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**Datasheet for the decision
of 16 December 2008**

Case Number: T 0438/06 - 3.2.04

Application Number: 99943531.6

Publication Number: 1104986

IPC: A01J 5/04

Language of the proceedings: EN

Title of invention:

An apparatus for milking an animal

Patentee:

DeLaval Holding AB

Opponents:

WestfaliaSurge GmbH
Octrooibureau Van der Lely N.V.

Headword:

Teatcups/DELAVAL

Relevant legal provisions:

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Relevant legal provisions (EPC 1973):

EPC Art. 56
EPC R. 115(2)

Keyword:

"Inventive step (no)"

Decisions cited:

T 0775/90

Catchword:

-



Case Number: T 0438/06 - 3.2.04

DECISION
of the Technical Board of Appeal 3.2.04
of 16 December 2008

Appellant I: WestfaliaSurge GmbH
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Respondent: DeLaval Holding AB
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
2 March 2006 concerning maintenance of European
patent No. 1104986 in amended form.

Composition of the Board:

Chairman: M. Ceyte
Members: P. Petti
T. Bokor

Summary of Facts and Submissions

I. In its interlocutory decision dated 2 March 2006, the opposition division found that, having regard to the amendments submitted by the patent proprietor, the European patent No. 1 104 986, against which two opposition had been filed, met the requirements of the European Patent Convention.

II. Opponent II (appellant II) lodged an appeal against this decision on 21 March 2006 and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 3 July 2006.

Opponent I (appellant I) lodged a further appeal on 2 May 2006 and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 30 June 2006.

III. Oral proceedings before the board were held on 16 December 2008.

The patent proprietor (respondent), who had been duly summoned, informed the board by letter dated 25 August 2008 that he would not attend the oral proceedings. In accordance with Rule 115(2) EPC the oral proceedings were held without him.

IV. Both appellants requested that the decision under appeal be set aside and the patent be revoked.

The respondent had requested in writing that the appeals be dismissed, i.e. the patent be maintained in the amended form held allowable by the opposition

division (main request) or alternatively, that the decision under appeal be set aside and the patent be maintained on the basis of either the set of claims 1 to 16 of the first auxiliary request or the set of claims 1 to 12 of the second auxiliary request, filed with the letter dated 22 February 2007.

Claim 1 of the main request is identical with claim 1 of the first and second auxiliary requests and reads as follows:

"1. An apparatus for milking an animal comprising a first set of teatcups and a second set of teatcups, said first set of teatcups comprising at least two teatcups of the same size or shape, said second set of teatcups comprising at least two teatcups of the same size or shape, each of said teatcups is elongated and comprises a rigid shell and a flexible liner forming a pulsation space, said liner being adapted to receive a teat at one end and to let out extracted milk at a second end, wherein the first set of teatcups comprises teatcups of a first size or shape and the second set of teatcups comprises teatcups of a second size or shape, the first size or shape being different from the second size or shape, and wherein it further comprises a device for automatically attaching teatcups to the teats of an animal in response to a control means, and an animal identification means associated with said control means, the size of each teat of an animal individual being stored in a memory of said control means, said apparatus being adapted to choose at least one teatcup from either of said first and second sets of teatcups."

V. The appellants essentially submitted that the subject-matter of claim 1 does not involve an inventive step starting from DE-E-10660/III/45g (E17) as closest prior art and combining this closest prior art with WO-A-96/11567 (D1) or EP-A-188303 (E8) and the common general knowledge of the skilled person.

VI. In his reply dated 22 February 2007 the respondent submitted that the subject-matter of claim 1 involved an inventive step in view of E17 and E8.

In particular, he submitted that E17 did not disclose the last features of claim 1 (starting from "and wherein it further comprises a device for automatically attaching ..."). Moreover, neither E17 nor D1 nor E8 disclosed the claimed feature concerning the storage of teat size data of individual animals in a memory of the control means.

Reasons for the Decision

Since the European patent was already granted at the time of the entry into force of the EPC 2000 on 13 December 2007, the transitional provisions according to Article 7 of the Act revising the EPC of 29 November 2000 and the Decisions of the Administrative Council of 28 June 2001 and of 7 December 2006, Article 2, have been applied. When Articles or Rules of the version of the EPC 1973 are cited, the year is indicated.

1. The appeals are admissible.
2. *Inventive step (claim 1)*
 - 2.1 Document E17 refers to the problem of milking cows having abnormally long teats (see page 1, lines 1 to 6) and suggests the use of a head-piece ("Aufsatz" 6)

which is put on the top end (3) of the teat cup liner of a normal teat cup so as to adapt it to a long teat.

