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**Datasheet for the decision
of 10 February 2026**

Case Number: T 0550/25 - 3.2.01

Application Number: 19772562.5

Publication Number: 3768123

IPC: A47C27/10, A47C7/02, A47C4/54,
B60N2/62, B60N2/90

Language of the proceedings: EN

Title of invention:

THERAPEUTIC SEAT CUSHION EQUIPPED FOR PRESSURE MONITORING AND
INFLATION SYSTEM FOR SAME

Applicant:

Bussert Medical, Inc.

Headword:

Relevant legal provisions:

EPC Art. 94(3), 97(1), 113(2), 116, 153(4)
EPC R. 71(3), 71(5), 71(6), 101(1), 103(1)(a), 139, 140,
159(1)(b)

Keyword:

Admissibility of appeal (yes) - appellant adversely affected despite
decision to grant a patent
Failure to communicate the text intended for grant - missing
drawing sheets
Allowability of appeal (yes)
Reimbursement of appeal fee (no)

Decisions cited:

G 0001/10, J 0004/09, T 2081/16, T 1003/19, T 0408/21,
T 1823/23, T 1224/24

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 0550/25 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 10 February 2026

Appellant: Bussert Medical, Inc.
(Patent Proprietor) 247 Coffey Hill Road
Nashville, IN 47448 (US)

Representative: Wimmer, Hubert
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office, posted on 23 January
2025, granting European patent No. 3 768 123
pursuant to Article 97(1) EPC**

Composition of the Board:

Chair A. Jimenez
Members: B. Spitzer
V. Vinci

Summary of Facts and Submissions

- I. The appeal lies from the decision of the examining division to grant a European patent on the basis of the documents indicated in the communication under Rule 71(3) EPC of 20 September 2024 following examination of European patent application No. 19 772 562.5, which was filed on 22 March 2019 as an international application with application No. PCT/US2019/023630 and publication No. WO 2019/183502 A1.

- II. The international application and publication were composed of a description of 15 pages, a set of 19 claims and five pages of drawings.

- III. With the request for entry into the European phase, the applicant specified the application documents on which the European grant procedure was to be based (Rule 159(1) (b) EPC), as follows.

Table for section 6 of Form 1200.3

In accordance with the Notice from the European Patent Office dated 26 January 2009 concerning the 2009 fee structure (OJ EPO 2009, 118, and Guidelines for Examination in the EPO, April 2009, A-III, 13.2), the amount of the additional fee (Art. 2, item 1a, Rules relating to Fees) for the pages of this European patent application is calculated as follows:

Documents intended for proceedings before the EPO (R. 159 (1) (b) EPC) and for calculating the additional fee (Art. 2, item 1a, RFees):		Page(s) from ... to ...	Number of pages
Description:	International application as published	1 to 15	15
Claims:	International application as published	16 to 20	5
Drawings:	International application as published	1 to 5	5
Abstract:	Default count: one page		1
Total number of pages			26

- IV. The European patent application A1, identical to the international application and published in accordance

with Article 153(4) EPC, contained besides 15 pages of the description and a set of 19 claims five pages of drawings with Figures 1 to 10.

- V. The supplementary European Search Report, issued on 25 November 2021, and the communication from the examining division under Article 94(3) EPC, dated 18 December 2023, mentioned that, for the figures, the examination was carried out on the drawing sheets 1/1 as published. Thus, in the European Search Opinion, four of these five pages of drawings went missing.
- VI. After entry into the European phase and during examination, the applicant has filed amended set of claims with letters dated 21 April 2021, 14 June 2022 and 18 June 2024. In addition, amended pages 1, 1a and 15 of the description were filed with letter dated 14 June 2022. The applicant has not cancelled or amended any of the drawing sheets 1/5 to 5/5.
- VII. In a communication under Rule 71(3) EPC dated 20 September 2024, the applicant was informed that the examination division intended to grant a European Patent on the basis of the following documents including some amendments to the description and claim 1 proposed by the examining division:

Description, Pages

2-14 as published
1, 1a, 15 received on 14-06-2022 with letter of 14-06-2022

Claims, Numbers

1-9 filed in electronic form on 18-06-2024

Drawings, Sheets

1/1 as published

With the following amendments to the above-mentioned documents proposed by the division

Description, Pages 1
Claims, Numbers 1

The drawing sheets 2/5 to 5/5 were not included in this set of documents. Also the "Druckexemplar" sent as an annex to the applicant included only one drawing sheet 1/1, along with two figures numbered 1 and 2.

