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**D E C I S I O N**  
of 29 September 1998

**Case Number:** T 0016/95 - 3.2.2

**Application Number:** 88850382.8

**Publication Number:** 0323421

**IPC:** A61C 8/00

**Language of the proceedings:** EN

**Title of invention:**  
Spacer for dental implants

**Patentee:**  
Nobelpharma AB

**Opponent:**  
Friatec Aktiengesellschaft Keramik- und Kunststoffwerke  
Wieland Edelmetalle GmbH & Co. KG

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 105

**Keyword:**  
"Remittal to the first instance"

**Decisions cited:**  
G 0010/91, G 0001/94

**Catchword:**  
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Case Number: T 0016/95 - 3.2.2

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.2  
of 29 September 1998

**Appellant:** Friatec Aktiengesellschaft  
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**Other party:** Wieland Edelmetalle GmbH & Co.  
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**Representative:** Aufenanger, Martin  
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**Respondent:** Nobelpharma AB  
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**Representative:** Moll, Walter, Dipl.-Phys., Dr.  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 2 November 1994  
rejecting the opposition filed against European  
patent No. 0 323 421 pursuant to Article 102(2)  
EPC.

**Composition of the Board:**

**Chairman:** W. D. Weiß  
**Members:** D. Valle  
J. C. M. De Preter

## Summary of Facts and Submissions

- I. The appellant (opponent) lodged an appeal received on 24 December 1994 against the decision of the Opposition Division to reject the opposition and to maintain the patent No. 323 421 as granted.

The statement setting out the grounds of appeal was received on 23 February 1995. The fee for appeal was paid on 24 December 1994.

- II. Originally one opposition has been filed on the sole ground of lack of inventive step having regard to seven documents.

This opposition has been rejected by the decision of the Opposition Division dated 2 November 1994.

In its original grounds of appeal, filed on 23 February 1995, the appellant still maintained its allegation of lack of inventive step, now exclusively based on the documents D4 and D5 already cited during the opposition proceedings.

On 18 May 1995, by letter of 17 May 1995, the appellant, for the first time, alleged lack of novelty (Article 54(3), (4) EPC) having regard to document D8 = EP-A-0 313 222.

By letter of 24 June 1996 the respondent (proprietor) has given its consent to the admittance of D8, but denied that the subject-matter of claim 1 as granted lacked novelty having regard to the disclosure of this document.

III. On 2 December 1997, a third party intervened in the opposition proceedings under Article 105 EPC on the basis of the infringement proceedings instituted against it on 4 September 1997.

The intervention was mainly based on lack of novelty on the basis of Article 54(3)(4) EPC having regard to document I3 = EP-A-320 024 having a priority date of 12 June 1987 and a publication date of 14 June 1989, (see point 1.1 of the letter of intervention) having regard to two oral disclosures in May 1988 and August 1988, respectively, which were allegedly performed by two employees of the proprietor (see points 1.2.1 and 1.2.2 of the letter of intervention) and having regard to document D8. There were also two events of prior use alleged to have taken place in spring and in early summer 1987 (state of the art according to Article 54(1)(2) EPC).

It was further asserted that the oral disclosures based on document I3 even constitute a state of the art according to Article 54(1)(2) EPC, because the priority of the patent in suit had not been validly claimed, the priority document not being the first disclosure of the subject-matter claimed by the patent in suit.

IV. By letter of 28 January 1998, the respondent (proprietor) filed a new claim 1 to be followed by claims 2 to 6 as granted requesting that the patent be maintained as amended on the basis of this set of claims.

Claim 1 reads as follows:

"An angulated spacer for a dental implant adapted at its one end for attachment to a fixture (19) implanted in the jaw bone and at its other end adapted to support a dental prosthesis characterised in that said spacer

is made as a unitary member comprising a base portion (1) being lockable in a fixed rotational position with respect to the fixture by means of a first screw union (6) and an upper portion (9) having a second screw union for securing the dental prosthesis, said second screw union forming a fixed angle ( $\alpha$ ) with respect to the first screw union (6), and in that said base portion (1) has an interior geometrical configuration (20) designed to fit an upper hexagon of the fixture (19) so as to constitute a rotational lock providing twelve fixed directions for the spacer."

The respondent asserted that the subject-matter of claim 1 was novel having regard to the disclosure of documents D8, I3 and that the subject-matter of the present restricted claim 1 was validly covered by the Swedish application, the priority of which is claimed by the patent in suit.

V. The appellant, by letter of 2 April 1998, cited two new documents D9 and D10.

The intervenor, by letter of 16 April 1998, objected that claim 1 violated Article 123(2) EPC, still denied novelty with respect to document D8 and maintained that the asserted prior use and said oral disclosures constituted a state of the art according to Article 54(1)(2) EPC. It requested also to remit the case to the first instance.

VI. On 1 July 1998 the Board issued a communication with which it stated that it was its intention to remit the case to the first instance for further prosecution without having oral proceedings.

The intervenor, with letter of 8 July 1998, gave its agreement.

The proprietor, with letter of 3 September 1998, accepted the proposal of the Board.

- VII. The appellant requests that the decision under appeal be set aside and a patent revoked for lack of novelty or inventive step. Provisionally, he requests oral proceedings.

The intervenor requests that the decision under appeal be set aside and that patent revoked for lack of novelty or for lack of inventive step. It further requests to remit the case to the first instance.

The proprietor requests the rejection of the appeal and the maintenance of the patent in amended form with claim 1 as filed on 28 January 1998 and claims 2 to 6, description and drawing in the form as granted. He requests further provisionally oral proceedings.

### **Reasons for the Decision**

1. The appeal and the intervention are admissible.
2. According to the decision of the Enlarged Board of Appeal G 10/91 new grounds for opposition may only be admitted during appeal proceedings with the consent of the proprietor. In the case of admittance, however, the case should normally be remitted to the department of first instance for further prosecution (see point 18).

Furthermore, an intervention during current appeal proceedings is admissible and may be based on any of the grounds for opposition mentioned in Article 100 EPC (see decision of the Enlarged Board of Appeal G 1/94). In the case, however, that new grounds of opposition are introduced by this intervention, the case should be remitted to the first instance for further prosecution.

In the present case new grounds of opposition have been put forward by the appellant and by the intervenor. Furthermore new claims have been filed by the proprietor. It follows that the case as it stands is completely different from the one which was decided by the first instance. Following the principles laid down by the Enlarged Board of Appeal in its decisions G 10/91 and G 1/94 referred to above, and balancing the interests of the parties, the Board is of the opinion that the case should be remitted to the Opposition Division for further prosecution without having oral proceedings.

**Order**

**For these reasons it is decided that:**

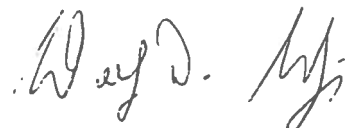
1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for further prosecution.

The Registrar:



S. Fabiani

The Chairman:



W. D. Weiß

