

OPINION UNDER SECTION 74A

Patent	EP1059899
Proprietor(s)	Dr. Pawel Sawlewicz
Exclusive Licensee	
Requester	Haddenham Healthcare Limited
Observer(s)	Dr. Pawel Sawlewicz
Date Opinion issued	07 July 2017

The request

1. The comptroller has been requested to issue an opinion as to whether granted patent EP1059899 (“the patent”) is valid in light of a conventional sock or stocking.
2. Observations were filed by Praecedo Law Office on behalf of the proprietor and observations in reply were filed by Roger Moore & Associates on behalf of the requester.

Preliminary matters

3. This request follows an earlier request for an opinion regarding alleged infringement, in response to which I prepared opinion 04/17. Some of the preliminary parts of this opinion are taken directly from that earlier opinion. Since the timescales for this opinion and opinion 04/17 overlapped, only the observations in reply for this opinion could be written with knowledge of opinion 04/17.
4. In their observations Praecedo Law Office state a belief that the request should be refused as groundless. Section 74A(3)(b) allows the comptroller not to issue an opinion if for any reason he considers it inappropriate in all the circumstances to do so. Rule 94(1) establishes that the comptroller shall not issue an opinion if the request appears to him to be frivolous or vexatious or the question upon which the opinion is sought appears to him to have been sufficiently considered in any relevant proceedings.
5. The reasons for refusal advanced in the observations do not seem to me to fall into any of these categories. Consequently the comptroller will issue an opinion.
6. Under a heading of Inventive Step the request includes an assertion that “*any*

differences between the present invention and the arrangement discussed above would be a routine variant, well within the scope of the skilled person and his/her common general knowledge.”. There is no meaningful inventive step argument offered upon which I could offer an opinion and I will restrict myself to the question of novelty. Similarly the request makes no reference to the only dependent claim, claim 2, and I will not consider that claim either.

The patent

7. The application for the patent was filed via a Patent Cooperation Treaty application on 1 March 1999, claiming a priority date of 6 March 1998 from a Polish national application. It was granted by the European Patent Office on 7 July 2004 and it remains in the force in the UK.
8. The patent is entitled “Auxiliary device for putting on therapeutic compression garments, especially tights, knee-length socks and full-length stockings”. According to paragraph 0004 the device “is made from low friction factor fabric and its characteristic feature is its shape, i.e. of a plane figure with a beneficial catch element in the form of a pocket at its one end; at the opposite end, beneficially, there is a fastening element in the form of a tape, press stud or some other well-known fasteners.”.
9. Two versions of the device are illustrated and three examples are described.