- VIII. The applicant subsequently filed a translation of the claims in the two other official languages and paid the fee for grant and publication within the period indicated in the communication dated 20 September 2024.
- IX. On 23 January 2025, the examining division issued the decision to grant a European patent under Article 97(1) EPC, in the form specified in the communication pursuant to Rule 71(3) EPC.
- X. Following the decision of the examining division to grant the patent in the version indicated above, the applicant appealed this decision.
- XI. The appellant requested "to revoke the publication of the grant and to correct the application documents, in particular the pages of the drawings, before issuing a new decision to grant."

In the alternative, the appellant withdrew its approval

of the communication under Rule 71(3) EPC and requested "to correct the application documents, in particular the pages of the drawings, and to grant a patent on the basis of the following documents:

- Pages 1 to 15 of the description, according to the text intended for grant submitted with the communication under Rule 71(3) EPC of 20 September 2024
- Claims 1 to 9, according to the text intended for grant submitted with the communication under Rule 71(3) EPC of 20 September 2024 and
- Drawing sheets 1 /5 to 5/5, as originally filed".

Furthermore, reimbursement of the appeal fee was requested.

In the statement of grounds of appeal, the appellant argued that the omission of 4 drawing sheets was an obvious mistake that should be corrected in accordance with Rule 140 EPC or with Rule 139 EPC. The appellant cited decision G 1/10 and decision T 1823/23.

XII. The Board interprets the appellant's main request as follows:

It is requested that the decision under appeal be set aside and that the case be remitted to the examining division with the order to grant a patent based on the following documents:

- Pages 1 to 15 of the description, according to the text intended for grant submitted with the communication under Rule 71(3) EPC of 20 September 2024

- Claims 1 to 9, according to the text intended for grant submitted with the communication under Rule 71(3) EPC of 20 September 2024 and
- Drawing sheets 1 /5 to 5/5, as originally filed.

Reasons for the Decision

1. This case principally corresponds to those cases underlying decisions T 1224/24, T 1823/23, T 408/21, T 1003/19 and T 2081/16. Following the rationale in these decisions, the appellant had not been informed of the text in which the examining division intended to grant the patent.

2. Admissibility of the appeal

The appeal is admissible since the appellant is adversely affected by the omission of drawing sheets 2/5 to 5/5 in the decision to grant. The granted version of the patent does not correspond to the text submitted by the applicant, nor to a text agreed upon or deemed approved by the applicant.

- 2.1 With letter dated 18 June 2024, the applicant noted that "*[h]aving thus taken care of all the Examiner's objections, it is trusted that the application may now proceed to grant.*"

To determine what was meant by "the application", it is necessary to refer to the file history.

The applicant has filed a new set of claims 1 to 12, 1 to 11 and 1 to 9 with letters dated 21 April 2021, 14 June 2022 and 18 June 2024, respectively. With letter dated 14 June 2022, the applicant has filed new pages 1, 1a and 15 of the description to replace pages

1 and 15 of the description. The applicant has not withdrawn or amended any of the drawing sheets 1/5 to 5/5 and, thus, the drawing sheets were those based upon in its request for entry into the European phase, namely drawing sheets 1/5 to 5/5, and correctly published in the A1 application.

- 2.2 The communication under Rule 71(3) EPC dated 20 September 2024 proposed amendments to page 1 of the description and to claim 1 but did not indicate that the text intended for grant differed from the applicant's request regarding the drawings. Furthermore, no prior communication from the examining division proposed amendments to the drawings filed by the applicant or contained any comments on them.

All communications stated that, for the figures, the examination was carried out on the drawing sheets 1/1 as published. Drawing sheets 2/5 to 5/5 were never mentioned by the examining division. However, the file contains no explicit approval from the applicant for the removal of the drawing sheets 2/5 to 5/5. It appears that neither the members of the examining division nor the appellant realized that the drawing sheets 2/5 to 5/5 as published were omitted.

