

Internal distribution code:

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

**Datasheet for the decision
of 15 January 2024**

Case Number: T 1661/21 - 3.2.02

Application Number: 09828171.0

Publication Number: 2346468

IPC: A61H7/00, A61N1/32, A61M1/00

Language of the proceedings: EN

Title of invention:
DYNAMIC, REDUCED-PRESSURE TREATMENT SYSTEMS

Patent Proprietor:
KCI Licensing, Inc.

Opponent:
Smith and Nephew, Inc.

Headword:

Relevant legal provisions:
EPC Art. 54

Keyword:
Contextual claim interpretation (yes)
Novelty - (yes)

Decisions cited:

T 0367/20

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 1661/21 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 15 January 2024

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

Representative: Simmons & Simmons
City Point
One Ropemaker Street
London EC2Y 9SS (GB)

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

Representative: HGF
HGF Limited
1 City Walk
Leeds LS11 9DX (GB)

Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
26 July 2021 concerning the maintenance of
European Patent No. 2346468 in amended form

Composition of the Board:

Chairman M. Alvazzi Delfrate
Members: D. Ceccarelli
N. Obrovski

Summary of Facts and Submissions

- I. Both the patent proprietor and the opponent appealed against the Opposition Division's decision that, account being taken of the amendments made by the patent proprietor according to auxiliary request 1, the patent and the invention to which it relates met the requirements of the EPC.

The main request was not allowed due to lack of novelty of the subject-matter of claim 1 over the following document:

D1: WO 2006/114638 A2

- II. As both parties had requested oral proceedings, the Board summoned them and sent a preliminary opinion by communication dated 10 October 2023.
- III. By letter dated 11 December 2023, the appellant/opponent ("the opponent") announced that they would not attend the oral proceedings and withdrew their request in that respect. The Board then cancelled the oral proceedings.
- IV. The appellant/patent proprietor ("the proprietor") requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request, filed with the statement of grounds of 26 November 2021, or that the patent be maintained on the basis of the first auxiliary request, also filed with the statement of grounds of 26 November 2021.

The opponent requested that the decision under appeal

be set aside and that the patent be revoked.

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

"A dynamic, reduced-pressure treatment system for treating a tissue site on a patient, the system comprising:

a porous and permeable foam manifold (112) adjacent the tissue site (104) for distributing reduced pressure to the tissue site (104);

a sealing member (111) coupled to the patient's epidermis to form a fluid seal over the tissue site (104);

a reduced-pressure source (140) for producing reduced pressure;

a reduced-pressure delivery member (144) for delivering reduced pressure from the reduced pressure source (140) to the manifold (112);

a wave generator (110) associated with the reduced-pressure delivery member (144), where-
in the wave generator (110) imparts a wave to the reduced pressure developed by the reduced-pressure source (140); and

wherein the wave generator (110) is associated with the reduced-pressure delivery member

(144) between the reduced-pressure source (140) and the sealing member (111),

wherein the wave generator (110) imparts a wave to the reduced pressure with a frequency in the range of 0.5 Hz to 20 Hz."

Claims 2 to 7 are dependent claims.

VI. The proprietor's arguments, where relevant to this decision, can be summarised as follows.

The feature of claim 1 of the main request according to which the wave generator imparts a wave to the reduced pressure with a frequency in the range of 0.5 Hz to 20 Hz meant that the frequency of the imparted wave was in the defined range.

The word "with" was linked to the noun "a wave", which defined that the wave had a frequency in the specified range. This was further supported by the fact that the parameter "frequency" applied specifically to waves and was an important parameter in defining the physical characteristics of a wave. Paragraph [0030] of the application as filed made clear that it was the frequency of the wave itself that fell in the range defined in the claim.

Hence, the frequency range defined in the claim did not refer to a frequency with which the wave was imparted, contrary to what the impugned decision asserted.

D1 disclosed a system in which an ultrasound transducer applied ultrasound to reduced pressure with a frequency of at least 20 kHz (page 9, first paragraph) in a pulsed manner. The transducer was turned on and off at a frequency of 5 Hz - 10 kHz (page 9, fifth paragraph) such that a period of ultrasound was delivered, then nothing, and then a period of ultrasound. The only wave imparted to reduced pressure in D1 was at a frequency of at least 20 kHz. The on/off frequency of the system was not the frequency of a wave imparted to reduced pressure, but merely the frequency at which the transducer was activated and deactivated. While the transducer was off there was no wave.

