

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

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KAZUYUKI OHNISHI AND
HIROYUKI OHGATA

Appeal No. 2006-0885
Application No. 10/168,883

ON BRIEF

Before KIMLIN, WARREN and JEFFREY T. SMITH, **Administrative Patent Judges**.
JEFFREY T. SMITH, **Administrative Patent Judge**.

DECISION ON APPEAL

Applicants appeal the decision of the Examiner finally rejecting claims 1, 2, 4 to 8 and 14 to 17, all of the pending claims. We have jurisdiction under 35 U.S.C. §134.¹

¹ In rendering this decision, we have considered Appellants' arguments presented in the Brief, filed August 29, 2005.

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CITED PRIOR ART

As evidence of unpatentability, the Examiner relies on the following references:

Kramer et al. (Kramer) 4,578,068 Mar. 25, 1986

Levy et al.² (Levy) 5,582,903 Dec. 10, 1996

The Examiner entered the following rejections:

Claims 1, 2, 4 to 8 and 14 to 17 stand rejected under 35 U.S.C.

§ 103(a) as unpatentable over the combination of Levy and Kramer.
(Answer, pp. 3-4).

We have carefully reviewed the claims, specification and applied prior art, including all of the arguments advanced by both the Examiner and Appellants in support of their respective positions. This review leads us to conclude that the Examiner's rejection of claims 1, 2, 4 to 8 and 14 to 16 are well founded. However, the rejection of claim 17 is not well founded.

Our reasons follow.

² This reference was misidentified by the Examiner in the Answer.

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Rather than reiterate the conflicting viewpoints advanced by the Examiner and the Appellants concerning the above-noted rejections, we refer to the Answer and the Brief.

OPINION³

Appellants' invention relates to a disposable garment comprising a liquid pervious topsheet and a liquid impervious backsheet combined with the topsheet. The backsheet comprises melt-blown nonwoven web made from fine fibers having an average fiber diameter of from about 3 µm to about 10 µm. The backsheet has a basis weight of from about 3 g/m² to about 60 g/m² and an air permeability value of at least about 15 cm³/cm²/sec. The nonwoven web has a moisture breathability value of at least 7,000 g/m²/24 hours. Representative claim 1, as presented in the Brief, is reproduced below:

1. A disposable garment comprising a liquid pervious topsheet, a liquid impervious backsheet combined with the topsheet, and an absorbent core disposed between the topsheet and the backsheet, wherein the absorbent core comprises an absorbent gelling material wrapped with a tissue material;

³ Appellants have presented separate arguments for claims 1, 8, 14, 15, 16 and 17. The remaining claims not argued separately will stand or fall with claim 1.

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wherein the backsheet comprises melt-blown nonwoven web made from fine fibers having an average fiber diameter of from about 3 µm to about 10 µm, the backsheet has a basis weight of from about 3 g/m² to about 60 g/m² and an air permeability value of at least about 15 cm³/cm²/sec; wherein the nonwoven web has a moisture breathability value of at least 7,000 g/m²/24 hours; and wherein the disposable garment exhibits no leakage under 1 psi of pressure.

The Examiner found that Levy teaches a disposable diaper comprising a liner, an absorbent medium and a backing material comprising a water resistant barrier fabric. According to the Examiner, it is commonly known in the art to provide a diaper with a liquid pervious topsheet, an absorbent core, a backsheet, and elasticized leg cuffs. (Answer, p. 3). Levy teaches that at least about 50% of the fibers in the melt-blown web are polyolefin, e.g. polypropylene, micro-fibers having an average diameter of less than 5 microns. (Col. 7, ll. 15-30). Levy further discloses the barrier fabric provides satisfactory barrier properties when having a basis weight ranging from about 10 gms to about 30 gms (Col. 12, ll. 20-24). The Examiner recognized that Levy did not explicitly teach the leakage under 1 psi of pressure, air permeability value, and moisture breathability value as specified in claim 1. However, due to the similarity of the average diameter of the polypropylene fiber and the

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basis weight of the barrier fabric, the Examiner asserted that the leakage under 1 psi of pressure, air permeability value, and moisture breathability value properties were inherent in the invention of Levy.

