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**Datasheet for the decision
of 15 June 2020**

Case Number: T 1216/16 - 3.2.02

Application Number: 07794746.3

Publication Number: 2021047

IPC: A61M1/00, A61M27/00

Language of the proceedings: EN

Title of invention:
DEVICE FOR WOUND THERAPY

Patent Proprietor:
Smith & Nephew, Inc.

Opponent:
Sorbion GmbH

Headword:

Relevant legal provisions:
EPC R. 99(1)(b), 99(1)(c)
EPC Art. 54, 56

Keyword:

Admissibility of appeal - (yes)

Novelty - (yes)

Inventive step - (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1216/16 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 15 June 2020

Appellant: Smith & Nephew, Inc.
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Representative: Vossius & Partner
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Respondent: Sorbion GmbH
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Representative: FARAGO Patentanwälte
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
17 March 2016 concerning the maintenance of
European Patent No. 2 021 047 in amended form**

Composition of the Board:

Chairman M. Alvazzi Delfrate
Members: D. Ceccarelli
Y. Podbielski

Summary of Facts and Submissions

- I. The patent proprietor has appealed against the Opposition Division's interlocutory decision that, account being taken of the amendments according to the third auxiliary request then on file, European patent No. 2 021 047 and the invention to which it related met the requirements of the EPC. The patent was opposed on the grounds of added subject-matter, insufficient disclosure, lack of novelty and lack of inventive step.
- II. In the notice of appeal the appellant formulated the following requests:
- "(1) Reversal of the decision and revocation of the patent;
- (2) In the event that the request according to (1) should not be granted, the scheduling of oral proceedings before the Board of Appeal."
- III. In the statement of grounds of appeal the appellant requested that the decision under appeal be set aside and the patent be maintained as granted or on the basis of one of the first to thirteen auxiliary request filed therewith.
- IV. The respondent has requested that the patent be revoked in accordance with the appellant's request made in the notice of appeal, or that the appeal be held inadmissible. It has not requested oral proceedings.

V. The following documents are mentioned in the present decision:

D4: WO-A-2007/030598
D5: WO-A-2005/123170
D6: WO-A-2006/056294
D8: WO-A-2005/051461
D9: DE-U-20 2004 017 052
D10: WO-A-99/01173
D11: DE-U-20 2004 018 245 U1
D12: US-A-2004/0073151

VI. Claim 1 of the patent as granted reads as follows:

"A wound therapy device, comprising:

- a) a housing (20; 120; 220; 420; 520; 820) configured to cover at least a portion of a wound;
- b) a liquid-retention chamber (40; 140; 240; 440; 540; 640, 640'; 840) positioned inside of the housing; and
- c) a vacuum connection (30, 32; 130, 132; 230, 232; 432) for coupling to a vacuum source (134; 234; 434; 534; 634, 634'), the vacuum connection in gaseous communication with the liquid-retention chamber, the vacuum connection being separated from the liquid-retention chamber by a liquid barrier (36; 136; 236; 436; 636, 636') which prevents travel of liquid from the liquid-retention chamber to the vacuum connection while allowing gas flow, **characterized in that** the liquid barrier is positioned inside the housing."

Claims 2 to 22 are dependent claims.

VII. The appellant's arguments where relevant to the present decision may be summarised as follows:

Appellant's requests and admissibility of the appeal

In the letter of 20 June 2016 (filed before the statement of grounds of appeal) the appellant submitted that the knowledgeable reader would not understand request (1) formulated in the notice of appeal as a request for revocation, but as a request for reversal of the decision and reversal of the revocation.

Rule 99(1)(c) EPC was fulfilled since a reversal of the impugned decision was requested.

Novelty and inventive step

The Opposition Division had concluded in the impugned decision that the subject-matter of claim 1 of the patent as granted was not novel over D8. This was not correct.

D8 did not disclose the feature of a "liquid barrier which prevents travel of liquid from the liquid-retention chamber to the vacuum connection while allowing gas flow".