On page 2, lines 34 to 40, it is also referred to the possibility of using teat cup liners which are longer than normal teat cup liners and it is stated that such an embodiment would disadvantageously lead to an apparatus comprising a plurality of sets of teat cup shells ("Melkbecherhülsen") having different lengths.

Thus, this citation unambiguously discloses an apparatus for milking an animal comprising a first set of teat cups comprising teat cups of the same size and a second set of teat cups which also comprises teat cups of the same size, each of said teat cups being elongated and comprising a rigid shell and a flexible liner forming a pulsation space, said liner being adapted to receive a teat at one end and to let out extracted milk at a second end, the first set comprising teat cups of a first size (i.e. teat cups with normal teat cup liners), the second set comprising teat cups of a second size (i.e. teat cups with the longer teat cup liners and longer teat cups shells), said second size being different from the first size.

Accordingly, in order to milk cows with differently sized teats it is suggested in E17 to use sets of teat cups with two differently sized teat cups.

The teat cups in E17 are manually applied to the teats of a cow by an operator who has to choose either the normal teat cups of a first set or the longer teat cups of a further set in dependence of the length of the teats of the animal to be milked.

2.2 The subject-matter of claim 1 differs from this prior art by the following features relating to

(i) automatically attachment means and control means,

(ii) animal identification means,

(iii) the storage of teat size data of individual animals in a memory,

(iv) the requirement that the apparatus must be adapted to choose at least one teat cup from either of first and second sets of teat cups.

2.3 These distinguishing features have the effect of automatizing the milking process while using two differently sized sets of teat cups.

The objective problem, taking E17 as closest prior art, is thus the one of providing an automatic milking apparatus while having an improved overall fit and comfort for the animal.

2.4 Devices for automatically attaching teat cups to the teats of an animal in response to a control means and an animal identification means associated with said control means are generally known.

In particular, there are two basic types of these devices:

A device of the first type comprises a control means and a movable support carrying a milking cluster, wherein by means of the movable support the milking

cluster is brought under the udder of the animals and the teat cups of the cluster are automatically attached to the teats. A device of this type is known for instance from document E8, which also discloses an animal identification means associated with the control means, in which data relating to the position of the teats of the animals are stored.

A device of the second type comprises a milking robot associated with a control means and provided with a robot arm which is adapted to individually bring the teat cups from a teat cup magazine and individually attach them to the respective teats. A device of this type is known from document D1. This citation does not explicitly refer to an animal identification means. However, it is well known that fully automated milking devices are provided with an animal identification system. In particular, since D1 on page 1 (lines 16 to 21) refers to the circumstances that after milking of an ill cow, the milking plant has to be closed for an extra cleaning of the automatic milking device, it has to be assumed that the apparatus of D1 is provided with an animal identification means associated with the control means, in so far as ill animals can be identified.

- 2.5 It is well established that the mere automation of functions previously performed manually is a general trend in technology and cannot as such be considered as inventive (see e.g. decision T 775/90). It would have therefore been obvious for the skilled person to provide the apparatus of E17 with the above features (i) and (ii), which are also shown in D1 or D8.

Since such an apparatus provided with a first set of normal teat cups and a second set of longer teat cups would be equipped with automatic attachment means (i) and animal identification means (ii), the skilled person would realize that it should be adapted so as to allow it to choose either teat cups of the first set or those of the second set (feature (iv)) and that the choice between these two sets of teat cups should obviously depend on the size of the teats to be milked.

In this respect, it has to be noted that it is generally known (see for instance E8) to use a computer for controlling the device for automatically attaching the teat cups and for storing data concerning the animal to be milked in a memory of the computer.

Thus, the skilled person seeking to fully automatize the milking process in E17 would provide the apparatus of E17 not only with an automatic attachment means, a control means and an identification means (features (i) and (ii)) but also with the storage of the length, i.e. the size, of each teat of individual animals in a memory (feature (iii)). Accordingly, he would also program the control means so as to allow the apparatus to choose at least one teat cup from either of the first and second sets of teat cups in accordance with the stored length or size of the teat to be milked.

2.6 Having regard to the above considerations, the respondent's arguments referred to in section VI above cannot succeed.

2.7 Therefore, the subject-matter of claim 1 does not involve an inventive step (Article 56 EPC, 1973).

3. Since all the respondent's requests contain claim 1, none of them is allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte