

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

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Ex parte MICHAEL J. ISKRA

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Appeal No. 2005-2410  
Application No. 08/928,272

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ON BRIEF

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Before GARRIS, PAK, and JEFFREY T. SMITH, Administrative Patent Judges.  
JEFFREY T. SMITH, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 and 5 to 9, all of the pending claims. (Brief, p. 2). We have jurisdiction under 35 U.S.C. § 134.

### BACKGROUND

The present invention relates to a one piece collection container assembly. The container comprises a tubular housing having opposed first and second ends and a solid partition within the housing. (Brief, p. 2). Representative claim 1 appears below:

1. A one piece collection container assembly comprising:  
an elongated tubular housing having opposed first and second ends; and  
a solid partition positioned within said housing between said first and second ends;  
said housing defining a volume for specimen collection therein between said first end and said partition;  
said second end comprising a bottom end below said partition, said bottom end comprising a rounded bottom having an opening therein.

The Examiner relies on the following reference in rejecting the appealed claims:

Burns	5,458,854	Oct. 17, 1995
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Claims 1, 5, 7 and 8 stand rejected under 35 U.S.C. § 102(b) over Burns; and claims 6 and 9 stand rejected under 35 U.S.C. § 103(a) over Burns. (Answer, pp. 3-5). We affirm the rejections.

Rather than reiterate the conflicting viewpoints advanced by the Examiner and the Appellant regarding the above-noted rejections, we make reference to the Answer (mailed September 17, 2003) for the Examiner's reasoning in support of the rejection, and to the Brief (filed July 7, 2003) for the Appellant's arguments there against.

OPINION<sup>1</sup>

Upon careful review of the respective positions advanced by Appellant and the Examiner, we affirm for the reasons advanced by the Examiner and add the following primarily for emphasis.

Claims 1, 5, 7 and 8 stand rejected under 35 U.S.C. § 102(b) over Burns. We will limit our discussion to the subject matter of claim 1.

Appellant's principal argument is that Burns does not disclose a bottom end that is below the solid partition comprising a rounded bottom with an opening. (Brief p. 3). We do not agree. Appellant is free to recite features of his invention based on the structure. However, when describing the invention, the inventor must describe this specifically to avoid the prior art. In the instant case, the Appellant has chosen to describe the second end portion as "comprising a bottom end below said partition, said bottom end comprising a rounded bottom having an opening therein." The specimen container of Burns is a cylindrical tube in shape comprising two ends having a partition located there between. The cylindrical tube container is rounded at

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<sup>1</sup> Appellant asserts that for purposes of appeal that claims 1, 5 to 9 stand or fall together. (Brief, p. 2). We note that claims 6 and 9 are separately rejected by the Examiner. We will consider the rejections as presented by the Examiner.

both ends (i.e., the cross-section is round). Thus, the container of Burns anticipates the subject matter of claim 1 as presented.<sup>2</sup>

Claims 6 and 9 stand rejected under 35 U.S.C. § 103(a) over Burns.

Appellant has not specifically challenged the obviousness of using a partition with a conical shape or the selection of particular dimensions for the specimen container as asserted by the Examiner. Thus, it appears that Appellant is relying on the arguments presented in response to the previous rejection. These arguments are not sufficient to overcome the Examiner's rejection for the reasons presented above and the reasons presented in the Answer.

### CONCLUSION

For the foregoing reasons and those set forth in the Answer, giving due weight to Appellant's arguments, we determine that the preponderance of evidence weighs in favor of the Examiner's rejections. Accordingly, the Examiner's rejections under 35 U.S.C. §§ 102(b) and 103(a) are affirmed.

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<sup>2</sup> The description of a test tube, such as routinely used in basic Chemistry class, as "a cylindrical tube with a rounded end" does not differentiate between the top open end and the closed bottom end.

TIME FOR TAKING ACTION

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv)(effective Sep. 13, 2004; 69 Fed. Reg. 49960 (Aug. 12, 2004); 1286 Off. Gaz. Pat. Office 21 (Sep. 7, 2004)).

**Affirmed**

BRADLEY R. GARRIS  
**Administrative Patent Judge**

CHUNG K. PAK  
**Administrative Patent Judge**

JEFFREY T. SMITH  
**Administrative Patent Judge**

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