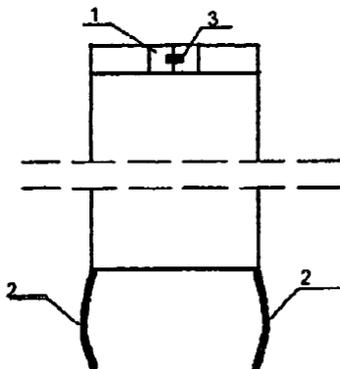


fig. 1

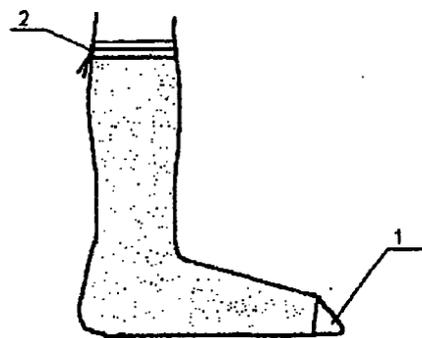


fig. 2

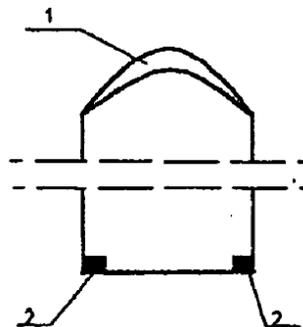


fig. 3

10. In the examples “*The device is made from material which is smooth on its both sides and of low friction factor of its surface.*”. In the first example the device is rectangular with a pocket 1 at one end for a user’s toes and tape 2 at the other end for fastening around a user’s leg. The second example is said to be just like Example I, but with the pocket “*closed with a fastener 3 in the form of Velcro®.*”. In the third example the pocket 1 “*is adjusted to the shape of toes*” and there is a fastener 2 at the other end of the device used to join the top edges of the device in use. I take it that figures 1 and 2 correspond to the first two examples and figure 3 corresponds to the third example, although this is not stated explicitly.
11. In use the toes of a user are inserted into the pocket 1 of the device and the device is put around the leg, covering “*the whole of the leg surface smoothly, possibly without any folds or wrinkles*”, with the top part attached to the leg with the tape or fastener 2. A compression stocking is then pulled up on the leg, after which the tape or fastener 2 is undone, the toes are freed from the pocket 1 and the device is removed from under the stocking, “*pulled by its top*”.

Claim construction

12. Before considering the documents put forward in the request I will need to construe the claims of the patent following the well known authority on claim construction which is *Kirin-Amgen and others v Hoechst Marion Roussel Limited and others* [2005] RPC 9. This requires that I put a purposive construction on the claims, interpret it in the light of the description and drawings as instructed by Section 125(1) and take account of the Protocol to Article 69 of the EPC. Simply put, I must decide what a person skilled in the art would have understood the patentee to have used the language of the claim to mean.

13. Section 125(1) of the Act states that:

For the purposes of this Act an invention for a patent for which an application has been made or for which a patent has been granted shall, unless the context otherwise requires, be taken to be that specified in a claim of the specification of the application or patent, as the case may be, as interpreted by the description and any drawings contained in that specification, and the extent of the protection conferred by a patent or application for a patent shall be determined accordingly.

14. And the Protocol on the Interpretation of Article 69 of the EPC (which corresponds to section 125(1)) states that:

Article 69 should not be interpreted in the sense that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims. Neither should it be interpreted in the sense that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patentee has contemplated. On the contrary, it is to be interpreted as defining a position between these

extremes which combines a fair protection for the patentee with a reasonable degree of certainty for third parties.

15. There is one independent claim, as follows:

1. An auxiliary device for putting on therapeutic compression garments, especially tights, knee-length socks and full-length stockings which is made from low friction factor fabric characterised in that it has the shape of a plane figure with a beneficial catch element (1) in the form of a pocket for inserting the toes at its one end; at the opposite end there is a fastening element (2) for fastening around the leg in the form of a tape, press stud or some other well-known fasteners.

16. It seems to me that the meaning of the claim is for the most part clear. I should however mention several parts. The “*catch element (1) in the form of a pocket*” is described as “*beneficial*”, also as “*nützlich*” and “*utile*” in the German and French translations of the claim. Those terms might also be translated as useful or helpful. The same term is used in the description, but is not described further. I am not entirely clear what, if any, limitation is intended by the term as used in claim 1. It seems to me that the skilled reader would place no particular significance on the term and that it places no limitation on the claim.

17. The device is required to have “*the shape of a plane figure*”, a phrase I considered in producing opinion 04/17. In that opinion I concluded that “*the shape of a plane figure*” would be understood by the skilled person to place little limitation upon the claim and, with some hesitation, I took the phrase to mean a body that could be laid substantially flat. I did not think that this necessarily implies anything about the thickness of the device nor does it preclude the device having overlapping regions. The statement and observations essentially repeat comments provided in the context of earlier opinion 04/17, although as noted above the statement and observations for this opinion were filed before opinion 04/17 was issued. The observations in reply endorse my construction of “*the shape of a plane figure*”. None of this has changed my view on the proper interpretation of this phrase.

