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**Datasheet for the decision
of 10 September 2020**

Case Number: T 1188/16 - 3.2.06

Application Number: 09755801.9

Publication Number: 2285323

IPC: A61F13/00, A61M1/00

Language of the proceedings: EN

Title of invention:

SUPER-ABSORBENT, REDUCED-PRESSURE SYSTEM

Patent Proprietor:

KCI Licensing, Inc.

Opponent:

Smith and Nephew, Inc.

Headword:

Relevant legal provisions:

RPBA 2020 Art. 13(1), 12(6)

EPC Art. 123(2)

Keyword:

Late-filed request - request could have been filed in first instance proceedings (yes)

Decisions cited:

Catchword:



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Case Number: T 1188/16 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 10 September 2020

Appellant: KCI Licensing, Inc.
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Respondent: Smith and Nephew, Inc.
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Representative: Vossius & Partner
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 18 March 2016
revoking European patent No. 2285323 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
E. Kossonakou

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (patent proprietor) against the decision of the opposition division revoking European patent no. 2 285 323, in which it found that the subject-matter of claim 1 according to each of a main request and a first auxiliary request extended beyond the content of the application as filed.
- II. With its grounds of appeal, the appellant requested that the decision under appeal be set aside and the case be remitted to the opposition division for further prosecution on the basis of the main request or on the basis of one of auxiliary requests 1 and 2.
- III. The respondent (opponent) requested that the appeal be dismissed.
- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the subject-matter of claim 1 of the main request seemingly extended beyond the content of the application as filed. With regard to the auxiliary requests, it was questioned whether these should be held inadmissible under Article 12(4) RPBA 2007.
- V. With letter of 2 July 2020, the appellant filed a single new request (main request) replacing all requests on file.
- VI. Oral proceedings were held before the Board on 10 September 2020. The requests of the parties were as follows:

The appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request filed as its sole request with letter dated 2 July 2020.

The respondent requested that the appeal be dismissed.

Both parties requested remittal of the case to the opposition division, in case the requirement of Article 123(2) EPC were found to be met in respect of the now claimed subject-matter.

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

"A reduced-pressure treatment system (10) for treating a wound, the system comprising:
a super-absorbent liquid-controlled bolster (31, 131) for placing on the patient's epidermis and substantially sized to overlay the wound, the super-absorbent bolster operable to manifold reduced pressure;
wherein the super-absorbent bolster (31,131) comprises:
a breathable, fluid-restricted dry layer (38) having a first surface (40) and a second, inward-facing surface (42),
a super-absorbent layer (32) having a first surface (34) and second surface (36), the second, inward-facing surface of the super-absorbent layer disposed adjacent to the first surface of the breathable dry layer (38),
and
a non-breathable layer (44) having a first surface (46) and a second surface (48), the second, inward-facing surface of the non-breathable layer (44) disposed adjacent to the first surface (34) of the super-absorbent layer (32);

a sealing subsystem (60) for providing a fluid seal between the super-absorbent dressing bolster (31, 131) and the patient;
a reduced-pressure subsystem (80) for delivering reduced pressure to the sealing subsystem (60);
a fluid delivery interface (335) for delivering a fluid to the super-absorbent layer (32), wherein the super-absorbent layer is adapted to become more rigid with the addition of the fluid;
a reduced-pressure interface (92/392) for delivering the reduced pressure to the super-absorbent layer (32); wherein the sealing subsystem (60) and reduced-pressure subsystem (80) are operable to deliver reduced pressure to the wound; and
wherein the super-absorbent dressing bolster (31, 131), sealing subsystem (60), and reduced-pressure subsystem (80) are operable to develop a compressive force."

VIII. The appellant's arguments may be summarised as follows:

The main request should be admitted. The objections leading to revocation by the opposition division were first raised during the oral proceedings before it and so could not have been addressed earlier. In its notice of opposition, point 2.5, a general objection regarding an intermediate generalisation of the para. [0044] disclosure was made without indicating specifically which features were considered to be missing. Subsequently in its preliminary opinion, the opposition division indicated on page 3, point d) in respect of the disclosure in para. [0044] that the position of the fluid delivery interface may be of importance with respect to added subject-matter, which motivated the filing of auxiliary request 1 prior to the oral proceedings before the opposition division. Thus, at no time was the necessity of including the reduced

pressure interface in claim 1 apparent prior to receiving the written decision from the opposition division.