The Opposition Division had identified backing layer 3 of D8 as the claimed liquid barrier and concluded that a certain degree of gas communication was possible across that backing layer. However, there was no teaching in D8 that the backing layer allowed some relative amount of gas to pass through.

In D8 (page 7, lines 21 to 22 and page 8, lines 31 to 32) the backing layer was described as permitting a

positive or negative pressure to be applied to a wound, and as forming a "relatively fluid-tight seal or closure over the wound and/or around the inlet and outlet pipe(s)". The person skilled in the art would understand that the backing layer functioned as a drape to trap vacuum within the wound bed thereby allowing for the application of negative pressure to the wound. Such a backing layer prevented air passage from the atmosphere so as to allow the wound bed to reach a negative pressure.

The term "gas flow" in claim 1 had to be interpreted, in view of the patent as a whole, as a means for the application of negative pressure. The application of negative pressure required a significant amount of gas flow, more than the certain degree of gas flow which the Opposition Division considered to be implied by the expression "relatively fluid tight seal."

Moreover, D8 was not concerned with negative pressure wound therapy, but with cleaning the wound fluids and to "supply and recirculate" beneficial materials to the wound (page 2, lines 6 to 10). The conventional approach of negative pressure wound therapy implying the removal of wound exudate, was excluded by D8 (page 1, lines 11 to 27). It followed that D8 did not qualify as the closest prior art for the assessment of inventive step.

VIII. The respondent's arguments where relevant to the present decision may be summarised as follows:

Appellant's requests and admissibility of the appeal

The appellant had requested revocation of its own patent and had never withdrawn this request. Following

such a request, which implied a withdrawal of the agreement to the text of the patent as granted and which could not be simply withdrawn, the Board had to revoke the patent.

Moreover, the appeal was inadmissible since the grounds of appeal did not reflect the request for revocation of the patent.

Novelty and inventive step

The respondent has not submitted any arguments on novelty and inventive step.

Reasons for the Decision

1. Appellant's requests and admissibility of the appeal
- 1.1 In the notice of appeal the appellant literally requested "reversal of the decision and revocation of the patent".

The respondent submitted that the patent should be revoked accordingly. It argued that the request had never been withdrawn by the appellant and, in any case, a request for revocation could not simply be withdrawn. In addition, the appeal was inadmissible as the grounds of appeal did not support the request made in the notice of appeal.

It is established case law of the Boards of Appeal that Rule 99(1)(c) EPC is complied with if the notice of appeal contains a request, which may be implicit, to set aside the decision under appeal in whole or in part. Any more specific requests do not need to form

part of the notice of appeal, but may be filed with the statement setting out the grounds of appeal (Case Law of the Boards of Appeal, 9th edition, V.A.2.5.2 c)). In the present case, the appellant requested in the notice of appeal that the decision under appeal be reversed, i.e. that the decision under appeal be set aside in whole. The grounds of appeal then set out the specific requests concerning the form in which maintenance of the patent was sought and thus explained the extent to which amendment of the appealed decision was requested. Thus, the appeal is admissible.

The fact that the notice of appeal contains the wording that "*The following requests are made: [...] revocation of the patent*" does not change this conclusion.

Although the respondent argued that a request for revocation cannot be withdrawn, the Board does not consider that a valid request for revocation was made.

Since a request for revocation by the proprietor may have extreme consequences, i.e. the irremediable loss of the patent *ex tunc*, before ordering that the patent be revoked there must be no doubt that the proprietor is making such a request with the consequences specified in Article 68 EPC (Case Law of the Boards of Appeal of the EPO, IV.D.2). In contrast thereto, the wording in the notice of appeal appears to be a mistake. The patent attorney might have not realised that it was filing an appeal on behalf of a patent proprietor, not of an opponent.

