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Datasheet for the decision of 17 February 2011

Case Number: T 0709/08 - 3.2.04

Application Number: 97203807.9

Publication Number: 0836802

IPC: A01J 5/017

Language of the proceedings: EN

Title of invention:
A method of and an implement for milking animals automatically

Patentee:
MAASLAND N.V.

Opponent:
DeLaval International AB

Headword:
Dead time/MAASLAND

Relevant legal provisions:
EPC Art. 54, 56, 123(2)

Relevant legal provisions (EPC 1973):
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Keyword:
"Lack of inventive step (main request)"
"Added subject-matter (auxiliary request)"

Decisions cited:
-

Catchword:
-

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Case Number: T 0709/08 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 17 February 2011

Appellant: (Patent Proprietor)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 8 February 2008 revoking European patent No. 0836802 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

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

Summary of Facts and Submissions

I. The European patent No. 0 836 802 was revoked by a decision of the opposition division dispatched on 8 February 2008.

II. The patent proprietor (hereinafter appellant) lodged an appeal against this decision on 3 April 2008 and simultaneously paid the appeal fee. The grounds of appeal were received on 12 June 2008.

III. Oral proceedings before the board were held on 17 February 2011.

At the oral proceedings the appellant withdrew auxiliary requests I to III previously filed and submitted a new auxiliary request.

IV. The appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request filed by letter dated 17 January 2011 or in the alternative on the basis of the auxiliary request filed during oral proceedings before the board.

Claim 1 of the main request, which is identical to granted claim 1, reads as follows:

"1. A method of milking animals, especially cows, automatically, with a milking plant including a computer and making use of teat cups, characterized in that, at randomly selectable times, the monitor display of the computer and/or a printer is capable of indicating the animals of which the dead time between

the instant when one of the teat cups has been connected to a teat and the instant when the flow of milk from this teat has started, has exceeded the respective predetermined value as well as the extent hereof."

Claim 1 of the auxiliary request reads as follows:

"1. A method of milking animals, especially cows, automatically, with a milking plant including a computer and making use of teat cups, characterized in that, at randomly selectable times, the monitor display of the computer and/or a printer is capable of indicating the animals of which the dead time between the instant when one of the teat cups has been connected to a teat and the instant when the flow of milk from this teat has started, has exceeded the respective predetermined value as well as the extent hereof, wherein

– the dead time between the instant when any one of the teat cups is connected to a relevant teat and the instant when the flow of milk from this teat has started is determinable by means of a computer,

– the dead time between the instant when a vacuum-sensitive sensor has established a sufficient vacuum in a teat cup applied to a relevant teat and the instant when the start of a flow of milk from this teat has been established by a flow-sensitive sensor is established by means of the computer,

– the dead time for the flow of milk from each of the teats is established, and

– the extent to which the dead time exceeds a predetermined value for a relevant animal is determined by means of the computer."

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

VI. The appellant essentially submitted that the subject-matter of claim 1 is novel and involves an inventive with regard to D2 and D7 as well as that the subject-matter of claim 1 of the auxiliary request can be directly and unambiguously derived from the parent application as filed.

VII. The respondent contested the arguments of the appellant.

Reasons for the Decision

1. The appeal is admissible.

2. *Novelty (main request)*

2.1 D2 discloses a method of milking animals automatically, making use of a milking plant including a computer and of teat cups, the computer being provided with a display monitor. Since this citation does not refer to the dead time, it does not disclose the feature that the display monitor of the computer is capable of indicating the animals of which the dead time has exceeded the respective predetermined value as well as the extent thereof.

2.1.1 In this respect, the respondent essentially submitted that the terms "capable of indicating ..." in claim 1 did not imply that the monitor display or the printer are specifically arranged or adapted to generate and show specific information concerning the animal, the dead time and the amount or extent to which the dead time has exceeded the respective predetermined value.

2.1.2 The board does not find this argument convincing for the following reasons:

- Claim 1 - in so far as it refers to a milking plant including a computer and its monitor display - has to be construed as including the step of **using the monitor display of a computer** capable of indicating the animals for which the dead time has exceeded its respective predetermined value as well as the extent thereof. This step implies that the computer has to be programmed in a specific way.

- D2 is silent as to how the computer is programmed.

