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**Datasheet for the decision
of 24 July 2018**

Case Number: T 0055/17 - 3.2.02

Application Number: 00920207.8

Publication Number: 1169071

IPC: A61M1/00

Language of the proceedings: EN

Title of invention:
WOUND THERAPY DEVICE

Patent Proprietor:
KCI Licensing, Inc.

Opponents:
Paul Hartmann AG
Smith and Nephew, Inc.

Headword:

Relevant legal provisions:
RPBA Art. 12(4), 13(1), 13(3)
EPC Art. 111(1), 123(2)

Keyword:

Late-filed requests - admitted (yes)

Main request - claim 1 - added subject-matter (no)

Appeal decision - remittal to the department of first instance
(yes)

Decisions cited:

T 1692/17

Catchword:



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 0055/17 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 24 July 2018

Appellant: KCI Licensing, Inc.
(Patent Proprietor) P.O. Box 659508
San Antonio, TX 78265 (US)

Representative: Cordina, Kevin John
Simmons & Simmons LLP
CityPoint
One Ropemaker Street
London EC2Y 9SS (GB)

Respondent: Paul Hartmann AG
(Opponent 1) Paul-Hartmann-Strasse 12
89522 Heidenheim (DE)

Representative: DREISS Patentanwälte PartG mbB
Postfach 10 37 62
70032 Stuttgart (DE)

Respondent: Smith and Nephew, Inc.
(Opponent 2) 1450 Brooks Road
Memphis, TN 38116 (US)

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

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 28 October 2016
revoking European patent No. 1169071 pursuant to
Article 101(3) (b) EPC**

Composition of the Board:

Chairman E. Dufrasne
Members: D. Ceccarelli
 P. L. P. Weber

Summary of Facts and Submissions

- I. The patent proprietor has appealed against the Opposition Division's decision, dispatched on 28 October 2016, to revoke European patent No. 1 169 071. All requests on file were found to contravene Article 123(2) EPC.
- II. The patent is derived from European patent application No. 00 920 207.8. Divisional application No. 10 174 741.8 was the basis for the grant of European patent No. 2 255 837, which is the subject of decision T 1692/17.
- III. The patent in suit was opposed on the grounds of lack of novelty and inventive step, insufficient disclosure and added subject-matter.
- IV. Notice of appeal was received on 30 December 2016. The appeal fee was paid on the same day. The statement setting out the grounds of appeal was received on 6 March 2017.
- V. The Board summoned the parties to oral proceedings. Under point 1 of the communication accompanying the summons the Board drew attention to a discrepancy in the appellant's requests in its statement of grounds:

"The appellant explained that the main request corresponded to the main request considered in the impugned decision except the definition in claim 1 that the surgical drape is impermeable. According to the impugned decision, the main request considered at first instance comprised 13 claims. However, the main request filed with the statement of grounds only comprises one

claim. This discrepancy has to be clarified."

VI. Oral proceedings took place on 24 July 2018.

The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of one of the main request and the first to third auxiliary requests, all filed with letter dated 22 June 2018.

The respondents opponents 1 and 2 requested that the appeal be dismissed.

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

"A therapeutic apparatus for stimulating healing of a wound, comprising:

a porous pad (36) which is permeable to fluids including a porous body having an outer surface and an inner body, wherein a portion of the outer surface which is adapted for contact with a surface of a wound has pores 100 microns or less in diameter, and wherein the inner body has pores which are greater than 100 microns in diameter,

an impermeable surgical drape (43) for covering the porous pad (36) and the wound and securing the porous pad (36) in the wound, which adheres to skin around a periphery of the wound, said drape creating an air-tight sealed environment at the wound;

a vacuum canister (19) for collecting fluids sucked from the wound by a negative pressure connected to said porous pad through a drainage tube;

a suction pump (84) connected to said canister through a hose generating said negative pressure to be applied to the wound; and

at least one filter being interposed between said canister (19) and said pump (84)."

VIII. The appellant's arguments where relevant to the present decision may be summarised as follows:

Admissibility of the appellant's requests

The main and first auxiliary requests had been filed more than one month before the oral proceedings in response to the Board's communication attached to the summons to oral proceedings. Compared with the second and third auxiliary requests respectively, which had been filed with the statement of grounds, they additionally comprised claims 2 to 13 and 2 to 11 of the main and first auxiliary requests before the Opposition Division. Compared with claim 1 of the main and first auxiliary requests on which the impugned decision was based, in claim 1 of the present main and first auxiliary requests only the word "impermeable" had been added. This word, which qualified the surgical drape, had been introduced in response to the reasons in the impugned decision.

All the requests were therefore admissible.

Added subject-matter

The introduction of the word "impermeable" found a basis in claim 10 and from line 24 of page 7 of the application as filed and addressed the comments in section 1.2.2 of the impugned decision. In particular,

page 7, lines 27 to 29, together with page 11, lines 20 to 22, which did not mention any material of the surgical drape, provided a basis for specifying that the originally claimed dressing cover was a surgical drape.

The objections of the Opposition Division and the respondents to the feature "a portion of the outer surface which is adapted for contact with a surface of a wound has pores 100 microns or less in diameter" were a matter of grammar, based on an incorrect construction of claim 1. More particularly, the correct construction was that the term "which" referred back to "portion" and not to "outer surface". Hence, the claim required the pad to have an outer surface, a portion of which was adapted for contact with a surface of a wound. That portion had pores of 100 microns or less, but not more than 100 microns, in diameter. This interpretation was derivable from the wording of the claim alone. If the claim drafter had meant to define an outer surface adapted for contact with a surface of the wound, only a portion of that surface having pores of 100 microns or less, he would have specified it by reference to the first occurrence of the term "outer surface" in the claim. Moreover, the description as a whole, to which the skilled person would refer to resolve an ambiguity in the claim, clearly supported that correct construction, for which there was ample basis in the application as filed. There was no need to specify that the portion adapted for contact with the surface of the wound was a whole side of the pad, as shown in figures 11 to 13 of the application as originally filed, since the portion had to conform to the specific wound to be treated. If the wound were smaller, there would be no need to have the whole side with that reduced pore size.

In the impugned decision the Opposition Division had concluded that there was no general disclosure in the application as originally filed of a porous pad with an outer surface having pores 100 microns or less in diameter and an inner body with pores greater than 100 microns in diameter. However, as the Opposition Division itself explained, the application as originally filed comprised two embodiments of a porous pad with those pore sizes. Moreover, page 8, lines 7 to 8 and 19 to 21, of the application as originally filed made it clear that the larger pores, greater than 100 microns in diameter, in the inner body had greater vacuum compatibility. Greater vacuum compatibility of the inner body was originally disclosed in connection with all the embodiments, as was derivable, in particular, from page 9, lines 26 to 29, and page 11, lines 4 to 8. Hence, there was an implicit disclosure of a pad with an outer surface having pores 100 microns or less in diameter and an inner body with pores greater than 100 microns in diameter for all embodiments, which provided a basis for that general feature in claim 1 of the main request.

Remittal

The appellant had no objection to remittal to the department of first instance for further prosecution if it were established that claim 1 of the main request complied with Article 123(2) EPC.

- IX. The respondents' arguments where relevant to the present decision may be summarised as follows:

Admissibility of the appellant's requests

The appellant's requests had been filed late without any proper excuse. In particular, the addition of the term "impermeable" in claim 1 could and should have been done during the first-instance proceedings, since the objection against the omission of that term was known to the appellant and was even present in the summons to attend oral proceedings before the Opposition Division. As regards the main and first auxiliary requests in particular, there was no reason why the appellant had to wait until only one month before the oral proceedings before filing them. The subject of the impugned decision consisted only of the independent claims of the then pending requests, as was apparent from item 11 on page 5 of the decision. With its statement of grounds the appellant had filed requests each comprising only one claim. The respondents had no reason to believe that they could be confronted with further claims. Moreover, the Board had issued summons to oral proceedings in April 2018. Even if the appellant's requests had been filed in reaction to those summons, they still could and should have been filed earlier.

