

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 14

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

---

Ex parte DANIEL J. COOK

---

Appeal No. 2003-1340  
Application No. 10/072,247

---

ON BRIEF

---

Before ABRAMS, FRANKFORT, and NASE, Administrative Patent Judges.  
ABRAMS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-9.<sup>1</sup>

We REVERSE.

---

<sup>1</sup>Pending claims 10-13 have not been included in the appeal (Brief, page 1).

### BACKGROUND

The appellant's invention relates to a retainer for a laryngeal mask. An understanding of the invention can be derived from a reading of exemplary claim 1, which has been reproduced below.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

|                                     |           |               |
|-------------------------------------|-----------|---------------|
| Sanderson                           | 4,863,439 | Sep. 5, 1989  |
| Holmgreen <u>et al.</u> (Holmgreen) | 5,024,220 | Jun. 18, 1991 |

The following are the standing rejections

- (1) Claims 1-9 under 35 U.S.C. § 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.
- (2) Claims 1-5 under 35 U.S.C. § 102(b) as being anticipated by Sanderson.
- (3) Claims 1, 6, 7 and 8 under 35 U.S.C. § 102(b) as being anticipated by Holmgreen.
- (4) Claim 9 under 35 U.S.C. § 103(a) as being unpatentable over Holmgreen.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the Answer (Paper No. 10) for the examiner's complete reasoning in support of the rejections, and to the Brief (Paper No. 9) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

*Claim 1*

An endo-tracheal tube retainer used to facilitate the removal of a laryngeal mask of the type used to facilitate lung ventilation and the insertion of endo-tracheal tubes or related medical instruments through a patient's laryngeal opening, said laryngeal mask being removed from a patient's oropharynx without dislodging any inserted endo-tracheal tubes or related medical instruments passing through the laryngeal mask into the patient's tracheal tube, said endo-tracheal tube retainer comprising:

a solid semi-rigid stylet rod having proximal and distal ends; and

a connection adapter tapered from a proximal end of said connection adapter to a distal end of said connection adapter for secure insertion within a range of endo-tracheal tubes, said adapter being secured to said distal end of said solid stylet rod.

*The Rejection Under The First Paragraph Of Section 112*

This rejection is based upon the premise that the specification "fails to specifically teach [a] **solid** stylet rod, which is recited in claim 1. It is the examiner's position that while "there is enablement for a rod in the specification . . . there is no enablement as to whether the rod is solid or hollow" (Answer, page 3). The appellant points out that the term "rod" is used throughout the specification, and argues that the common definition of "rod" is "a slender bar" and that a "bar" is "a solid block of

material” that is usually “considerably longer than it is wide.” Thus, concludes the appellant, a “rod” inherently is solid, and therefore the disputed term is supported in the specification. The appellant further directs attention to the fact that the drawings depict element 52 (the stylet “rod”) as being solid. See Brief, pages 3 and 4.

For the reasons expressed by the appellant, we agree that this rejection is misplaced, and we will not sustain it.

*The Section 102 Rejection Based On Sanderson*

It is the examiner’s conclusion that claims 1-5 are anticipated by Sanderson. Anticipation is established only when a single prior art reference discloses, expressly or under the principles of inherency, each and every element of the claimed invention. See, for example, RCA Corp. v. Applied Digital Data Systems, Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984). We find this not to be the case with regard to claims 1-5, and therefore we will not sustain this rejection.

Sanderson discloses a surgical cannula for use in removing tissue in lipo-suction surgery and the like, and not an endo-tracheal tube retainer. The Sanderson surgical cannula comprises a hollow needle 10 which is attached via a first hollow handle member 30 to a second hollow handle member 50, with a suction tube being attached to the free (proximal) end of handle member 50. The distal end of hollow needle 10 terminates in an opening through which tissue can pass in response to the application of suction. The needle terminates at its proximal end in an annular flange that is

accepted in first hollow handle means 30. The examiner has found that the first handle means 30 and second handle means 50 comprise the claimed “connection adapter,” and the hollow needle to be the “solid semi-rigid stylet rod.”

On the basis of his conclusion that the appellant’s disclosure does not support the limitation that the “rod” recited in claim 1 is “solid,” the examiner finds Sanderson’s needle 10 constitutes the required “solid semi-rigid stylet rod.” As we stated above, we do not agree with the examiner that support is lacking for the claimed rod being solid, and therefore we cannot accede to this finding. Thus, the rejection of claims 1-5 cannot be sustained inasmuch as Sanderson fails to disclose or teach “solid semi-rigid stylet rod.”