It is the established case law of the Boards of Appeal that, in these circumstances, the extent to which amendment of the appealed decision is requested is to be determined from the totality of the appellant's

submissions (Case Law of the Boards of Appeal, 9th edition, V.A.2.5.2 c)). In the present case this includes the notice of appeal, the appellant's letter of 20 June 2016 and the grounds of appeal dated 25 July 2016. From these documents it is very clear to what extent amendment of the appealed decision is requested and that this is not to revoke the patent.

The Board therefore concludes that the appeal is admissible and that the appellant's requests are those set out in the grounds of appeal.

2. The invention

The invention relates to a wound therapy device for applying suction to a wound. Such systems are typically used to promote healing especially of chronic wound types.

A device according to claim 1 of the patent as granted is depicted in Figure 2, reproduced below.

The device, for application over an open wound, comprises a housing (20), a liquid-retention chamber (40) within the housing, and a vacuum connection (30) for coupling to a vacuum source.

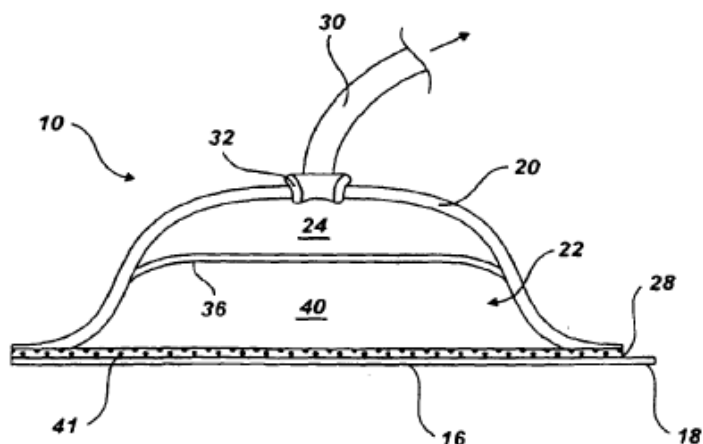


Fig. 2

The liquid-retention chamber (40) is for retaining liquid drawn from the wound. According to the patent (paragraph [0029]) the liquid-retention chamber may include structures and/or substances, such as sponges or foams, to assist in retaining the liquid drawn into the chamber.

The vacuum connection is in gaseous communication with the liquid-retention chamber so that suction can be applied to the wound. However, the vacuum connection is separated from the liquid-retention chamber by a liquid barrier (36).

The liquid barrier prevents travel of liquid from the liquid-retention chamber to the vacuum connection while allowing gas flow, and is positioned inside the housing.

According to the patent the claimed device allows use by a patient in-home, with little supervision, and is easily portable to allow travel and mobility of the patient (paragraph [0005]).

3. Extension of subject-matter and sufficiency of disclosure

The primary object of the appeal proceedings is to review the decision under appeal in a judicial manner, in view of the submissions of the parties.

In the impugned decision the Opposition Division concluded that the patent as granted did not extend beyond the content of the application as filed and fulfilled the requirements of sufficiency of disclosure.

In the appeal proceedings the respondent has not raised any specific objections to these findings in the impugned decision. The Board does not see any evident defect in them either.

It follows that the grounds for opposition under Article 100(b) and (c) EPC do not prejudice the maintenance of the patent as granted.

4. Novelty

4.1 In the impugned decision the Opposition Division concluded that the subject-matter of claim 1 of the patent as granted lacked novelty over D8.

D8 concerns devices for cleansing wounds, with the object of removing materials deleterious to wound healing from wound exudate, whilst retaining materials that are beneficial in promoting wound healing in contact with the wound bed (page 1, lines 29 to 33). In essence, it proposes a method for cleansing wound exudates by circulating the wound exudates through a cleansing means.

The Opposition Division referred to the embodiment depicted in Figure 7 of D8, reproduced below.