IX. The respondent's arguments may be summarised as follows:

The main request should not be admitted as it could have been filed at oral proceedings before the opposition division. Already in the notice of opposition, the objection that the fluid delivery interface was disclosed in para. [0044] in combination with Fig. 4 was raised. This was discussed at length during the oral proceedings before the opposition division and, as was evident from point 2.2 of the minutes, the chairman had indicated the fluid delivery interface to be disclosed in para. [0044] solely in combination with further features. Since the further features in para. [0044] were only the super-absorbent dressing assembly and the reduced pressure interface, it had been clear which 'further features' were considered missing.

Reasons for the Decision

1. *Admittance - Article 13(1) RPBA 2020*

1.1 According to the first two sentences of Article 13(1) RPBA 2020:

'Any amendment to a party's appeal case after it has filed its grounds of appeal or reply is subject to the party's justification for its amendment and may be admitted only at the discretion of the Board.

Article 12, paragraphs 4 to 6, shall apply *mutatis mutandis*.'

The second sentence of Article 12(6) RPBA 2020 states:

'The Board shall not admit requests, facts, objections or evidence which should have been submitted, or which were no longer maintained, in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance.'

- 1.2 With the present main request having been filed with letter of 2 July 2020, its admittance pursuant to the transitional provisions of Article 25 RPBA 2020 is subject to Article 12(6) RPBA 2020. A factor for the Board to consider in exercising its discretion is whether the main request should have been filed already before the opposition division, in which case the request shall not be admitted unless the circumstances of the appeal case justify its admittance.

- 1.3 During the oral proceedings before the opposition division, on delivering the added subject-matter finding with respect to the then main request, the chairman announced *inter alia* that para. [0044] of the application as filed 'only discloses a fluid delivery interface in combination with further features which are however not present in claim 1' (see point 2.2 of the minutes, particularly the first point on page 2). The Board finds this to be an unambiguous indication that the super-absorbent dressing assembly and/or the reduced-pressure interface was/were missing from claim 1 since the remaining features in para. [0044] were already included in claim 1 at that time (i.e. the fluid delivery interface and the super-absorbent layer). Thus, contrary to its arguments presented, at

the latest at that juncture the appellant was in a position to file requests including the omitted features from para. [0044] in response to the added subject-matter finding of the opposition division.

- 1.4 The appellant's argument that the notice of opposition and the opposition division's preliminary opinion failed to provide an indication of which features needed to be added to claim 1 of the then main request in order to overcome the added subject-matter objection is not persuasive to find that the present request should not have been filed sooner. Even if the precise amendment required to overcome the objection had not been evident in the written submissions, at the very latest during the oral proceedings a clear indication was orally given. The disclosure of a very limited number of features in para. [0044] placed the appellant, at the time the chairman announced the opposition division's finding, in the position of being able to respond in a substantive manner to overcome the objection. The appellant's contention that the necessity of including the reduced pressure interface in claim 1 not being apparent is thus not accepted. The failure to do so at that juncture, when the objection had been made abundantly clear, leads the Board to conclude that the present main request could and should have been filed before the opposition division. It should be noted that the appellant was also given an opportunity during those proceedings to consider its requests in view of the opposition division's finding (see the minutes of those oral proceedings, point 2.2, last sentence). Lastly, it may be added, although it was not argued to be the case, that no circumstances of the present appeal case itself can be seen as giving rise to cause to alter the opposition division's

finding.

1.5 The Board thus exercised its discretion not to admit the main request (Article 13(1) RPBA 2020) as the request should have been filed in the proceedings leading to the decision under appeal (Article 12(6) RPBA 2020).

1.6 Asked by the Chairman, the appellant confirmed that it did not wish to file a further request. Since the only request of the appellant is not admitted into the proceedings, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated