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**Datasheet for the decision
of 5 November 2019**

Case Number: T 0987/19 - 3.2.02

Application Number: 15305982.9

Publication Number: 3108866

IPC: A61G7/05, A61G7/10

Language of the proceedings: EN

Title of invention:

PATIENT POSITIONING APPARATUS AND METHOD

Applicant:

Hill-Rom S.A.S.

Headword:

Relevant legal provisions:

EPC Art. 109(1), 113(1)

EPC R. 103

Keyword:

Interlocutory revision - reimbursement of appeal fee (no)

Decisions cited:

Catchword:



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Case Number: T 0987/19 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 5 November 2019

Appellant: Hill-Rom S.A.S.
(Applicant) Z.I. du Talhouet, B.P. 14-r
56330 Pluvigner (FR)

Representative: Vleck, Jan Montagu
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 22 November
2018 refusing European patent application No.
15305982.9 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman E. Dufrasne
Members: D. Ceccarelli
S. Böttcher

Summary of Facts and Submissions

- I. The applicant has appealed against the Examining Division's decision to refuse European patent application No. 15 305 982.9. The written decision was despatched on 22 November 2018.
- II. Notice of appeal was filed on 18 January 2019. The appeal fee was paid on the same day. A statement setting out the grounds of appeal was received on 20 March 2019.
- III. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of auxiliary request III, filed with letter dated 20 March 2019. The appellant further requested reimbursement of the appeal fee by reason of a substantial procedural violation, and oral proceedings "before any adverse decision is taken".
- IV. In a communication dated 11 April 2019 the Examining Division ordered rectification of its decision under Article 109(1) EPC. However, it did not allow the appellant's request for the reimbursement of the appeal fee and forwarded the case to the Board for a decision on the matter under Rule 103(3) EPC.
- V. The Board summoned the appellant to oral proceedings by a communication dated 6 August 2019. It expressed its preliminary view that the reimbursement of the appeal fee did not appear to be equitable.
- VI. By a letter dated 25 September 2019 the appellant announced that it would not be attending the oral proceedings and requested that a decision on the reimbursement "be made in writing without the need for

Oral Proceedings".

- VII. The oral proceedings were cancelled by the Board, as notified by a communication dated 1 October 2019.
- VIII. The appellant's arguments, where relevant to the present decision, may be summarised as follows:

The clarity objections against claim 1 of auxiliary request III, raised at the oral proceedings before the Examining Division, were entirely new objections. Although the applicant had not been present at those oral proceedings, its right to be heard had not been forfeited. By rejecting auxiliary request III without giving the applicant the opportunity to respond to the new objections, the Examining Division had infringed Article 113(1) EPC, thereby committing a substantial procedural violation.

Reasons for the Decision

- 1. The appeal is admissible.
- 2. Following the rectification of the impugned decision by the Examining Division under Article 109(1) EPC, the Board only has to decide on the appellant's request that the appeal fee should be reimbursed (Rule 103(3) EPC).

Under Rule 103(1) (a) EPC, the appeal fee should be reimbursed in the event of interlocutory revision if such reimbursement is equitable by reason of a substantial procedural violation.

3. As pointed out by the Board in the communication dated 6 August 2019, auxiliary request III was refused by the Examining Division not just because of the lack of clarity of claim 1. Another objection was that the subject-matter of independent method claim 9 was considered to lack novelty (point 6 of the impugned decision). As far as this objection is concerned, the appellant was given the right to be heard in accordance with Article 113(1) EPC, since the objection was formulated in the communication accompanying the summons to attend oral proceedings before the Examining Division, with respect to independent method claim 12 of the main request (points 3 to 3.2).

4. It follows that, irrespective of whether the introduction of the clarity objection to the grounds for the impugned decision could be considered a procedural violation, the final outcome of the case would have been the same without that objection, i.e. without any procedural violation, and the applicant would still have had to appeal the impugned decision in order not to lose the application. As a consequence, the alleged procedural violation - if any - is not a substantial one that would justify the reimbursement of the appeal fee.

For this reason, the Board concludes that the reimbursement of the appeal fee is not equitable within the meaning of Rule 103(1) (a) EPC.

Order

For these reasons it is decided that:

The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



D. Hampe

E. Dufrasne

Decision electronically authenticated