Thus, the appellant's requests should not be admitted by the Board.

Added subject-matter

In claim 1 of the main request an impermeable surgical drape had been defined. Claim 10 as originally filed, however, referred to an "impermeable dressing cover", but not to an "impermeable surgical drape". Moreover, claim 10 as originally filed comprised additional features which had not been introduced in claim 1 of

the main request. Claim 10 further required "material modifications to enhance biocompatibility". Also, the passage from line 24 of page 7 of the application as originally filed disclosed a surgical drape with additional features, namely a peripherally coated elastomeric material or a pressure-sensitive adhesive, which were not present in claim 1 of the main request. Hence, claim 1 related to an intermediate generalisation which was not allowable under Article 123(2) EPC. Moreover, according to claim 1 and page 11, lines 22 to 24, of the application as originally filed, the surgical drape was for providing "an air-tight seal around the wound". This expression was narrower and more specific than "creating an air-tight sealed environment at the wound", defined in claim 1 of the main request. Hence, the claim did not comply with Article 123(2) EPC for this additional reason.

The Opposition Division in the impugned decision had correctly held that the wording "a portion of the outer surface which is adapted for contact with a surface of a wound has pores 100 microns or less in diameter" in claim 1 of the main request could be interpreted as requiring the outer surface to be adapted for contact with a surface of a wound, and only a portion of that outer surface had to fulfil the requirements with regard to the claimed diameters. This interpretation was technically sensible. Whether another interpretation was also technically sensible was no reason for referring back to the specification. The broader interpretation had to be considered. According to that broader interpretation the feature in question clearly had no basis in the application as originally filed. Moreover, claim 1 of the application as originally filed specified that the outer surface was adapted for contact with a wound surface with small

pores to enhance biocompatibility. In claim 1 of the main request this specific measure of adaptation was no longer recited, which amounted to a non-allowable generalisation. The language of claim 1 of the main request did not rule out the possibility that the surface adapted for contact with a wound surface, in addition to pores 100 microns or less in diameter, also had pores greater than 100 microns in diameter. The application as originally filed did not teach any criticality of 100 micrometers, as was derivable in particular from page 8, lines 1 to 6. In any case the object of the invention of reducing tissue ingrowth in the pad would clearly also be obtained if not all the pores of the surface in contact with the wound had a diameter of 100 micrometers or less. Furthermore, in the application as originally filed there was only a basis for a whole side - not any portion - of the pad provided with smaller pores (figures 11 and 12 and page 8, lines 20 to 21).

The definition of the inner body having "pores which are greater than 100 microns in diameter" constituted a non-allowable intermediate generalisation. Originally, such a feature was specific to only some embodiments. In particular, page 8, lines 5 to 6, stating that a pore size as small as one micron still allowed air to flow therethrough, made it clear that the "vacuum compatible pores" mentioned on page 8, lines 26 to 29, did not have to be greater than 100 microns in diameter. Moreover, the language of claim 1 of the main request did not rule out the possibility that the inner body, in addition to pores greater than 100 microns in diameter, also had pores 100 microns or less in diameter. This was not originally disclosed.

Remittal

Respondent opponent 2 requested that the case be remitted to the department of first instance for consideration of any issue other than added subject-matter in claim 1 of the main request. Respondent opponent 1 had no objection to that.

Reasons for the Decision

1. The appeal is admissible.
2. The invention

The invention relates to a therapeutic apparatus for stimulating healing of a wound by applying negative pressure to an area around the wound in order to promote migration of epithelial and subcutaneous tissue towards the wound.

