

Internal distribution code:

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

**Datasheet for the decision
of 30 November 2017**

Case Number: T 2480/13 - 3.2.06

Application Number: 02796039.2

Publication Number: 1487389

IPC: A61F13/00, A61M1/00

Language of the proceedings: EN

Title of invention:

EXTERNAL CATHETER ACCESS TO VACUUM BANDAGE

Patent Proprietor:

KCI Medical Resources

Opponent:

Smith and Nephew, Inc.

Relevant legal provisions:

EPC Art. 84

RPBA Art. 13(1)

Keyword:

Late filed request - not clearly allowable - claim not clear
after amendment



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 2480/13 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 30 November 2017

Appellant: Smith and Nephew, Inc.
(Opponent) 1450 Brooks Road
Memphis, TN 38116 (US)

Representative: Appleyard Lees IP LLP
15 Clare Road
Halifax HX1 2HY (GB)

Respondent: KCI Medical Resources
(Patent Proprietor) 122 Mary Street
Zephyr House
Grand Cayman (KY)

Representative: CMS Cameron McKenna Nabarro
Olswang LLP
Cannon Place
78 Cannon Street
London EC4N 6AF (GB)

Decision under appeal: **Interlocutory decision of the Opposition**
Division of the European Patent Office posted on
29 October 2013 concerning maintenance of the
European Patent No. 1487389 in amended form.

Composition of the Board:

Chairman M. Harrison
Members: G. de Crignis
W. Ungler

Summary of Facts and Submissions

- I. By way of its interlocutory decision, the opposition division found that European Patent No. 1 487 389 as amended met the requirements of the European Patent Convention (EPC).
- II. The appellant (opponent) filed an appeal against this decision and requested revocation of the patent. It argued that the amendments to claim 1 contravened Article 84 EPC. Further objections with regard to Article 100(b) EPC, Articles 54 and 56 EPC were also raised.
- III. The respondent (patent proprietor) requested dismissal of the appeal and submitted first to third auxiliary requests.
- IV. In a communication annexed to the summons to oral proceedings, the Board indicated its preliminary view that the amendments made in claim 1 did not provide a clear distinction between the covers referred to therein nor was the relationship of the covers clearly specified, such that Article 84 EPC was contravened in all requests.
- V. In reply, the respondent submitted an amended main request and amended first to fifth auxiliary requests.
- VI. Oral proceedings were held before the Board on 30 November 2017, during which the respondent replaced all previous requests by a new main request.

The appellant requested that the decision under appeal be set aside and the patent be revoked.

The respondent requested that the patent be maintained in amended form on the basis of the main request as filed during the oral proceedings of 30 November 2017.

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

"A bandage (10) connectable to a vacuum source (14) for use with a wound having a wound surface, the bandage (10) comprising:

an outer flexible cover (18) positioned over the wound and configured to seal to a patient's healthy skin surrounding the wound, the outer flexible cover (18) including a port; a collar (20) coupled to the outer flexible cover (18) and including a passageway (22) in communication with the port of the outer flexible cover (18), the passageway (22) being configured to receive at least a portion of a tube (24) in communication with the vacuum source (14),

and a sealer (82, 96) coupled to the collar (20) and configured to provide a substantially-airtight seal between the tube (24) and the passageway (22) to create a sealed environment capable of maintaining a negative pressure between the outer flexible cover (18) and the wound surface;

characterised in that the bandage comprises a flexible member (30) configured to lie adjacent the wound surface, the member (30) including a wound contacting layer (32) including a wound-contacting surface (38) and an upper surface (40), a cover (34) coupled to the upper surface of the wound contacting layer (32), and a connector (36) coupled to a top surface (52) of the cover (34) to receive the tube (24)."

VIII. The arguments of the appellant relevant to the decision may be summarised as follows:

The request - filed during the oral proceedings and hence late - should not be admitted as it was not *prima facie* allowable. Claim 1 neither met the requirements of Article 84 EPC nor of Article 123(2) EPC.

The wording of the claim should be clear in itself. Claim 1 referred to two covers: "a cover" and a "flexible outer cover". No definition or specification was given which would allow the "a cover" to be distinguished from the "flexible outer cover". Both covers had to be flexible. The term "outer" did not clarify the position further than that the cover had to be positioned over the wound which condition applied to both covers. The different reference numerals ("18", respectively "34") were not suitable to provide a difference.

It was also not clearly defined in the claim whether the "a cover" specifically related to the flexible member or not. The feature of a "connector coupled to a top surface (52) of the cover (34) to receive the tube (24)" did not necessarily lead to such a conclusion. The connector might just as well be coupled to a top surface of the outer flexible cover, since the connector could anyway be arranged so as to receive the tube. The connector could, for example, either be a distinct part of the collar or could be an extra part distinct therefrom. There was no restriction claimed in this regard. Therefore, even when adopting the concept of a mind willing to understand, this would be a technically reasonable interpretation of the wording of the claim and by no means artificial.

Additionally, the wording in the description (WO publication, page 3, lines 28/29) supported this view

in that it generally disclosed that the "collar may be coupled to a top surface of the cover".

Hence, there existed an internal lack of clarity within the claim as well as an inconsistency between the wording of the claim and the description.

IX. The arguments of the respondent relevant to the decision may be summarised as follows:

Only due to the indications of the Chairman about the wording of claim 1 at the beginning of the oral proceedings was the clarity objection understood also in relation to the auxiliary requests on file. Due to this, filing of a corresponding request should be allowed to overcome the problem. The new main request replaced all previous requests on file. The request should be admitted.