2.2 D7 discloses a method of milking animals comprising the steps of making use of a milking plant including teat cups and a recording device capable of recording graphically for each teat of an animal at least the time of latent period of lactation reflex, the milking time and the overmilking time, whereafter the recordings are processed and histograms are printed out for each teat.

D7, which was published in 1986 and received for publication in 1985, does not clearly disclose a milking plant with a computer.

2.3 Therefore, the subject-matter of claim 1 of the main request is novel (Article 54 EPC) over either D2 or D7.

3. *Inventive step (main request)*

3.1 The claimed subject-matter differs from the method of D2 in that, at randomly selectable times, the monitor display of the computer or a printer is capable of indicating the animals of which the dead time between the instant when one of the teat cups has been connected to a teat and the instant when the flow of milk from this teat has started has exceeded the respective predetermined value as well as the extent thereof.

In the claimed method the computer is programmed so that the monitor display or a printer is capable of showing this information.

In this respect, it is observed that it is generally known to program a computer in such a way that data stored in the memory of the computer or provided to the computer by means of a peripheral input device, such as a keyboard, can be indicated or displayed by a peripheral output device, such as a monitor display or a printer.

3.2 Starting from D2, the technical problem underlying the claimed invention may be seen in providing information

about the physical condition of the animals to be milked.

In order to solve this problem the skilled person would consider document D7 which relates to the problem of providing information about the physical condition of the animals with respect to the inhibition of the lactation reflex (i.e. the milk ejection reflex).

3.3 Figures 1-I, 2-I and 3-I of D7 show histograms, each consisting of four rectangles extending from a base line and corresponding to one of the teats of a milked cow. The height of each rectangle represents the time between the beginning and the end of the milking process of a teat, wherein the lower black portion, the middle light coloured portion and the upper black portion of each rectangle represent "latent period of the lactation reflex", "milking time" (i.e. the period between the instant when the milk flow starts and the instant when the milk flow stops), and "overlactation" (i.e. the period between instant when the milk flow stops and the instant when the four teat cups are disconnected), respectively. It can be deduced from these figures that the latent period of the lactation reflex is the time between the instant when a teat cup is attached to the a teat and the instant when the flow of milk from the teat starts. That means that the latent period of the lactation reflex is the "dead time" referred to in claim 1.

The histograms of D7 are printed out and analyzed in order to detect the "extension of the time of the latent period of the lactation reflex" and compared to each other in order to determine "the effect of the

inhibition of the lactation reflex" (see page 2, last paragraph).

Thus, D7 teaches the general idea of indicating information concerning the physical condition of an animal. It would have been obvious for the skilled person confronted with the problem of providing information concerning the physical condition of the animals to be milked to apply the teaching of D7 to D2 and therefore to program the computer of D2 in such a way that the monitor display or a printer is capable of showing this information.

The specific nature of the information does not give the claimed subject-matter an inventive character. In this respect, it has to be noted claim 1 - although it refers to the specific information to be indicated - cannot be construed as implying the features that the computer is arranged to determine the dead time and the extent in so far as these features are defined in dependent claims 6, 7 and 9.

Moreover, D7 not only teaches to indicate information concerning the physical condition of an animal but also suggests using the time between the instant when a teat cup is attached to a teat and the instant when the flow of milk from the teat starts, i.e. the dead time, as a parameter to be provided for each animal.

Moreover, it is generally known when comparing a measured parameter to a reference value to establish the extent or amount to which the parameter exceeds its reference value.

Therefore, it would also have been obvious for the skilled person, on the basis of the teaching of D7 and common general knowledge, to arrive at a method in which - at randomly selected times, i.e. at times randomly selectable by an operator - the monitor display or a printer indicates the animal for which the dead time exceeds a predetermined value and the extent thereof.

3.3.1 The appellant has essentially submitted the following arguments:

(i) The latent period of milk ejection according to D7 is the time between the initial stimulation of the teat and the start of the ejection of alveolar milk, i.e. the milk released by the alveoli of the mammary gland, while the start of milk flow referred to in claim 1 relates not only to the alveolar milk but also to the cistern milk, i.e. to the milk stored in the teat cistern between two milkings. Thus, the dead time defined in claim 1 does not correspond to the latent period of milk ejection referred to in D7.

(ii) The histograms shown in D7 do not indicate either the animals for which the latent period of milk ejection has exceeded a threshold value or the extent to which the threshold value has been exceeded.