It followed that D1 did not disclose a wave generator that imparts a wave to the reduced pressure with a

frequency in the range of 0.5 Hz to 20 Hz. Hence the subject-matter of claim 1 of the main request was novel over D1.

VII. The opponent's arguments, where relevant to this decision, can be summarised as follows.

The phrase "the wave generator (110) imparts a wave to the reduced pressure with a frequency in the range of 0.5 Hz to 20 Hz" of claim 1 of the main request had a broad meaning. It was unclear whether the term "with a frequency" in that phrase related to the frequency of the imparted wave or to the frequency at which the wave was imparted. The term could mean that the recited frequency range referred to an amplitude modulation frequency, modulating the amplitude of an unspecified carrier frequency. In this case, if the frequency was 0.5 Hz, a pressure waveform with an unspecified carrier frequency varied in amplitude every other second.

Amplitude modulation was part of the common general knowledge of the person skilled in the art, who would understand that claim 1 of the main request did not specify the nature of the wave imparted to the reduced pressure.

D1 disclosed a system as claimed, with a form of amplitude modulation within the meaning of claim 1 of the main request. It disclosed a wave generator in which ultrasound (comprising a carrier waveform with a frequency between 20 kHz and 10 MHz) was pulsed by a square wave amplitude modulating waveform at a relatively low frequency of 5 Hz to 10 kHz (page 9 paragraphs 1 and 5).

In any case, the low frequency pulsed ultrasound of D1

comprised a wave with a frequency in the range 0.5 Hz to 20 Hz imparted to the reduced pressure. Accordingly, D1 anticipated the subject-matter of claim 1 of the main request regardless of which interpretation was attached to the claimed frequency range.

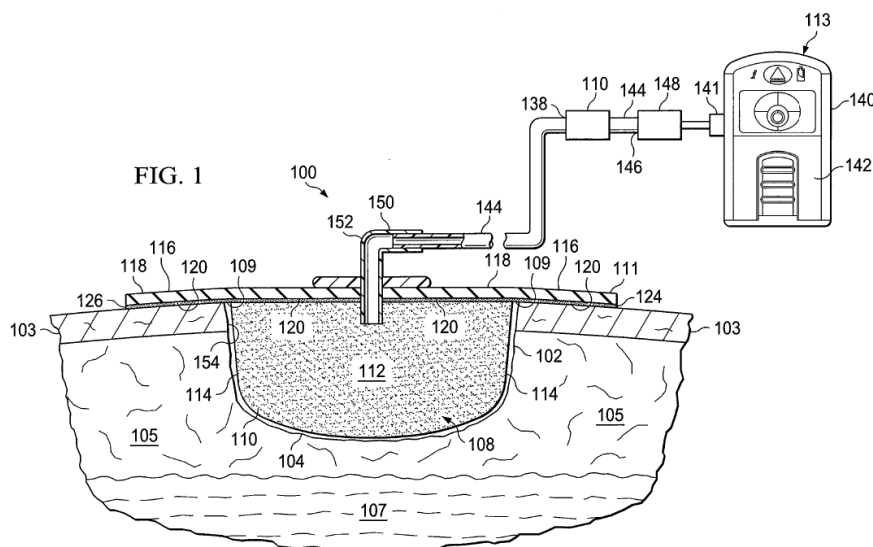
Reasons for the Decision

1. The patent

The patent relates to a dynamic, reduced-pressure treatment system for treating a tissue site on a patient.

Such a system finds application in the treatment of wounds, as providing a reduced pressure in proximity to a tissue site augments and accelerates the growth of new tissue at the tissue site.

A system as claimed is illustrated in Figure 1 of the patent, reproduced below.



The system comprises a porous and permeable foam manifold (112) adjacent the tissue site (104) for distributing reduced pressure to the tissue site and a sealing member (111) coupled to the patient's epidermis to form a fluid seal over the tissue site. These elements can be used to create an enclosed space around the wound, to which reduced pressure can be applied.

The system further comprises a reduced-pressure source (140) for producing reduced pressure, a reduced-pressure delivery member (144) for delivering reduced pressure from the reduced pressure source to the manifold and a wave generator (110) associated with the reduced-pressure delivery member. These elements are intended to provide the appropriate reduced pressure at the treatment site.