The Examiner asserted that the invention of Levy differed from the subject matter of claim 1 by not describing the core material as comprising absorbent gelling material wrapped with a tissue material. The Examiner relied on the teachings of Kramer for disclosing that it would have been obvious to wrap the absorbent core materials of Levy with a tissue material to immobilize the absorbent particles at the interfaces. (Answer, p. 4).

Due to the identified similarity in properties between the invention of Levy and claim 1, we determine that the Examiner has met the initial burden of establishing a *prima facie* case of unpatentability under §§ 102/103. Therefore, the burden has been shifted to Appellants to show that the claimed product differs substantially from the product disclosed by Levy. See *In re Fitzgerald*, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1980); *In re Fessmann*, 489 F.2d 742, 744, 180 USPQ 324, 326 (CCPA 1974). Appellants have not directed us to evidence that the product of Levy is substantially different than the claimed product.

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Appellants argue that the Examiner's rejection of the claims is not based on anticipation, thus the Examiner has improperly attempted to shift the burden to Appellants to distinguish the claimed invention. (Brief, pp. 5-8).

It is well settled that when a claimed product reasonably appears to be substantially the same as a product disclosed by the prior art, the burden is on the Appellants to prove that the prior art product does not necessarily or inherently possess characteristics attributed to the claimed product. *In re Spada*, 911 F.2d 705, 708, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990); *In re Best*, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977). However, it is also fundamental that the Examiner bears the initial burden of presenting objective evidence to support the conclusion that the claimed and prior art products are substantially the same. In the present case, Appellants have not substantively challenged the Examiner's finding that Levy's invention possessed a similarity in the average diameter of the polypropylene fiber and the basis weight of the barrier fabric to the claimed invention. Appellants have not asserted that the leakage under 1 psi of pressure, air permeability value, and moisture breathability value properties were not related to the properties of Levy

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identified by the Examiner. Further, Appellants have not asserted that the properties not disclosed by Levy were due to the wrapping of the absorbent core with tissue material. As such, the Appellants have not adequately rebutted the Examiner's rejection.

We will now address the remaining claims.

Appellants' arguments regarding the properties of claims 8, 14, 15 and 16 have been considered. These claims all further define the garment of claim 1. The claims specify the properties: web modulus, bending force, whiteness and leakage under pressure. According to the Examiner, Answer page 3, these properties are all related to the materials that form the claimed article disclosed by Levy. As stated above, Appellants have not proven that the prior art product does not necessarily or inherently possess characteristics attributed to the claimed product. Appellants have not asserted that the properties specified by the claims were not related to the properties of Levy identified by the Examiner. As such, these claims are not patentable over the stated rejection for the reasons presented above.

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Regarding claim 17, we agree with Appellants. (Brief, p. 9). The Examiner has not established that it would have been obvious to include a melt-blown nonwoven web in an elasticized leg cuff as specified by the claim. These properties are similar to the properties of the nonwoven backsheet. The Examiner has not directed us to evidence that suggests the inclusion of the backsheet material in the leg cuffs of a disposable garment. As such, the Examiner has not directed us to a teaching or suggestion within the cited references or within the general knowledge of those skilled in the art that would have led one skilled in the art to the claimed invention. The rejection of claim 17 under §103(a) is reversed.

CONCLUSION

The rejection of claims 1, 2, 4 to 8 and 14 to 16 under 35 U.S.C. § 103(a) is affirmed. The rejection of claim 17 under 35 U.S.C. §103(a) is reversed.

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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)(2004).

AFFIRMED-IN-PART

EDWARD C. KIMLIN)
Administrative Patent Judge)
CHARLES F. WARREN) BOARD OF PATENT
Administrative Patent Judge) APPEALS
JEFFREY T. SMITH) AND
Administrative Patent Judge) INTERFERENCES

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THE PROCTER & GAMBLE COMPANY
INTELLECTUAL PROPERTY DIVISION
WINTON HILL TECHNICAL CENTER – BOX 161
CINCINNATI, OH 45224