Furthermore, to use the device as disclosed, the distal end of the Sanderson cannula is at the opening in the free end of the needle and the proximal end is at the opening in the free end of the second handle means. This means that the taper shown at 56 runs from the proximal end toward the distal end of the device, which is the opposite of that required by claim 1. To support the examiner’s position, the Sanderson device would have to be utilized backwards, that is, the needle used as the handle and the handle as the connection adapter, which would, from our perspective, be viewed by one of ordinary skill in the art, as an improper interpretation of the reference in that the device then would be inoperable for its intended purpose. This is another reason why the language of claim 1 cannot be read upon the structure disclosed by Sanderson.

We further note that while the claim requires that the taper be “from” a proximal end “to” a distal end of the connection adapter, according to the drawings, the taper in Sanderson extends only about twenty percent of the distance from the distal terminus towards the proximal end and not, in our view “from” the proximal end.

*The Section 102 Rejection Based On Holmgreen*

Holmgreen discloses a nasotracheal tube insertion connector 3 which comprises a hollow bellows-like body 3 that can be bent as shown in Figure 2, a tapered longitudinally slitted tip 4 attached to the distal end of the body, and a receiving end 8 at the proximal end of the body for mating with a conventional anesthesia connector 11. The purpose of the stylet is to facilitate the attachment of tapered tip 4 to a nasotracheal tube 2 that has been intubated into a patient’s nostril. To accomplish this task, an expansion collar 14 is placed in a recessed portion 16 of the distal end of a stylet 18, and the stylet inserted through connector 3 until it forces the segments of tip 4 outwardly into tight-fitting contact with the inner surface of the nasotracheal tube, (Figures 4 and 5), whereafter the stylet is removed (column 4, line 20 et seq.).

The appellant argues that the Holmgreen body 3, which the examiner has found to be the “connection adapter,” is not “secured to”<sup>2</sup> the distal end of the stylet, as is required by claim 1. We agree. In the Holmgreen arrangement, the stylet never comes

---

<sup>2</sup>The common applicable definition of “secured” is “made fast.” See, for example, Merriam Webster’s Collegiate Dictionary, Tenth Edition, 1996, page 1056.

into direct contact with body 3, for the expansion collar is interposed therebetween. The collar is described merely as being “mounted on” the stylet for insertion into the tapered tip (column 4, line 38), and to accomplish this the connection between the stylet and the expansion collar only need be such that shoulder defining recess 16 can push the collar into position. Moreover, to operate in the manner described, the stylet must readily be removable from the collar when pulled in the opposite direction, in order to leave the collar installed in the connection adapter. Thus, from our perspective, the reference does not support a conclusion that the connection adapter is “secured to” the stylet, as is required by the claim. Furthermore, as was the case in Sanderson, the tapered portion in the body of the Holmgreen device does not extend “from” a proximal end “to” a distal end, but encompasses only a small portion of the distal end.

This being the case, all of the subject matter recited in claim 1 is not disclosed or taught by Holmgreen, and this rejection of claims 1, 6, 7 and 8 cannot be sustained.

#### *The Section 103 Rejection*

Claim 9 stands rejected as being obvious in view of Holmgreen. The test for obviousness is what the combined teachings of the prior art would have suggested to one of ordinary skill in the art. See, for example, In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

Claim 9 depends from claim 1 through claims 6 and 8, and requires that there be at least four of the equally spaced longitudinal grooves added to claim 1 by the intervening claims. It is the examiner's view that while Holmgreen does not disclose or teach such a limitation, it would have been obvious to provide these four grooves since the appellant has not disclosed that this arrangement solves a stated problem or provides an advantage over the prior art (Answer, page 5). However, be that as it may, considering Holmgreen in view of Section 103 fails to cure the shortcoming discussed above regarding the subject matter recited in claim 1, and therefore the rejection fails at this juncture and will not be sustained.

#### CONCLUSION

None of the rejections are sustained.

The decision of the examiner is reversed.

NEAL E. ABRAMS  
Administrative Patent Judge

CHARLES E. FRANKFORT  
Administrative Patent Judge

JEFFREY V. NASE  
Administrative Patent Judge

)  
)  
)  
)  
)  
) BOARD OF PATENT  
) APPEALS  
) AND  
) INTERFERENCES  
)  
)  
)  
)  
)

NEA:pgc

Polster, Ieder, Woodruff & Lucchesi, L.C.  
C/O Ahajik. Amos  
763 S. New Ballas  
St. Louis, MO 63141