Where claim 1 defined the feature of "a cover", this was thus a distinct element from a "flexible outer cover". An internal inconsistency arose if both were understood as being the same element.

The bandage specifically comprised a flexible member in addition to the outer flexible cover. The skilled person understood the feature "flexible member" as a different entity to the flexible outer cover due to the way the covers were linked to the other parts of the bandage. The outer flexible cover included a port, and was coupled to a collar and included a passageway in communication with the port. The cover which was distinct therefrom was structurally identified in that it was coupled to the upper surface of the wound contacting layer of the flexible member and in that a connector was coupled to its top surface to receive the tube. These structural differences allowed the

differentiation between the covers to be made in the claim, since another reading would be inconsistent.

Reasons for the Decision

1. Admittance of the (new) main request

1.1 The current request was filed during the oral proceedings, hence at the latest possible stage in the proceedings. According to Article 13(1) of the Rules of Procedure of the Boards of Appeal (RPBA), it lies within the discretion of the Board to admit any amendment to a party's case after it has filed its grounds of appeal or reply. In order to be admitted at such a late stage of proceedings, such a request should normally be clearly allowable at least in the sense that it overcomes the objections raised (and does not give rise to new objections). The objections already raised in this regard concerned in particular the issue that two "covers" are defined in claim 1.

1.2 In this respect the Board had already indicated in its communication pursuant to Article 15(1) RPBA (see points 2 and 3) that no clear distinction between the covers was given in the claim and that it was not clarified what the positional or structural relationship between one cover and the other cover was. A clarification by means of reference numerals (18, 34) or by defining the characteristic of flexibility was also indicated by the Board as not being apt to distinguish one cover from the other.

1.3 The amendments made in claim 1 of the current request do not overcome the respective objection either, as set out below.

1.4 The amendments concern

(a) the definition of one cover as an "outer flexible cover (18)" and the addition of another feature related to "a cover (34)";

(b) the definition of the flexible member (30) as "including a wound contacting layer (32) including a wound-contacting surface (38) and an upper surface (40), a cover (34) coupled to the upper surface of the wound contacting layer (32),";

(c) the definition of the connector (36) as "coupled to a top surface (52) of the cover (34)".

1.5 Concerning amendment (a):

Both covers referred to have to be flexible in that a bandage for use with a wound should be flexible overall itself. Hence, the attribute of flexibility is not one which distinguishes one of the covers in the claim from the other.

The definition of one cover (the "outer flexible" cover) as being positioned over the wound and configured to seal to a patient's healthy skin surrounding the wound mandatorily applies to any cover or layer of such an article. Moreover, the structural features of the claim include this possibility for both covers. Accordingly, also this characteristic does not distinguish the "outer flexible cover (18)" from "the cover (34)".

1.6 Concerning amendment (b):

The further features characterising the flexible member do not alter the fact that the relationship of one cover to the other cover is not defined in the claim. The "cover (34)" is defined as being coupled to the upper surface of the wound contacting layer. This does not exclude the further cover (18) from being a cover coupled to the upper surface of the wound contacting layer. No specific information in this regard is present in the claim; at least an indirect coupling of the cover (18) to the upper surface of the wound contacting layer has to be present. Thus, the now claimed specific relationship of the cover (34) to the upper surface of the wound contacting layer does not clarify the relationship, or even differentiation, of the covers.

1.7 Concerning amendment (c):

By this amendment the respondent argued that the connector was defined so as to be mandatorily related to be part of the flexible member, in that it was linked to it by the word "and" when listed in the characterising portion. However, the conjunction "and" used in the characterising portion is preceded by a comma and hence the feature is not necessarily directly linked to the preceding wording. Similarly, the wording "a connector coupled to a top surface of the cover to receive the tube" does not include any clear limitation requiring that it is the top surface of the cover referred to in the characterising part which is to be considered. The wording of the claim is broad enough to logically cover all possibilities in this respect.

The respondent's view that the connector had to be a part of the flexible member rather than the outer flexible cover, and in particular connected to the top surface of the cover coupled to the upper surface of the wound contacting layer, was based on its argument that the connector could not be a part related somehow to the outer flexible cover due to the claim wording. However, the connector is specified only such that it is coupled to a top surface of "the cover" to receive the tube. Such an undefined coupling is, as also argued by the appellant, possible - irrespective of the cover's top surface on which it is made. The connector is separately defined as an element and can indeed be understood as such. Nevertheless, it can possibly be coupled to the top surface of either the cover of the flexible member or to the outer flexible cover which includes a port and a collar. In the latter case, the connector could either be a specific part of the collar or it could be a part distinct therefrom. Both are technically logical possibilities. No further restriction is defined. Accordingly, no internal inconsistency in the claim can be recognised in this respect, such that the respondent's reliance on this as implying a distinction between the covers is not accepted.

- 1.8 The respondent further argued that a broad interpretation of the claim would be a misinterpretation which would not be considered by the skilled person. However, the above explanations indicate that it is a technically reasonable interpretation of the wording of the claim and by no means artificial.
- 1.9 Accordingly, the objections raised by the appellant and also stated by the Board in its provisional opinion

given in the Board's communication were not overcome. Thus, the Board exercised its discretion under Article 13(1) RPBA not to admit the 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:



M. H. A. Patin

M. Harrison

Decision electronically authenticated