- 2.3 According to Rule 71(3) EPC, first sentence: "*Before the Examining Division decides to grant the European patent, it shall inform the applicant of the text in which it intends to grant it and of the related bibliographic data.*" Rule 71(5) EPC further provides: "*if the applicant...pays the fees... and....files the translations..., he shall be deemed to have approved the text communicated to him under paragraph 3, and verified the bibliographic data.*"

- 2.4 In accordance with T 1224/24 (Reasons, point 1.4), T 1823/23 (Reasons, point 1.9), T 408/21 (Reasons, point 1.12), T 1003/19 (catchword and Reasons, point 2.4) and T 2081/16 (Reasons, point 1.4), the Board considers that the legal consequence set out in Rule 71(5) EPC can only apply if the communication under Rule 71(3) EPC reflects the intention of the examining division regarding the application documents on which the patent is to be granted.
- 2.5 This conclusion is drawn from the unambiguous wording of Rule 71(3) EPC, which uses the verb "intends", clearly indicating the intention of the examining division. Deemed approval under Rule 71(5) EPC can only occur after a text compliant with Rule 71(3) EPC has been communicated to the applicant. Rule 71(5) EPC is not a stand alone provision. Simply paying the fee and filing translations does not trigger deemed approval regardless of the communicated text's content. The text must conform to Rule 71(3) EPC, to which Rule 71(5) EPC refers, and align with the intention of the examining division regarding the application documents that form the basis for granting the patent. Otherwise, the subsequent fee payment and translation filing remain ineffective.
- 2.6 This conclusion does not absolve the applicant of the responsibility to carefully review the content of the communicated text. Rule 71(6) EPC namely allows the applicant to request reasoned amendments or corrections to the communicated text. However, this provision applies only to texts communicated in accordance with Rule 71(3) EPC, which reflect the intention of the examining division regarding the application documents that form the basis for granting the patent. This specifically addresses situations where the

communication refers to the correct documents intended for grant, but these documents contain clerical mistakes or inaccuracies that the applicant wishes to rectify, or the applicant is not satisfied with the amendments explicitly proposed by the examining division to the text they submitted. However, if the communicated text does not reflect the intention of the examining division for granting the patent, neither the absence of a correction or amendment request under Rule 71(6) EPC, nor the payment of the fee and filing of translations under Rule 71(5) EPC will have any legal consequence. The Board finds that this conclusion not only aligns with the clear wording of Rule 71(3) EPC but also safeguards the applicant from being seriously prejudiced by the impossibility to request corrections under Rule 140 EPC (see decision G 1/10, Reasons, points 8 to 12).

2.7 Under normal circumstances, it can be assumed that the text referred to in a communication under Rule 71(3) EPC reflects the intention of the examining division regarding the text on which the patent is to be granted. However, this is not the case when objective elements in the communication and/or in the text annexed to the it, such as significant discrepancies between the communication and the "Druckexemplar", or within the "Druckexemplar" itself, clearly indicate that the text does not correspond to the intention of the examining division (see T 1003/19, points 2.4.3 and 2.4.4).

2.8 In the case at hand, it can only be concluded that the omission of the drawing sheets 2/5 to 5/5 as published was never intended by the examining division:

As mentioned in point 2.2 above, in the course of the

examining proceedings, the examining division never raised any objections to the drawings as published, nor did it provide any reasons for deleting drawing sheets 2/5 to 5/5. The Office's standard practice is to indicate amendments proposed by the examining division in the "comments" field of Form 2004C, used for communications under Rule 71(3) EPC, rather than including them only in the "Druckexemplar" annexed to the communication. In the case at hand, this field was used by the examining division to propose minor changes to page 1 of the description and to claim 1, but the need to delete some of the drawing sheets forming part of the appellant's request for grant was not mentioned. As noted by the appellant, the description in the "Druckexemplar" annexed to the Rule 71(3) EPC communication still lists all Figures 1 to 10 (see paragraphs [0006] to [0015]) and repeatedly refers to these figures (see for instance paragraph [0018], [0020], [0021], [0024], [0028]). However, the "Druckexemplar" only contains 2 figures; Figures 1 and 2.

2.9 Therefore, the Board concludes in the present case that neither the documents referred to in Form 2004C nor the "Druckexemplar" reflected the text in which the examining division intended to grant the patent. Hence, the text communicated to the applicant with the communication of 20 September 2024 did not correspond to the text intended for grant under Rule 71(3) EPC.

2.10 If the applicant is not communicated the text intended for grant under Rule 71(3) EPC, the legal consequence outlined in Rule 71(5) EPC does not apply. Therefore, the applicant's subsequent filing of translations and payment of fees for grant and publishing do not imply

approval of the communicated text.