The apparatus comprises a porous pad permeable to fluids, to be placed into contact with a surface of the wound, an impermeable surgical drape for covering the porous pad and creating an air-tight sealed environment at the wound site, a vacuum canister connected to the porous pad through a drainage tube, for collecting fluids sucked from the wound, a suction pump and a filter between the canister and the pump.

An objective of the invention is to avoid the spread of infection through the pad and the vacuum line. According to the patent, this is achieved by providing a pad having a sufficiently small pore size such that granulation tissue does not migrate into the pad (column 2, lines 19 to 22) and skin regrowth into the

pad is also prevented (column 3, lines 9 to 13 and 28 to 34). More particularly, a surface of the pad which, in use, is in contact with the wound has pores 100 microns or less in diameter.

3. Admissibility of the appellant's requests

The appellant's requests were all filed with letter dated 22 June 2018.

3.1 However, the second and third auxiliary requests correspond to the main and first auxiliary requests respectively, which were filed with the statement of grounds of appeal.

Under Article 12(4) RPBA, everything presented by the appellant in the statement of grounds is to be taken into account by the Board if and to the extent it relates to the case under appeal and meets the requirements of Article 12(2) RPBA. However, the Board retains discretion to hold inadmissible requests which could have been presented in the first-instance proceedings.

No objection under Article 12(2) RPBA was raised by the respondents against the second and third auxiliary requests, and the Board does not have any either. As the appellant pointed out, the claims of the second and third auxiliary requests respectively correspond to claim 1 of the main and first auxiliary requests on which the impugned decision was based, but for the addition of the word "impermeable" qualifying the surgical drape. The Board considers such an amendment, which addresses an objection raised by the respondents and found convincing by the Opposition Division in the impugned decision, to be an appropriate reaction to the

reasons presented in that decision. The amendment does not raise new substantive issues but is rather an attempt to speed up the appeal proceedings. Hence, the Board cannot find any convincing reasons for not admitting the second and third auxiliary requests into the proceedings.

- 3.2 Claim 1 of the main and first auxiliary requests corresponds to the only claim of the second and third auxiliary requests respectively. However, the main and first auxiliary requests comprise further claims. Hence, they constitute amendments to the appellant's case made after it had filed its statement of grounds and after oral proceedings had been arranged.

Under Article 13(1) RPBA the admission of such amendments into the appeal proceedings is at the Board's discretion, which is to be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy. Under Article 13(3) RPBA such amendments are not to be admitted if they raise issues which the Board or the other parties cannot reasonably be expected to deal with without adjournment of the oral proceedings.

The Board notes that the main and first auxiliary requests were presented in response to a specific observation made under point 1 of the annex to the summons to oral proceedings. In particular, they comprise further claims of the main and first auxiliary requests pending before the Opposition Division at the time the impugned decision was taken, as is derivable from points 10.1 and 10.2 of the "Summary of Facts and Submissions" in that decision. The filing of the main and first auxiliary requests more than one month before

the oral proceedings gave the Board and the respondents enough time to consider them, especially in view of the fact that their claims do not constitute complex new subject-matter: they do not raise new issues for the respondents, as they had already been present in the first-instance proceedings. In this respect, whether the Opposition Division found it sufficient to consider only one claim of the pending requests to reason the impugned decision has no relevance. In view of these circumstances the Board exercises its discretion under Article 13(1) and (3) RPBA and admits the main and first auxiliary requests into the proceedings too.

3.3 Hence, the main and first to third auxiliary requests are in the proceedings.

4. Added subject-matter

4.1 In the application as originally filed the Board sees a basis for the individual features of claim 1 of the present main request in claims 1 and 10; page 7, lines 24 to 29, for the dressing cover in the form of a surgical drape; claim 5, page 3, lines 12 to 14 and 26 to 29, for the definition of the pore size of the portion of the outer surface adapted for contact with the wound surface; and page 8, lines 19 to 21, page 9, lines 14 to 18, together with page 9, lines 26 to 29, or page 11, lines 4 to 8, for the definition of the pores of the inner body greater than 100 microns in diameter.

