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Datasheet for the decision of 8 January 2008

Case Number: T 0988/06 - 3.2.02

Application Number: 97301302.2

Publication Number: 0796630

IPC: A61M 16/10

Language of the proceedings: EN

Title of invention:
Oxygen flush for anesthesia systems

Patentee:
Datex-Ohmeda, Inc.

Opponent:
L'AIR LIQUIDE, S.A. A DIRECTOIRE ET CONSEIL DE

Headword:
-

Relevant legal provisions:
EPC Art. 52(1), 54, 56

Relevant legal provisions (EPC 1973):
-

Keyword:
"Novelty (yes)"
"Inventive step (yes)"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0988/06 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 8 January 2008

Appellant: (Opponent)
L'AIR LIQUIDE, S.A. A DIRECTOIRE ET CONSEIL DE SURVEILLANCE POUR L'ETUDE ET L'EXPLOITATION DES PROCEDES GEORGES CLAUDE
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Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted 2 May 2006 rejecting the opposition filed against European patent No. 0796630 pursuant to Article 102(2) EPC.

Composition of the Board:

Chairman: T. Kriner
Members: S. Chowdhury
M. Vogel

Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the decision of the opposition division relating to European patent No. 0 796 630.

II. The decision was dispatched on 2 May 2006. The appeal was received on 23 June 2006, and the fee for the appeal was paid on the same day. The statement setting out the grounds of appeal was received on 7 July 2006.

III. The opposition was filed against the whole patent and based on Article 100 (a) EPC (lack of novelty and inventive step). The opposition division decided that the claimed subject-matter met the novelty and inventive step requirements of Article 52(1) EPC and rejected the opposition, accordingly.

The following documents are of interest in the appeal procedure:

D1: Norme Internationale ISO 5358 — Appareils d'anesthésie utilisés chez l'être humain, 2e edition, 1992-01-15
D3: LU-A-58141
D4: EP-A-0 684 049.

IV. Oral proceedings were held on 8 January 2008. The following requests were submitted:

The appellant requested that the decision under appeal be set aside and that European patent No. 0 796 630 be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed.

V. Independent claim 1 reads as follows: -

"An anaesthesia system for providing anaesthesia to a patient comprising: a patient circuit (16) adapted to be connected to the patient (18) for delivering and receiving gas from a patient's lungs, a valve (22) in communication with said patient circuit (16), said valve (22) adapted to be opened to vent said patient circuit (16) to an external environment, a ventilator (10) for providing a quantity of gas to said patient circuit (16) for delivery to the patient; said ventilator (10) having an inhalation mode where the gas is supplied to the patient and an exhalation mode where the gas is received from a patient's exhalation; means for providing a supply (30) of oxygen under pressure, a conduit (28) communicating said oxygen supply means (30) with said patient circuit (16), and control means (32) in said conduit (28) operable by the user to activate the supply (30) of oxygen to enter and flush the patient circuit (16), characterised in that the system includes means responsive to the activation of said control means (32) to positively open said valve (22) to the said external environment independent of the pressure in the patient circuit (16), the opening of the valve to the said external environment preventing build up of pressure in said patient circuit (16)."

Claims 2 to 6 are dependent claims.

VI. The parties argued as follows:

Appellant

The anaesthesia system of claim 1 was anticipated by each of D1 and D4.

D1 disclosed a classical anaesthesia system according to the preamble of claim 1, and also stated that a supply of oxygen to flush the patient circuit was an obligatory feature of such systems. Section 16.4 stated that oxygen was supplied with the system vented to atmosphere in order to prevent pressure build-up in the patient circuit, which implied means responsive to the activation of control means to positively open the valve to the external environment independent of the pressure in the patient circuit. The claimed anaesthesia system lacked novelty in view of D1, accordingly.

D4 disclosed the features of the preamble of claim 1. The last feature of claim 1, the opening of the valve to the external environment independent of the pressure in the patient circuit, must be interpreted in light of paragraphs 43 and 44 of the patent in suit which disclosed an embodiment in which the opening of the valve was dependent on the pressure in the circuit. D4 disclosed means (circuit 14) responsive to the activation of control means to positively open a valve (28) to the external environment. Therefore, the subject-matter of claim 1 lacked novelty in view of D4.

The anaesthesia system of claim 1 also lacked an inventive step having regard to D1, D3, and D4.

D1 required anaesthesia systems to have a supply of oxygen for flushing the patient circuit, and Section 16.4 stated that gases should be vented to atmosphere to relieve pressure. The simplest realisation for the person skilled in the art would be to open the circuit to atmosphere when the oxygen was supplied. He would then naturally couple the control means with the opening of the patient circuit, and hence to the expiration valve since this was already present. Claim 1, therefore, did not involve an inventive step.