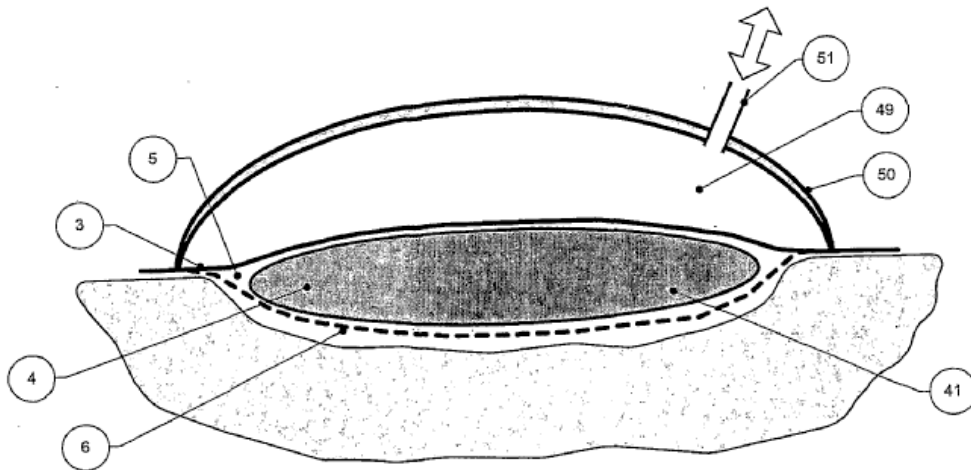


Figure 7

In this embodiment the wound exudate is made circulate through foam-like cleansing means 4, which is held between a permeable polymer film 6, in contact with the wound, and a backing layer 3 (page 45, lines 10 to 14). The chamber containing the cleansing means is alternatively compressed and expanded by the application of varying pressure in chamber 49. This is made by pumping fluid in and out of chamber 49 via inlet and outlet pipe 51 (page 46, lines 17 to 21). The fluid may be a gas or a liquid.

The Opposition Division identified rigid dome 50 as the housing, the chamber holding the cleansing means (delimited by permeable polymer film 6 and backing layer 3) as the liquid-retention chamber, pipe 51 as the vacuum connection and backing layer 3 as the liquid barrier.

As regards backing layer 3, the Opposition Division

held that it allowed gas flow from the liquid-retention chamber to the vacuum connection in that "a certain degree of gas communication" was possible across it. In particular, the Opposition Division referred to page 7, lines 17 to 24 of D8, which describes the backing layer as forming a "relatively fluid-tight seal".

The Board notes that the technical meaning of a claim feature and of the disclosure of a prior-art document has to be established in context.

In context, claim 1 of the patent as granted prescribes a liquid barrier that is permeable to gas so that there is gas communication with little restriction between the vacuum connection and the liquid-retention chamber.

On the other hand it is clear that, in order for the device of Figure 7 of D8 to work, the fluid contained in chamber 49 cannot enter the chamber containing the cleansing means in any appreciable amount. Since that fluid can be a gas, this means, in context, that backing layer 3 is gas-tight under the working pressure conditions of D8. This is confirmed on page 7, lines 20 to 24 of D8, which also discloses that the working pressure conditions of D8 are the same as in the intended use of the claimed invention. The fact that some gas particles may pass through backing layer 3 does not make the layer "allow gas flow" within the meaning of claim 1.

In conclusion, D8 does not disclose a liquid barrier which allows gas flow from the liquid retention chamber to the vacuum connection.

It follows that the subject-matter of claim 1 of the

patent as granted is novel over D8.

4.2 In the impugned decision the Opposition Division concluded that the subject-matter of claim 1 of the patent as granted was novel over the remaining documents (D4, D5, D6 and D12) based on which the opponent had raised novelty attacks. In appeal the respondent has not objected to this finding. The Board does not have any evident reasons to question it either.

4.3 Since the subject-matter of claim 1 and, a fortiori, of dependent claims 2 to 22, of the patent as granted is novel over the cited prior art, the ground for opposition of lack of novelty under Article 100(a) EPC does not prejudice the maintenance of the patent as granted.