4.2 The respondents argued that an impermeable surgical drape had only been disclosed in combination with other features, the omission of which in claim 1 of the main request constituted a non-allowable intermediate generalisation infringing Article 123(2) EPC.

However, the Board does not see any technically inextricable link between the specific feature of the impermeable wound cover (or dressing) in the form of a surgical drape and the other features disclosed on page 7, lines 26 to 29. In particular, the original description does not link the material and the adhesive mentioned in that passage with the surgical drape, but, if with anything, with the wound cover in general. This is made clear in lines 29 to 32 on page 7, which assign a certain importance to the elastomeric material and the adhesive for the wound cover. A basis for a wound cover without those features is however clearly present in claims 1 and 10 as originally filed.

As for the respondents' argument that claim 10 required "material modifications to enhance biocompatibility", it suffices to note that the material the claim refers to is not the material of the wound cover, but of the porous wound pad.

Whether the definition of the surgical drape for "creating an air-tight sealed environment at the wound" is broader and more general than the originally disclosed suitability for providing "an air-tight seal around the wound" is not decisive, since the other features of claim 1 of the main request, i.e. the suitability of the surgical drape "for covering the porous pad (36) and the wound and securing the porous pad (36) in the wound" and for adhering "to skin around a periphery of the wound" make it clear that, in use, the air-tight seal is created specifically around the wound, which renders the content of claim 1 of the main request identical to that of original claims 1 and 10 in that respect.

For these reasons the definition of the impermeable surgical drape in claim 1 of the main request does not infringe Article 123(2) EPC.

- 4.3 The respondents argued that the feature of claim 1 of the main request whereby "a portion of the outer surface which is adapted for contact with a surface of a wound has pores 100 microns or less in diameter" constituted subject-matter extending beyond the content of the application as filed, in contravention of Article 123(2) EPC. The main line of argument is a matter of claim construction, in relation to what the term "which" may refer to.

The respondents argued that, based on a literal interpretation, that term may equally refer to the "portion" or to the "outer surface" mentioned just before. The Board notes that those two possibilities are mutually exclusive and associated with different technical limitations. Hence, only one of them may be chosen.

Irrespective of the correctness or not of both literal interpretations, the Board does not accept the respondents' argument that, in such circumstances, the broader interpretation should be chosen. The claims of a patent are directed to the skilled person, who reads and interprets them from a technical point of view, taking into consideration the technical purpose of the invention apparent primarily from the claimed features. In other words, the skilled person looks for a teleological interpretation of the claims, which is not necessarily the broader or the most convenient for one party. This further implies that the claims cannot be read in isolation from the other parts of the patent.

In the context of the claimed apparatus for stimulating the healing of a wound with a porous pad to be secured in the wound by covering it and the wound with an impermeable surgical drape, it makes more sense from a technical point of view to distinguish between a part of the pad surface to be brought into contact with the wound and another part to be contacted possibly only by the surgical drape. The properties of the first part will be more important than those of the second part for the healing of the wound. As a consequence, the skilled person interprets the claim by relating the term "which" to the previously defined portion. This interpretation is clearly in line with the teaching of the patent and its purpose as stated in column 2, lines 19 to 22, and column 3, lines 9 to 13 and 28 to 34, corresponding respectively to page 2, lines 14 and 15, and page 3, lines 12 to 14 and 25 to 29, of the application as originally filed.

It follows that claim 1 of the main request defines a pad with an outer surface, a portion of which is adapted for contact with a surface of a wound. That portion has pores 100 microns or less in diameter.