3.3.2 The board does not find these arguments convincing for the following reasons:

(i) As has been explained, it can be understood from D7 that the latent period of lactation is the time between the instant when the teat cup is connected to the teat and the start of the milk flow, as defined in claim 1. Neither D7, nor the patent specification make a distinction between "alveolar milk" and "cistern milk". Therefore, the dead time of claim 1 and the latent period of lactation of D7 are to be considered as defining the same period of time.

(ii) The histograms shown in Figures 1 to 3 of D7 do not indicate the identity of the animal. However, it is clear that each histogram shows information concerning a particular animal and the skilled person would immediately recognize that the information that the dead time has exceeded a threshold value has to be linked to the identity of the animal for which this has occurred.

Moreover, the fact that the histograms of D7 do not indicate the extent to which the dead time has exceeded its respective predetermined value is irrelevant for the findings of the present decision, in so far as on the basis of common general knowledge the skilled person would come to the idea of indicating such an extent without exercising inventive skill.

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

4. *Procedural matter (auxiliary request)*

Claim 1 of the present auxiliary request differs from claim 1 of third auxiliary request previously on file in that the features of granted claims 6 to 9 have been added.

Since the amendments made define the features of claim 1 more precisely, consideration of the patentability of the new auxiliary request would not extend the scope of debate with respect to that determined by the written appeal proceedings. Neither do these amendments raise issues which the board or the respondent cannot reasonably be expected to deal with without adjournment of the oral proceedings (Rule 13 (3) RPBA). Moreover, these amendments are uncomplicated and easy to understand.

Therefore, the board in exercising its discretion under Rule 13 (1) RPBA decided to admit this auxiliary request into the proceedings.

5. *Article 100 (c) EPC (auxiliary request)*

Claim 1 of the auxiliary request results in essence from the combination of features of granted claims 1 and 6 to 9.

5.1 Granted claim 1 corresponds to independent claim 33 of the parent application as filed (EP-A-534 565) which also contains two further independent claims 10 and 12 for a method and independent claim 1 for an implement.

5.2 Granted dependent claims 6 to 9 correspond to dependent claims 16 to 19 of the parent application as filed, which do not refer to independent claim 33 but to independent claims 10 and 12. These two independent claims 10 and 12 do not state the features that at randomly selectable times a monitor display of a computer or a printer is "capable of indicating the animals for which the dead time ... has exceeded the respective predetermined value as well as the extent thereof" as defined in the characterising portion of claim 33. Thus, the combination of the features of claim 1 with the features of claims 6 to 9 is not supported by the claims of the parent application as filed.

5.3 The appellant submitted that claim 1 of the auxiliary request finds support in the description of parent application as filed at column 4, lines 15 to 39 and 55 to 58) and at column 6, lines 25 to 32.

It is true that the definition given for the dead time at column 4, lines 15 to 18 applies for all embodiments disclosed in the parent application as filed. It is also true that the features of granted claims 6 to 9 find support at column 4, lines 15 to 39 and 55 to 58. However, the method of milking disclosed therein refers neither to the monitor display of a computer nor to a printer which, at randomly selectable times, is "capable of indicating the animals for which the dead time ... has exceeded the respective predetermined value as well as the extent thereof", as claimed in granted claim 1.

The further paragraph cited by the appellant at column 6, lines 25 to 32 which refers (among others) to

a monitor display or to a printer and which also forms a basis for the features of granted claim 1 is separated from column 4, lines 15 to 39 and 55 to 58 by a number of paragraphs starting with "According to the invention" and defining further embodiments which are not specified in amended claim 1.

There is thus no link derivable from the description which could lead the skilled person to combine the features of these two passages.

Moreover, while the features of granted claims 6 to 8 find support in the same paragraph (column 4, lines 15 to 39) starting with "Accordingly the invention also relates to a method of milking animals", the features of granted claim 9 find support in a subsequent paragraph bridging column 4 (line 55) and column 5 (line 13) and starting with "According to another aspect of the invention". The features of claim 9 are thus said to refer to a different aspect from one already mentioned. Consequently, the two above mentioned passages do not clearly disclose the combination of the features of claims 6 to 8 with the features of claim 9.

5.4 Accordingly, the combination of the features of granted claims 1 and 6 to 9 could not be derived directly and unambiguously from the parent application as filed, so that amended claim 1 of the auxiliary request is not allowable under Articles 100 (c) and 76 (1) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Magouliotis M. Ceyte