5. Inventive step

5.1 The Opposition Division did not decide on inventive step of the subject-matter of claim 1 of the patent as granted.

In the first-instance proceedings the respondent raised objections starting from D8, D9, D10 or D12.

5.2 The subject-matter of claim 1 of the patent as granted differs from D8 in that the liquid barrier which prevents travel of liquid from the liquid-retention chamber to the vacuum connection allows gas flow.

If backing layer 3 was permeable to gas, the device of Figure 7 of D8 would not function the way it is intended, since the pressure in chamber 49 would be transferred to the chamber containing cleansing means

4. Hence, the chamber containing the cleansing means would not be alternatively compressed and expanded.

Under these circumstances the skilled person would not make backing layer 3 gas permeable, irrespective of whether gas-permeable liquid barriers are known as such.

5.3 D9 discloses a device for the treatment of wounds by application of suction (paragraph [0001]), comprising a housing (Wundabdeckungselement 4, described in paragraph [0033]), a vacuum connection (Anschlußstelle 5.1) and a body for absorbing wound exudates, placed within the housing (Absorptionskörper 2). The absorbing body is enclosed in a fluid-permeable sheet of textile (11, paragraph [0035]). The respondent identified the room enclosed by the permeable sheet as the liquid-retention chamber within the meaning of claim 1 of the patent as granted. Irrespective of whether such an enclosure may qualify as a chamber, D9 does not disclose a liquid barrier within the housing, separating the vacuum connection and the liquid-retention chamber as defined in claim 1 of the patent as granted.

D9 teaches that the absorbing body itself prevents wound exudates from reaching the vacuum connection. It acts like a sponge (paragraph [0022]). Hence, there is no reason for the skilled person to provide a further liquid barrier as claimed. It is irrelevant whether such a liquid barrier may be known per se. As regards the combination with D8, which was suggested by the respondent, the Board notes that D8 does not teach a liquid barrier as claimed either.

5.4 D10 relates to a drainage system for treating open wounds (page 1, lines 5 to 10). As the respondent also noted, D10 does not disclose any liquid barrier between a liquid-retention chamber and a vacuum connection. Since the system is for draining fluids from the wound (page 3, lines 16 to 25) it would make no technical sense to provide the system of D10 with a liquid barrier as defined in claim 1 of the patent as granted. Such a barrier would prevent the drainage and would make the system useless. It is therefore irrelevant whether a liquid barrier as claimed is known per se, in particular from D11 pointed at by the respondent.

5.5 D12 concerns an apparatus for treating a wound by applying reduced pressure to the wound (paragraph [0002]). The apparatus may comprise a fluid collection system for trapping wound exudates (paragraph [0018]). The respondent referred to the embodiment depicted in Figures 8a and 8b, which comprises a container (270) for trapping wound exudates, fluidly connected to the wound bed by a suction tube (245), a vacuum connection (273) from the container to a vacuum source (250), and a filter (253) interposed between the container and the vacuum source to prevent potentially pathogenic microbes or aerosols from contaminating the vacuum source (paragraph [0076]). The filter and the container can be enclosed in individual housings or integrated in a single unit (paragraph [0077]). The respondent identified the container as the liquid-retention chamber and the filter as the liquid barrier according to claim 1 of the patent as granted. However, container 270 and filter 253 are not within a housing configured to cover at least a portion of the wound as prescribed by the claim.

Due to the overall dimensions of the apparatus of D12,

it would make no technical sense to locate the container and the filter in a housing as claimed, concealed from the exterior and in the same enclosed space as the wound.

- 5.6 In conclusion, the subject-matter of claim 1 and, a fortiori, of dependent claims 2 to 22, of the patent as granted is inventive over the cited prior art. It follows that the ground for opposition of lack of inventive step under Article 100(a) EPC does not prejudice the maintenance of the patent as granted.
6. Hence, the patent can be maintained as granted and there is no need for the Board to consider the auxiliary requests.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar:

The Chairman:



D. Hampe

M. Alvazzi Delfrate

Decision electronically authenticated