According to claim 1 of the main request, the wave generator is associated with the reduced-pressure delivery member between the reduced-pressure source and the sealing member and imparts a wave to the reduced pressure developed by the reduced-pressure source with a frequency in the range of 0.5 Hz to 20 Hz.

According to the patent (paragraph [0033]), the dynamic variation of pressure or energy by the wave generator at the tissue site may help with the healing process in various ways.

2. Main request - novelty

The opponent argued that the subject-matter of claim 1 of the main request lacked novelty over D1. This view was shared by the Opposition Division in the impugned decision.

- 2.1 D1 discloses a dynamic, reduced-pressure treatment system for treating a tissue site on a patient, in particular a wound (Figures 1 and 3). D1 discloses a wave generator in the form of a sonode-transducer (111) mounted on an upper face of a backing layer (342) of the system. The sonode-transducer is for applying ultrasound to the wound bed which, according to D1, further stimulates the healing process (page 1, paragraph 5; page 4, paragraphs 4 to 6; page 9, paragraph 1). The ultrasound is in the frequency range of 20 kHz to 10 MHz (page 9, paragraph 1) and can be optionally slow pulsed, for instance at frequencies such as 5 Hz to 10 kHz (page 9, lines paragraphs 4 and 5).
- 2.2 The opponent - and the Opposition Division in the impugned decision - held that D1 disclosed the claimed feature of the wave generator imparting a "wave to the reduced pressure with a frequency in the range of 0.5 Hz to 20 Hz". This was because the defined frequency range in claim 1 of the main request could be interpreted in two alternative ways. According to a first possible interpretation, this feature would concern the frequency of the imparted wave. However, according to a second possible interpretation, the range could alternatively refer to a frequency at which the wave generator imparted or modulated any kind of wave to the wound bed. Under this second understanding of the claim wording, D1 would be novelty destroying because it disclosed that the ultrasound application could be pulsed, at low frequencies such as 5 Hz to 10 kHz. Point 11 of the impugned decision seems to imply that these two claim interpretations can be adopted simultaneously.

These two allegedly possible interpretations of claim 1

are not compatible with each other, because in the first interpretation the frequency of the wave mentioned in the claim has to be in the defined frequency range, whereas in the second one the defined frequency range would not limit the frequency of the wave but could relate to the frequency at which the wave which is not further specified is imparted or modulated.

According to decision T 367/20 (Reasons 1.3.9) the deciding body in such a situation must not adopt two mutually exclusive claim interpretations simultaneously. Rather, the deciding body must consider which of the two possible claim interpretations is correct.

2.3 In any case, the Board considers that the second interpretation put forward by the Opposition Division and the opponent is based on a purely literal reading of the claim wording, which ignores the technical context of the invention.

Claim 1 of the main request mentions a wave and then, immediately afterwards, it defines a frequency range. The person skilled in the art would understand that the defined frequency range refers to the wave. This is because frequency is one of the parameters which characterise a wave.

In the context of the claimed invention, the person skilled in the art would exclude an interpretation according to which the frequency could refer to a frequency at which some wave might be pulsed or modulated. Under this interpretation, the claim would leave the imparted wave itself completely undefined. Even if the interpretation provided by the Opposition

Division and the opponent might be technically meaningful in some specific technical contexts, the Board notes that the claim and the patent as a whole do not point to any such specific technical context. On the contrary, the description of the patent, which must be taken into account when reading the claim, clearly and repeatedly states that the frequency of the imparted wave is in the claimed range of frequencies (paragraphs [0020], [0025], [0026] and [0032]).

Hence, in the present case the only technically meaningful interpretation of the disputed feature is that the wave generator must be suitable for imparting a wave to the reduced pressure, which wave must have a frequency of 0.5 Hz to 20 Hz. The fluctuation of the reduced pressure must be at this frequency.

- 2.4 D1 does not disclose a wave generator suitable for imparting such a wave. The sonode-transducer imparts ultrasound at much higher frequencies.

Hence, the novelty objection against claim 1 of the main request is unsuccessful.

3. There are no other substantiated objections on appeal against the main request and the Board does not see any reasons against maintaining the patent on the basis of this request. Hence, the patent is to be maintained on the basis of the main request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division with the order to maintain the patent on the basis of:
 - claims 1 to 7 of the main request filed on 25 November 2021;
 - Figures 1 to 8 of the patent specification; and
 - a description to be adapted.

The Registrar:

The Chairman:



A. Chavinier-Tomsic

M. Alvazzi Delfrate

Decision electronically authenticated