The Board also rejects the respondents' argument that claim 1 of the main request did not require the specific adaptation to enhance biocompatibility recited in claim 1 as originally filed. The meaning of the wording of the originally filed claim "*said outer surface being adapted for contact with a surface of said wound with small first pores to enhance biocompatibility*" is that the enhancement of biocompatibility is achieved by the provision of small first pores. Claim 1 of the main request defines an outer surface, a portion of which is adapted for contact with a surface of the wound and has pores 100

microns or less in diameter. Pores with those dimensions are considered to be "*small first pores*" in the application as originally filed (claim 5). Hence, the enhanced biocompatibility according to claim 1 as originally filed is retained in claim 1 of the main request.

As regards the respondents' argument concerning the meaning of the word "has" in the expression "has pores 100 microns or less in diameter", it suffices to note that the passage on page 3, lines 12 to 14, of the application as originally filed is literally equivalent.

The argument that the application as originally filed only provided a basis for a whole side - not any portion - of the pad provided with smaller pores is not convincing either. As the appellant has correctly submitted, the general teaching of the application as filed, in accordance with common sense, is that the portion with smaller pores is the one which has to conform to the specific wound to be treated. This is also derivable from figures 10 and 14A to 16 and page 10, lines 19 to 24.

It follows that no extension of subject-matter beyond the content of the application as filed results from the definition of "a portion of the outer surface which is adapted for contact with a surface of a wound has pores 100 microns or less in diameter" in claim 1 of the main request.

- 4.4 The respondents further argued that the feature of the inner body having "pores which are greater than 100 microns in diameter" constituted a non-allowable intermediate generalisation.

The Board notes that, in the application as originally filed, this feature is explicitly disclosed on page 8, lines 19 to 21, and page 9, lines 14 to 18, in relation to the embodiments of figures 11 and 12, and 13 respectively. For those embodiments an inner body having pores with those dimensions is for providing (greater) vacuum compatibility of the pad with the vacuum tube (page 8, lines 19 to 21, and page 9, lines 19 to 20), and no other features are described as being necessary in order to achieve such vacuum compatibility. Moreover, good vacuum compatibility, presented as specific to the pore dimensions with no technical link to other features of the pad, is disclosed as being desirable for the other embodiments too (page 9, lines 26 to 29, and page 11, lines 4 to 8, in relation to the embodiments of figures 17 and 18, and 14A to 16 respectively).

Hence, the respondents' argument that the introduction of the feature of the inner body having "pores which are greater than 100 microns in diameter" in claim 1 of the main request constituted a non-allowable intermediate generalisation is not accepted by the Board.

Whether other non-claimed pore dimensions could also be satisfactory for sufficient vacuum compatibility, as the respondents argued with reference to page 8, lines 5 to 6, is irrelevant for assessing the claim's compliance with Article 123(2) EPC.

As regards the respondents' argument concerning the meaning of the word "has" in the expression "has pores which are greater than 100 microns in diameter", it again suffices to note that the passages on page 8,

lines 19 to 21, and page 9, lines 14 to 18, of the application as originally filed are literally equivalent.

It follows that no extension of subject-matter beyond the content of the application as filed results from the definition of the inner body having "pores which are greater than 100 microns in diameter" in claim 1 of the main request.

- 4.5 In conclusion, claim 1 of the main request complies with Article 123(2) EPC.

Since the impugned decision only considered the requirements of Article 123(2) EPC in relation to claim 1 of the pending requests, the appeal is allowable insofar as the grounds for that decision do not prejudice the maintenance of the patent on the basis of claim 1 of the present main request.

5. Remittal

Under Article 111(1) EPC, following the examination as to the allowability of the appeal, the Board retains the discretion to remit the case to the department which was responsible for the decision appealed for further prosecution.

Since the impugned decision did not deal with several of the respondents' objections, in view of the request of respondent opponent 2 that the case be remitted and of the fact that the other parties have not objected to a remittal, the Board decides to remit the case to the Opposition Division for further prosecution, in order for the parties to have the further objections possibly considered by two instances.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairman:



D. Hampe

E. Dufrasne

Decision electronically authenticated