Also, starting from D3, given that D1 required all anaesthesia systems to include an oxygen flush, the person skilled in the art would be led to the claimed system in an obvious manner.

Respondent

Prior art anaesthesia systems having an oxygen flush facility could not guarantee that no overpressure in the system would occur because oxygen could be introduced while the system was in the inhalation phase when the exhaust valve was closed. By providing a positive link between the oxygen flush control and the venting system this problem was overcome.

D4 was the closest prior art and it disclosed only the features in the preamble of claim 1. Neither this document, nor any other document cited by the appellant discussed the present technical problem or disclosed or suggested the present solution.

Reasons for the decision

1. The appeal is admissible.

2. *Novelty*

The appellant contends that the anaesthesia system defined in claim 1 of the patent in suit is anticipated by the anaesthesia system disclosed in each of documents D1 and D4.

2.1 It should be stated at the outset that D1 does not describe a working anaesthesia system. Instead, it lists definitions, norms, and individual features of a anaesthesia systems, but does not describe a complete anaesthesia system having either the features of the preamble of claim 1 or the characterising features thereof. In particular D1 does not disclose means responsive to the activation of control means to positively open a valve to the external environment independent of the pressure in the patient circuit.

The appellant's arguments, that the combination of features of both parts of the claim would be implicit to the person skilled in the art, is not acceptable since the appellant must demonstrate not only that each feature of claim 1 is clearly and unambiguously disclosed in D1, but that the combination of features of claim 1 is also disclosed. Instead, the appellant has merely alleged, not only that the features of claim 1 but also the combination thereof would be implicit and obvious for the skilled person. However, this is not evident to the Board.

Therefore, the argument of lack of novelty of the claimed system, in view of D1, is not convincing.

2.2 Document D4 discloses the combination of features of the preamble of claim 1. The parties and the Board are agreed on this.

The appellant's argument, that the embodiment of Figure 3 of the opposed patent justifies interpreting the characterising part of the claim broadly, such that the opening of the valve may alternatively be pressure dependent, is not acceptable. What "open" in the context means is that the passage of oxygen to atmosphere is substantially unobstructed such that an oxygen flush can readily escape to atmosphere. The minimal pressure required to open the valve cannot be interpreted to mean that the opening is pressure-dependent.

Thus, D4 does not disclose means responsive to the activation of said control means to positively open said valve to the said external environment independent of the pressure in the patient circuit. Therefore, the claimed system is novel over D4.

3. *Inventive step*

3.1 Closest prior art

As stated above D1 does not describe a working anaesthesia system, but instead it lists definitions, norms, and individual features of anaesthesia systems. D1 describes neither the anaesthesia system as set out

in the preamble of claim 1 nor in the characterising part thereof.

According to the case law of the EPO, in selecting the closest prior art, the first consideration is that it must be directed to the same purpose or effect as the invention, otherwise it cannot lead the skilled person in an obvious way to the claimed invention. D3 describes an anaesthesia system which has no oxygen flushing system, and for this reason D3 cannot be selected as the closest prior art document.

D4 describes an anaesthesia system according to the preamble of claim 1, including an oxygen flushing system, for which reason it is the closest prior art document.

3.2 As set out above D4 does not disclose any of the characterising features of claim 1. The technical problem these features address is as follows: In the event the oxygen flush valve is activated during the inhalation cycle of the ventilator, i.e. while the ventilator is providing a breath to the patient, the ventilator exhalation valve is closed and therefore the flow of oxygen is forced into a closed system, resulting in a build up of pressure in that system. The build up of pressure includes the lungs of the patient, and can reach unacceptable levels.

3.3 The characterising features of claim 1 overcome this problem by providing a link between the oxygen flush control and the venting valve to positively open the latter regardless of the phase of the breathing cycle.

3.4 None of documents D1, D3, or D4 discusses the present problem or discloses or suggests means responsive to the activation of said control means to positively open said valve to the said external environment independent of the pressure in the patient circuit.

The appellant's arguments, that the claimed solution is a simple and trivial modification of the prior art and would occur to the person skilled in the art, is based on an ex post facto analysis of the prior art with knowledge of the patent in suit, and are not acceptable.

3.5 Claim 1, therefore, involves an inventive step.

Order

For these reasons, it is decided that:

The appeal is dismissed.

The Registrar The Chairman

V. Commare T. K. H. Kriner