18. Claim 1 also specifies a “*catch element (1) in the form of a pocket for inserting the toes at its one end*”. The request interprets this as a compartment within the device rather than in addition to or attached to the device and goes on to consider that the device including the pocket should meet the “*shape of a plane figure*” requirement. As is conventional, the request takes “*for inserting the toes at its one end*” to mean “*suitable for ...*” and further interprets this to mean that the compartment must have a minimum size to fit the toes of a user, but that there is no maximum size and hence that the pocket could also accommodate more of the user’s foot or leg. I see no reason why the pocket might not be attached to the device, but ultimately I do not feel that anything in this opinion turns on the point. I agree that the device as a whole should meet the “*shape of a plane figure*” requirement. I also agree with the “*suitable for ...*” interpretation and that this implies a minimum size. However, I disagree that there is no maximum size. That the pocket is required to be at one end of the device tells me that it must be smaller than the device as a whole. Reading the specification as a whole I believe that the skilled man would understand that the catch element or pocket should be sized to accommodate the toes of a user, but not any further significant parts of the foot. There is nothing explicit in the specification to suggest that the pocket might accommodate significantly more of the foot than the

toes. Paragraphs 0008, 0010 and 0011 describe examples I, II and III in which the toes are freed from the pocket whilst within a compression stocking. This strikes me as an impractical task if the pocket accommodated much more than the toes of a user. The observations in reply argue that claim 1 does not define the garment (presumably meaning the device) as being capable of being removed once the compression garment has been put on. This is true, however I think to take this view is to adopt a “*strict, literal meaning of the wording used in the claims*” that the Protocol on the Interpretation of Article 69 of the EPC quoted above cautions against.

19. The device is also required by claim 1 to have “*a fastening element (2) for fastening around the leg in the form of a tape, press stud or some other well-known fasteners*”. Once again the request interprets “*for fastening*” conventionally and correctly as “*suitable for ...*”. It seems to me from the specification as a whole that “*fastening around the leg*” would be understood to mean a fastening element to be used to secure the device once it has been put around the leg, i.e. a separable fastening element allowing the device to be secured once it has been passed or wrapped around the leg and which is subsequently unfastened to allow the device to be removed from beneath a compression stocking. All of the examples in the specification conform to this interpretation, although it is not an explicit requirement of claim 1. Such a construction seems to me to form a fair and reasonable position between the extremes to which the Protocol quoted above refers.

Validity

20. The request argues that the patent lacks novelty in view of a conventional nylon sock or stocking, i.e. a garment intended to cover the leg from the foot up to the knee or possibly part or all of the thigh, the garment being secured in place with a garter or suspender belt or a band of elastic or highly tractive material such as silicone.
21. Taking the requirements of claim 1 in turn, a conventional nylon stocking is not an auxiliary device intended (my addition) for putting on therapeutic compression garments, especially tights, knee-length socks and full-length stockings. Such a conventional stocking I would argue is however suitable for putting on such garments, in much the same way as the prior art acknowledged in paragraph 0002 of the patent.
22. Nylon would seem to be a low friction factor fabric. A conventional sock or stocking forms a body that could be laid substantially flat and hence has the shape of a plane figure as I have construed the term.
23. In the sense that I have construed it above, a catch element in the form of a pocket for inserting the toes is absent from a conventional sock or stocking. The request argues that a garter or suspender belt or a band of elastic forms a fastening element for fastening around the leg. It seems to me that a suspender belt is not suitable for fastening around a leg, since such a belt fastens around the waist. As they are continuous bands, neither a garter nor a band of elastic forms a fastening element for fastening around the leg as I have construed that requirement above.

Opinion

24. In my opinion claim 1 of granted European patent EP1059899 is novel in view of the conventional nylon sock or stocking referred to in the request.

Karl Whitfield
Examiner

NOTE

This opinion is not based on the outcome of fully litigated proceedings. Rather, it is based on whatever material the persons requesting the opinion and filing observations have chosen to put before the Office.