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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0813/97 - 3.2.2

Decision of 26 June 2001
correcting errors in the Interlocutory decision
of the Technical Board of Appeal 3.2.2
of 22 May 2001

Appellant: (Proprietor of the patent)
Datex-Ohmeda Inc.
Ohmeda Drive
Madison
Wisconsin 53707-7550 (US)

Representative:
Hedley, Nicholas James Matthew
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20 Red Lion Street
London WC1R 4PJ (GB)

Respondent: (Opponent)
Instrumentarium Corporation
Kuortaneenkatu 2
FI-00510 Helsinki (FI)

Representative:
Charlton, Peter John
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 6 June 1997 revoking European patent No. 0 469 797 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: W. D. Weiß
Members: M. G. Noël
J. C. M. De Preter

In application of Rule 89 EPC, the decision of the Technical Board of Appeal given on 22 May 2001 is hereby corrected as follows:

Page 2, line 5: Replace the words "Figures 1 to 9" by the words "Figures 1 to 7".

The Registrar: The Chairman:

V. Commare W. D. Weiß

1411.B

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D E C I S I O N
of 22 May 2001

Case Number: T 0813/97 - 3.2.2

Application Number: 91306823.5

Publication Number: 0469797

IPC: A61M 16/18

Language of the proceedings: EN

Title of invention:
Anaesthetic vaporiser

Patentee:
Datex-Ohmeda Inc.

Opponent:
Instrumentarium Corporation

Headword:
-

Relevant legal provisions:
EPC Art. 54, 56

Keyword:
"Novelty and inventive step (yes, after amendments)"

Decisions cited:
-

Catchword:
-

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Summary of Facts and Submissions

I. By decision of 6 June 1997 the Opposition Division revoked European patent No. 0 469 797 on the ground that the subject-matter of claim 1 as granted lacked novelty vis-à-vis the disclosure of the prior art document

D1: US-A-4 328 823.

II. The appellant (patentee) lodged an appeal against this decision on 23 July 1997. A statement of grounds was filed on 10 October 1997 along with two sets of claims according to a main request (claims as granted) and an auxiliary request (amended claims).

The respondent (opponent) replied that, with regard to the auxiliary request, it had no objections to that request.

III. In a communication sent on 21 February 2001 following a summon to attend oral proceedings the parties were informed of the provisional opinion of the Board that the subject-matter of claim 1 according to the main request, even when regarded as novel, might be objectionable on the ground of lack of inventive step, in view of document D1. The Board, however, did not have any objection against claim 1 according to the auxiliary request. If the appellant converted its auxiliary request to a main request and submitted a respective set of renumbered claims along with a description adapted thereto, the oral proceedings could be dispensed with.

IV. By letter dated 27 April 2001 the appellant filed amended pieces of documents including amended claims 1 to 15 and a description adapted thereto, column 1 to 4. The remaining parts of the patent specification (columns 5 to 9 and Figures 1 to 9) remained unchanged.

The appellant unconditionally requested that the patent be maintained on the basis of these amended documents.

V. By letter dated 30 April 2001 the respondent confirmed that it still had no objection against the latest filed appellant's submissions.

Subsequently, the oral proceedings were cancelled.

VI. Claim 1 reads as follows:

"An anaesthetic vaporiser which comprises:

a) an inlet (1) for carrier gas;
b) an outlet (2) for the carrier gas and an anaesthetic agent for delivery to a patient;
c) a passage (20) which extends between the inlet (1) and the outlet(2);
d) a vaporising chamber (8) for an anaesthetic agent;
e) a passageway (24) which extends from the vaporising chamber (8) to the outlet (2), characterised by
f) a first restrictor (3) in the passage (20) and a second restrictor(4) in the passageway (24);
g) a pressure transducer (5) which generates an electrical signal corresponding to the differences in pressure between the carrier gas in the passage (20) upstream of the restrictor (3) and the agent in the passageway (24) upstream of the restrictor (4);
h) a device (7) for generating an electrical control signal corresponding to the pressure difference measured by the pressure transducer (5); and

i) an electrically operated control valve (6) located in the passageway (24) for controlling the rate of flow of the agent through the passageway (24), the valve (6) being controlled by the electrical signal from the control signal generating device (7); the pressure transducer (5), device (7) and the electrically operated control valve (6) between them forming an active regulator which operates to balance the pressure of anaesthetic agent vapour at the inlet to the restrictor (4) with the pressure of fresh carrier gas at the inlet to the restrictor (3)."

Reasons for the Decision

1. The appeal is admissible.

2. *Amendments*

The features introduced in the characterising portion of claim 1 refer to the two restrictors 3 and 4 in the respective passageways 20 and 24, to pressure measurements taken upstream of the restrictors and to the control elements forming an active regulator which operates to balance the pressures between the anaesthetic agent and the carrier gas at the inlets of the restrictors.

All these features are validly supported by the application as originally filed, in particular on page 9 and Figure 1. Consequently, the amendments do not extend beyond the context of the application as filed, in conformity with Article 123(2) EPC.

With respect to the version of claim 1 as granted, the amendments were made by way of additional features only. Therefore the scope of protection was restricted, also in conformity with Article 123(3) EPC.

Dependent claims 2 to 15 are based on the application as filed and the description was adapted to the amended claims, in line with Rule 27(1) EPC.

3. *Novelty and inventive step*

Claim 1 is delimited over the disclosure of document US-A-4 798 689, which is referred to in the patent description. This document discloses all the features in the precharacterising portion of claim 1, including a vaporising chamber for an anaesthetic agent.

Although document D1 also discloses an anaesthetic apparatus for supplying a carrier gas and an anaesthetic agent for delivery to a patient, comprising two main passageways provided with restrictors, it does not disclose a vaporising chamber, within the meaning of the present patent. Instead, the apparatus is supplied with compressed gas from cylinders (not shown) for the carrier gas and the anaesthetic agent.

Document D1 further discloses a control system for controlling the rate of flow of the anaesthetic agent, comprising (Figure 1) a differential pressure transducer 38 for detecting the differences in pressure between the carrier gas and the agent upstream of the restrictors 30, 32, and a flow control valve 40 for controlling the flow of the anaesthetic agent in response to the displacement of a plunger 90 forming the output of the differential pressure transducer. According to the specification (column 8, lines 60 to 68), the mechanical means described in reference to

Figure 1 may optionally be replaced by equivalent electrical or solid state electronic means. Therefore, the respective characterising features of claim 1 would not, by its own, involve an inventive step with respect to document D1.

However, the last characterising feature of claim 1 according to which the control elements form "an active regulator which operates to balance the pressure of anaesthetic agent vapour at the inlet to the restrictor 4 with the pressure of fresh carrier gas at the inlet to the restrictor 3" is not disclosed nor suggested by document D1. In this known device, the pressures in the respective chambers 80 at each side of the differential pressure transducer 38 are not equal. The purpose of the control system 20 there is not to balance the pressures in the two gas lines, but to adjust the opening of the control valve 40 of anaesthetic gas so as to maintain in the mixture a minimum ratio of oxygen (carrier gas) of 25%. Therefore, the known control system operates according to a different principle, which relies on a difference in pressures (provided by the biasing force of the spring 100), so as to maintain the above-mentioned ratio of oxygen flow at the predetermined threshold level.

It results therefrom that the combination of features as claimed is novel and involves an inventive step within the meaning of Articles 54 and 56 EPC.

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 the documents referred to in section IV above.

The Registrar: The Chairman:

V. Commare W. D. Weiß

F.N.