2.11 Since the text on which the patent was granted did not align with the applicant's request, nor was it agreed upon or deemed approved by the applicant, the applicant was adversely affected by the decision under Article 97(1) EPC. All other requirements under Rule 101(1) EPC being met, the Board concludes that the appeal is admissible.

3. Allowability of the appeal

3.1 A decision to grant under Article 97(1) EPC, based on a text that was neither submitted nor agreed upon by the applicant, as is the case here (see point 2. above), does not comply with Article 113(2) EPC.

3.2 The decision under appeal is therefore to be set aside.

4. Rules 140 and 139 EPC

4.1 The appellant based its arguments on a correction of an obvious mistake either in accordance with Rule 140 EPC or on Rule 139 EPC. It also referred to decision G 1/10.

4.2 The Board notes that in line with decision G 1/10 these Rules are not applicable in the case at hand.

4.3 In decision G 1/10, the Enlarged Board of Appeal decided that Rule 140 EPC is not available to correct the text of a patent. According to point 11 of the Reasons of decision G 1/10, Rule 140 EPC is intended for correcting errors in decisions of the EPO and not errors in documents filed by an applicant (see also Case Law of the Boards of Appeal of the European Patent

Office, 11th edition, July 2025, "Case Law", III.L.2.1)

Rule 139 EPC concerns the correction of obvious mistakes in any document filed with the EPO (see decision G 1/10, Reasons, points 9 and 10; see Case Law, II.E.4. and IV.A.5.5.1). However, this does not apply in the present case.

5. Reimbursement of the appeal fee

The request for reimbursement of the appeal fee is rejected.

5.1 The reasoning follows the rationale of decisions T 1224/24 (see Reasons, point 3.), T 1823/23 (see Reasons, point 3.), and T 1003/19 (see Reasons, point 5.).

5.2 Rule 103(1)(a) EPC provides for a refund of the appeal fee where an appeal is allowable, and the reimbursement is equitable by reason of a substantial procedural violation.

5.3 As the decision under appeal does not comply with Article 113(2) EPC (see point 3.1 above), the examining division committed a substantial procedural violation.

5.4 The reimbursement of the appeal fee is not equitable if an applicant made no use of opportunities to participate in the initial proceedings (J 4/09, Reasons 4).

5.5 In the case at hand, it appears that the error was introduced by the examining division already with the supplementary European Search Report, issued on 25 November 2021, and found its way into the

communication under Rule 71(3) EPC.

5.6 Normally, non-observation of the requirements of Article 113(2) EPC by the examining division justifies reimbursement of the appeal fee, as is also mentioned in decision G 1/10, point 12 of the Reasons. In the present case, however, while the error was committed by the examining division, the appellant had several instances to spot this error and, at the latest, could and should have noticed it when comparing the text of the communication under Rule 71(3) EPC and the "Druckexemplar". In particular, the fact that only one published drawing sheet instead of five drawing sheets existed should have alerted the appellant.

5.7 The fact that a narrow interpretation of Rule 71(3) and (5) EPC as proposed by this board and in some other decisions (see points 1. and 2.4 above) allows for an appeal to be treated as admissible should not be misinterpreted as an invitation to neglect the applicant's duty to carefully check both the communication and the "Druckexemplar" sent to it under Rule 71(3) EPC.

6. No need for oral proceedings

As the Board's decision is in line with the appellant's request that the decision under appeal be set aside and that the case be remitted to the examining division with the order to grant a patent based on the correct documents, the Board was able to take the decision in writing without holding oral proceedings in accordance with Article 12(8) RPBA.

No auxiliary oral proceedings were requested for the appellant's request for reimbursement of the appeal

fee.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the examining division with the order to grant a patent on the basis of the following documents:
 - Description: pages 1 to 15 of the description, according to the text intended for grant submitted with the communication of the examining division under Rule 71 (3) EPC of 20 September 2024 and as contained in the "Druckexemplar"
 - Claims 1 to 9, according to the text intended for grant submitted with the communication of the examining division under Rule 71 (3) EPC of 20 September 2024 and as contained in the "Druckexemplar" and
 - Figures: drawing sheets as originally filed 1/5 to 5/5.

The Registrar:

The Chair:



M. Schalow

A. Jimenez

Decision electronically authenticated