United States District Court,
N.D. Illinois, Eastern Division.

LEXION MEDICAL, LLC,
v.
NORTHGATE TECHNOLOGIES, INC., and.

Feb. 10, 2006.

PRELIMINARY CLAIM CONSTRUCTION

JAMES M. ROSENBAUM, Chief Judge.

The parties seek the Court's claim construction of terms in U.S. Patent No. 5,411,474 (the '474 patent) and U.S. Patent No. 6,068,609 (the ' 609 patent).

I. *Background*

The parties seek the Court's construction of the underlined terms in Claim 11 of the '474 patent:

11. A method of providing heated, humidified gas into a patient for an endoscopic procedure comprising the steps of: a) directing pressure-and volumetric flow rate-controlled gas, received from an insufflator into a *chamber* having a *means for heating* the gas to a temperature within a predetermined range and a *means for humidifying* the gas and being disposed immediately adjacent to the patient, wherein the chamber is in flow communication with and immediately adjacent to a means for delivering the gas to the interior of the patient; *sensing the temperature of the gas* as it exits the chamber to determine if it is within the predetermined range[.]

Many of these terms also appear in the claims of the patent, which recite:

1. An apparatus for treating gas prior to the use of the gas in a medical procedure involving a patient, the gas being received into the apparatus from an insufflator which receives gas from a gas source, and the gas exiting the apparatus being in flow communication with a means for delivering the gas to the interior of the patient, wherein the gas is pressure-and volumetric flow rate-controlled by the insufflator, the apparatus comprising:

a. a *housing* defining a *chamber* having an entry port and an exit port, the exit port adapted to be in flow communication with the means for delivering and the entry port adapted to be in flow communication with the outlet of the insufflator;

b. *humidification means* disposed within the chamber in the *path of travel of the gas* through the chamber for humidifying the gas as it travels through the chamber; and

c. a charging port *on the housing* to permit charging and recharging of the humidification means with liquid.

17. The apparatus of claim 1, and further comprising: heating means disposed within the chamber for heating the gas; and *temperature sensing means disposed within th* e chamber for sensing the temperature of the gas in the chamber; ...

31. An apparatus for conditioning gas for use in a medical procedure involving a patient, the gas being received into the apparatus from a gas source, the apparatus comprising:

a. a *housing* defining a *chamber* having an entry port and an exit port, the entry port adapted to be in flow communication with the gas source and the exit port delivering conditioned gas therefrom;

b. *humidification means* disposed within the chamber in the *path of travel of the gas* through the chamber for humidifying the gas as it travels through the chamber;

c. a charging port *on the housing* to permit charging or recharging of the humidification means with liquid.

33. The apparatus of claim 31, and further comprising: a heating element disposed *in the chamber;* a temperature sensor in the chamber to *sense the temperature of the gas as it exits the chamber; ....*

II. ***Analysis***

When construing claims, a Court "focuses at the outset on how the patentee used the claim term in the claims, specification and prosecution history," which constitute the intrinsic evidence of record. Phillips v. AWH Corp., 415 F.3d 1303, 1321 (Fed.Cir.2005) (en banc). Claim terms are presumed to carry "the meaning that the term would have to a person of ordinary skill in the art at the time of the invention." Id. at 1313. The Federal Circuit recognizes the specification as the "single best guide to the meaning of a disputed term." Id. at 1315. Further, the Court is admonished against importing limitations from the specification into the claim. Id. at 1322-23. The Court also recognizes that claims are to be construed without regard to the accused product. Jurgens v. McKasy, 927 F.2d 1552, 1560 (Fed.Cir.1991).

Other considerations inform the construction of means-plus-function claims, which present particular requirements. If a patentee uses such claims, it can obtain patent protection for a means of performing a specific function, but the protection only extends to "the corresponding structure ... described in the specification and equivalents thereof." 35 U.S.C. s. 112, para. 6. A claim employing the word "means" gives rise to a rebuttable presumption that s. 112, para. 6 applies. Apex Inc. v. Raritan Computer, Inc., 325 F.3d 1364, 1371 (Fed.Cir.2003). Whether a claim is, in fact, one of means-plus-function is a question of law. Id. at 1370.

When construing a means-plus-function claim, the Court begins with the function explicitly recited in the claim, and then identifies the corresponding structure which performs that function. Asyst Tech., Inc. v. Empak, Inc., 268 F.3d 1364, 1369 (Fed.Cir.2001). To be protected, the structure "must actually perform the recited function, not merely enable the pertinent structure to operate as intended." Id. at 1371.

The Court must further consider whether any material was surrendered in the patent process. *See* Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 733-34 (2002) (prosecution history estoppel is a "rule of patent construction that ensures that claims are interpreted by reference to those that have been cancelled or rejected.") (internal quotations omitted.) A patentee who narrows a claim to obtain a patent disavows patent protection for the broader subject matter. Id. at 737. The relevant inquiry is whether a competitor would reasonably believe, based on the applicant's position before the PTO, that the applicant had surrendered the broader subject matter. Cybor Corp. v. FAS Tech., Inc., 138 F.3d 1448, 1454 (Fed.Cir.1998) (en banc).

III. ***Claim Construction***

With the Federal Circuit's approach firmly in mind, the Court turns to the construction of the disputed claim terms.

As an initial matter, the Court declines to define certain disputed terms. These include "chamber" (and "in the chamber"), "housing" (or "on the housing"), and "path of travel of the gas ." The Court is of a mind that these terms, as used in the '474 and '609 patents are within the ken of a lay jury. If pressed, the Court would define "chamber" to mean "an enclosed space," but at present the Court sees no need to do so.

As to the remaining terms:

1. Insufflator **:**

"This is a device designed to inject gas into a body. In this case the gas is used to inflate the injected area to allow a laparoscopic procedure."

2. ***Sense / sensing the temperature of the gas***

"This means the thermal temperature of the gas is measured by a device after the gas has been humidified, but prior to delivery into the patient."

The written description in the '474 patent discloses that "it is vital to the present invention that the temperature is sensed after [the gas] has been humidified so that any change in temperature of the gas 21 as it is humidified is corrected at that point by the apparatus." ('474 Patent, Col. 8, lines 51-55.) The description in the '609 patent is substantially similar, noting that gas temperature is "preferably" sensed after humidification. ('609 Patent, Col. 5, 45-49.)

All of the remaining disputed terms employ the word "means", raising the presumption that s. 112, para. 6 applies.

3. ***Means for heating***

"This is a method or structure designed to heat a gas."

The Court looks to the drawings and written description to identify what performs the function of heating a gas. It appears the appropriate structure includes element 20 in Figures 2 and 3, described alternatively as an "electrical heating element" ('474 Patent, Col. 6, lines 34-35) or an "electric resistance heater element" ('474 Patent, Col. 8, lines 37-38). In the preferred embodiments, this heating element is embedded in a structure numbered 28, called a "humidification bed," which is "a porous bed or reservoir of entrapped water." ('474 Patent, Col. 8, lines 15-16 and 39.) The gas passes through the heated water in the humidification bed, and is heated through the process of thermal exchange. The summary of the invention notes that the apparatus provides for a heating means "within the humidification means," and which means may be "disposed within or around the water" contained by the humidification means. ('474 Patent, Col. 4, 20-21.)

Accordingly, the Court defines "means for heating" as "an electrical heating element within the humidification means," and equivalents.

4. ***Means for humidifying / humidification means***

This is "a method or structure designed to put water, or humidity, into a gas."

Here, too, the Court looks to the specification to determine what performs the function of putting water, or humidity, into a gas.

The summary of the invention describes one of its advantages over the prior art as improved efficiency, including "simultaneously" heating and humidifying the gas. ('474 Patent, Col. 3, lines 47-49.) The humidifying bed 28 contains several structures that perform the function of adding moisture to gas. These include the "porous bed or reservoir" containing "water-retaining material which has been infused with water." ('474 Patent, Col. 8, lines 15-19.) The summary of the invention states that the "humidification means can comprise a volume of water[.]" ('474 Patent, Col. 4, line 22.)

During prosecution, the '474 patent was amended to distinguish prior art in which a humidifier had gas flowing freely through a hollow air duct past a humidifying bed. (Amendment at 8, citing Dittmar et al., U.S. Patent No. 4,825,863, attached as Exs. 6 and 7 to Plaintiff's Claim Construction Submission.) The patentee, therefore, surrendered protection of a humidifier where gas flows freely past a humidifying bed.

The Court finds the structure in the '474 patent that performs the function of putting water, or humidity, into a gas consists of "a porous bed or reservoir containing water-retaining material which has been infused with a volume of water," and equivalents, except those which have been disclaimed.

The '609 Patent describes slightly different structures, which may include "one or more layers of liquid-retaining or absorbing padding or sponge material," or alternately a "chamber of liquid (without liquid-retaining layers) having semi-permeable membrane on opposite ends to allow gas to pass therethrough." ('609 Patent, col. 4, lines 65-67, and col. 5, lines 15-17.) As in the '474 patent, the gas takes on moisture when it comes into contact with the liquid.

Accordingly, the structures in the '609 patent which perform the function of putting water into gas, consist of "a chamber of liquid which may have one or more layers of liquid-retaining or absorbing padding or sponge material," and equivalents.

5. ***Temperature sensing means disposed within the chamber***

This is "a method or structure to detect and monitor the temperature of the gas at a location within the chamber."

Looking to the written description, the Court concludes the structure which performs this function is "a thermistor." ('609 Patent, col. 5, lines 35-49.)

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