subject-matter without exercising any inventive skill.

- 2.4 In this respect, the appellant essentially submitted that, having regard to paragraph [0012] of the patent specification, storing "stress measurement data **together with** milk related data" (emphasis added) means that a relation between the stress measurement data and the milk related data is established. Since neither D2 nor D5 suggests establishing a link between milk related data and stress measurement data, the combination of these documents would not lead to the claimed subject-matter.

However, claims 1 and 31 do not define any relation between these stored data. The terms "together with" only mean that stress measurement data and milk related data are stored in the same storage device.

In any case, even if claim 1 or claim 31 were to imply that a relation is established between stress data and milk related data of an animal, no inventive step could

be recognized, since it is generally known to compare different data with each other in order to establish whether the data are correlated. In D5, it is stated that "[t]he actual recorded data is compared with data of previous recording **and other data** stored in the herd management data base" (paragraph "Udder health monitoring", page 23; emphasis added).

2.5 Therefore, the subject-matter of claim 31 as well as that of claim 1 of the main request lack an inventive step (Article 56 EPC).

3. *Inventive step (claim 1 of the auxiliary request)*

3.1 According to D2, the control means is adapted to provide an output signal in case the value of the breathing rate or that of the movement rate of the animal exceeds a predetermined level. Thus, D2 discloses not only all the features of the pre-characterising portion of claim 1 of the auxiliary request but also the feature that the central unit comprises a comparing device for comparing stress measurement data with the data in the correspondence table.

3.2 The subject-matter of claim 1 differs from the device of D2 in that the comparing device is also suitable "for comparing the stress measurement data obtained before, during, and preferably also after milking during a milking run". Having regard to the fact that the term "preferably" renders facultative the terms "also after milking", the claimed subject-matter differs therefrom in that the comparing device is also suitable for comparing the stress measurement data

obtained before milking during a milking run with those obtained during milking for the same milking run.

- 3.3 A comparison of the stress situation of the animal before and during milking provides useful information on the behaviour of the animal with respect to the milking operation (see patent specification, column 5, paragraph [0029]).

Thus, the technical problem to be solved by the invention as defined in claim 1 of the auxiliary request may be seen in providing an improved device for milking in which more detailed information on the behaviour of the animal with respect to the milking session is made available to the farmer.

- 3.4 D8 refers to experimental investigations carried out in order to study the effect of side preference of cows in the milking parlour regarding behaviour, heart rate and milk production (see particularly page 48: "Abstract").

Pairs of cows (each pair being constituted by a cow showing side preference and another cow not showing it) from a group of 16 animals were provided with a stress measuring device comprising a heart rate monitor adapted to measure the heart rate of the animal (see particularly pages 51 and 52: "Enforced parlour side choice"). On page 60 (paragraph "Effect of parlour side"), it is stated that the "tachycardiac responses during entry (left: $10.1 \pm 1,16\%$; right: 6.2 ± 1.19) and during milking (left: $12.5 \pm 0,88\%$; right: $10.0 \pm 0.88\%$) were significantly higher in cows that were milked on the left than in cows that were milked on the right side of the milking parlour". From this sentence

the skilled person would immediately realize that a comparison between stress measurement data (i.e. tachycardiac responses) obtained before milking (during entry into the milking parlour) and stress measurement data obtained during milking within the same milking session is important for providing information on the behaviour of an animal with respect to the milking session.

3.5 Thus, D8 points towards the technical problem to be solved and suggests the solution. Therefore, the skilled person starting from D2 and seeking for a solution to the above mentioned technical problem would consider D8 and apply its teaching to the device of D2 and thus arrive at the claimed subject-matter without exercising any inventive skill.

3.6 It is true that - as submitted by the appellant - the above mentioned sentence from the paragraph "Effect of parlour side" on page 60 of D8 refers to a comparison between the stress measurement data of an animal milked on one side and those of another animal milked on the other side of the parlour. However, the values indicated in this sentence make it clear that there are significant differences between the tachycardiac responses measured on the same side of the parlour before and during milking and, thus, also suggest comparing stress measurement data obtained before milking with those obtained during milking from the same animal during the same milking session.

3.7 Therefore, the subject-matter of claim 1 of the auxiliary request lacks an inventive step (Article 56 EPC).

4. *Referral of two questions to the Enlarged Board of Appeal*

Pursuant to Article 112(1)(a) EPC an important point of law that arises during proceedings in a case may be referred to the Enlarged Board of Appeal if the referring Board considers that a decision is "required" for this point. According to the well established jurisprudence of the Boards of Appeal, an answer to the point of law must be necessary to the decision of the Board of Appeal. If the Board can reach a decision even by leaving open the question to be referred, then the referral is not "required" within the meaning of Article 112(1)(a) EPC and thus not admissible, even if relating to an important point of law of general interest (see J 16/90, OJ EPO 1992, section 1.2; G 3/98 OJ EPO 2001, 62, section 1.2 and T 1138/02).

In the present case, the referral of the above questions related to the main request must be rejected, as the subject-matter of independent claims 1 and 31 of the main request lacks an inventive step and this alone means that the main request has to be rejected in its entirety without it being necessary to consider whether the main request comprising two added independent claims would be admissible inter alia under Rule 57a) EPC 1973.

Consequently, the questions the appellant requested to refer to the Enlarged Board of Appeal are not material to the Board's decision on the main request.

4.1 Therefore, the request for referral to the Enlarged Board of Appeal must be rejected.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte