

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 25 February 2016**

Case Number: T 2244/13 - 3.2.08

Application Number: 06720577.3

Publication Number: 1850815

IPC: A61F7/08, A61F7/00

Language of the proceedings: EN

Title of invention:

WARMING DEVICE FOR PERIOPERATIVE USE

Applicant:

3M Innovative Properties Company

Headword:

Relevant legal provisions:

EPC Art. 123(2), 54, 56

EPC R. 43(2)(c)

Keyword:

Amendments of application - allowable (yes)

Novelty - (yes)

Inventive step - (yes)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent
Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89
2399-4465

Case Number: T 2244/13 - 3.2.08

D E C I S I O N
of Technical Board of Appeal 3.2.08
of 25 February 2016

Appellant: 3M Innovative Properties Company
(Applicant) 3M Center
P.O.Box 33427
St. Paul, MN 55133-3427 (US)

Representative: Vossius & Partner
Patentanwälte Rechtsanwälte mbB
Siebertstrasse 3
81675 München (DE)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 6 June 2013
refusing European patent application No.
06720577.3 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairwoman P. Acton
Members: C. Herberhold
D. T. Keeling

Summary of Facts and Submissions

- I. By its decision posted on 6 June 2013 the Examining Division refused European patent application No. 06 720 577.3.
- II. In its decision the Examining Division held that the subject-matter of the then main request was not new over the disclosure of document D1. The then auxiliary requests were found to be in violation of the requirements of Article 123(2) EPC.
- III. The appellant (applicant) lodged an appeal against that decision in the prescribed form and within the prescribed time limit.
- IV. Oral proceedings before the Board of Appeal took place on 25 February 2016.

At the end of the oral proceedings the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request as filed during oral proceedings before the Board.

- V. Independent claims 1 and 3 of the sole request read as follows:

Claim 1:

"A warming device (12, 40), comprising a clinical garment (13, 42) and a convective device attached to the inside surface of the clinical garment, characterized in that:

the convective device is a thermal blanket (51, 80, 90, 101) adapted for separate deployment for perioperative

use to provide therapeutic warming to prevent or treat hypothermia (Feature A); and,
a mechanism or means (52,60) acting between the clinical garment (42) and the thermal blanket is adapted to detach the thermal blanket from the clinical garment (Feature B); and
wherein the thermal blanket is an upper body thermal blanket (51) that is adapted to lie upon and extend transversely across the upper body of a person in order to cover the person's chest and extended arms (Feature C),
wherein the clinical garment (42) includes opposed vertical hems (45) and opposed flaps (62) formed in the opposed vertical hems;
the upper body thermal blanket (51) extending from one flap to the other flap;
the flaps adapted to be folded into the inside of the clinical garment over the upper body thermal blanket;
and means (65) for releasably retaining the opposed flaps against the inside of the clinical garment (Feature D)."

Claim 3:

"A warming device (12, 40), comprising a clinical garment (13, 42) and a convective device attached to the inside surface of the clinical garment, characterized in that:
the convective device is a thermal blanket (51, 80, 90, 101) adapted for separate deployment for perioperative use to provide therapeutic warming to prevent or treat hypothermia (Feature A); and,
a mechanism or means (52,60) acting between the clinical garment (42) and the thermal blanket is adapted to detach the thermal blanket from the clinical garment (Feature B); and

wherein the thermal blanket is an upper body thermal blanket (51) that is adapted to lie upon and extend transversely across the upper body of a person in order to cover the person's chest and extended arms (Feature C),

wherein the upper body thermal blanket (51) is adapted to be disposed longitudinally along the inside of the clinical garment (42), the clinical garment including a lower hem (47) being adapted to be folded into the inside (43) of the clinical garment over the upper body thermal blanket (51); and means (70) for releasably retaining the lower hem against the inside of the clinical garment (Feature E)."

VI. The following documents played a role for the present decision:

D1: WO-A-03/086500; and
D2: US-A-5,891,187.

VII. The essential arguments of the appellant can be summarised as follows:

Article 123(2)

Claim 1 of the main request was based on claims 1, 2, 3 and 8 as filed in combination with the disclosure on page 8, lines 11-14, Figures 2C, 2D, and page 10, lines 24-26 of the description as filed. Claim 3 was a combination of claims 1, 2, 3, 10 and 14 as filed also in combination with the above mentioned passages of the description as filed.

The requirements of Article 123(2) EPC were thus fulfilled.

Novelty and inventive step

The warming device disclosed in D1 was neither adapted for separate deployment, nor for perioperative use, nor for therapeutic warming, i.e. for treatment of hypothermia.

Furthermore, the independent claims specified the suitability of the blanket to cover not only a person's chest but also the extended arms as well as the garment's features for holding such a blanket.

Document D1 did neither disclose nor suggest such warming device nor the garment adaptation features nor did the further documents cited in the search report.

Thus it could be concluded that the subject-matter of the independent claims was not only novel but also based on an inventive step vis-à-vis D1.

Reasons for the Decision

1. Article 123(2) EPC

Claim 1 is a combination of claims 1, 2, 3 and 8 as filed and features A and C. Feature A is disclosed on page 10, lines 24-26. This passage also explicitly refers to an upper body thermal blanket which is detached from the garment and deployed as shown in Figure 2C. The upper body thermal blanket as illustrated in Figures 2C and 2D is "adapted to lie upon and extending transversely across the upper body of a person in order to cover the person's chest and extended arms" (Feature C, see page 8, lines 11-14). While page 8, lines 11-14 further mentions a bow-tie shape of the

upper body thermal blanket, the bow-tie form, the length of the upper body thermal blanket and the features for holding the blanket in the garment are not inextricably functionally or structurally linked.

Hence, the feature relating to the shape of the blanket does not need to be introduced into the independent claims.

Second independent claim 3 is a combination of claims 1, 2, 3, 10 and 14 as filed with the passages taken from the description as discussed above.

The dependent claims are based on dependent claims as originally filed, the feature combinations so defined being either derivable from the original claim tree or shown in the drawings.

2. Inventive step

Document D1, which represents the closest available prior art, discloses (the references relate to D1):

A warming device (page 3, third paragraph, first sentence: "treatment or prevention of hypothermia in a clinical or medical office setting"), comprising a clinical garment (Figure 1, **112**: "gown") and a convective device (**110**) attached to the inside surface of the clinical garment, wherein:
the convective device is a thermal blanket (**110**) further comprising, a mechanism or means acting between the clinical garment and the thermal blanket is adapted to detach the thermal blanket from the clinical garment (Claims 11 and 12 and page 10, last sentence - page 11, line 2 disclose "hook and loop" means. "Hook and eye" means are also claimed in dependent claim 7 of the

application; the D1 mechanism or means acting between blanket and garment will thus have the same effect, i.e. the blanket is detachable and thus separately deployable, no matter whether this is in a clinical or medical office setting or during surgery).

Further the application explicitly refers to D1 with respect to the specific construction of the thermal blankets (page 8, second paragraph, last sentence of the application as filed). Hence, the blanket from D1 has the same constructional features as the blanket used in the claimed warming device and must be also adapted for the same purpose i.e. to provide therapeutic warming to prevent or treat hypothermia.

Therefore, D1 discloses features A and B as well.

The subject-matter of claim 1 thus differs from the disclosure of D1 in Features C and D and the subject-matter of claim 3 differs from the disclosure of D1 in Features C and E.

- 2.1 The problem solved by these features is the provision of a warming device providing more efficient warming of the upper body in the intraoperative situation when the patient is lying on the operation room table with extended arms while allowing a comfortable wearing of the garment before the surgery.

Features D) and E) allow for the garment to accommodate the length of the relatively long thermal blanket defined in feature C). In this context it is noted that due to the normal proportions of the human body, a blanket according to feature C) has a length approximately corresponding to the height of the person (see Leonardo da Vinci: "The Vitruvian Man"). Thus, in

order to accommodate such a blanket within the garment, its length needs to be shortened.

The solutions defined in claims 1 and 3 both shorten the blanket:

Claim 1 explicitly mentions that the blanket extends from one flap of a respective vertical hem to the other (the blanket thus being disposed transversely across the inside of the garment from one flap to the other), folding the flaps thus equally folding the blanket.

In the situation of claim 3, the unfolded longitudinally disposed blanket is inevitably longer than the distance between collar and lower hem of the garment after folding up, it thus being intrinsic that the blanket is shortened together with the lower hem by inside folding.

2.2 Since D1 refers exclusively to heating a patient's upper body while awaiting treatment, it cannot suggest modifying the shape of the thermal blanket in order to make it suitable to cover the patient's upper body during surgery according to feature C. Moreover, as pointed out above, due to the normal proportion of the human body it will be necessary to further adapt the garment in order to make it suitable to accommodate the length of the thermal blanket. Such an adaptation cannot be suggested by D1 either.

2.3 Document D2 - cited in the search report - discloses using an insulation material having flaps for connecting to a patient a heating device having roughly the shape of the human body. It does not, however, disclose a thermal blanket adapted to lie upon and extend transversely across the upper body, let alone a solution to accommodate a blanket of such length within a clinical garment.

Therefore, the subject-matter of claims 1 and 3 is inventive over the teaching of documents D1 and D2.

2.4 Rule 43(2)(c)

Independent claims 1 and 3 provide alternative solutions to the problem defined in point 2.1 above, two independent claims in the product category thus being justified.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Examining Division with the order to grant a patent on the basis of the following documents:
 - Claims 1 to 7 as filed during the oral proceedings;
 - Description, pages 1 to 15 as filed during the oral proceedings;
 - Figures 1 to 8B as published.

The Registrar:

The Chairwoman:



C. Moser

P. Acton

Decision electronically authenticated