

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.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 KEVIN OWEN  
and  
KENNY McCRACKEN

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Appeal No. 2006-1101  
Application No. 10/193,560

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ON BRIEF

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Before GARRIS, WARREN, and FRANKLIN, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal which involves claims 1, 2, and 5.

The subject matter on appeal relates to a device or apparatus for cutting and producing tack-seals on a zipper from a continuous length of zipper. With reference to the

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appellants' drawing, the device (10) comprises a heating element (42), a plunger (44), and a blade (24) having a cutting face heated by the heating element and mechanically responsive to a reciprocating action of the plunger wherein the length of the blade provides a combined cutting and tack-sealing action to the zipper whereby ends of the zipper are tack-sealed (see 28, 34) when cut from the continuous length of zipper 12. The apparatus is defined as comprising means for simultaneously cutting and fusing a first end section 26 of the continuous length of zipper 12 so that a first tack-seal 28 is provided, and a means for simultaneously cutting and fusing a second end section 32 of the continuous length of zipper so that a second tack-seal 34 is provided. Further details concerning this appealed subject matter are set forth in representative claims 1 and 5, which are the only independent claims on appeal and which read as follows:

1. A device for cutting and producing tack-seals on a zipper from a continuous length of zipper, said device comprising:

a heating element;

a plunger connected to a moving medium, said plunger grooved to receive said heating element, said plunger being heated by said heating element;

a blade having a cutting face heated by said heating element and mechanically responsive to a reciprocating action of said plunger wherein the width of said blade provides a combined

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cutting and tack-sealing action to the zipper whereby ends of the zipper are tack-sealed when cut from the continuous length of zipper.

5. An apparatus for cutting and producing tack-seals on a zipper supplied from a continuous length of zipper, said apparatus comprising:

means for simultaneously cutting and fusing a first end section of the continuous length of zipper so that a first tack-seal is provided at the first end section; and

means for simultaneously cutting and fusing a second end section of the continuous length of zipper so that a second tack-seal is provided at the second end section such that ends of the zipper are tack-sealed when cut from the continuous length of zipper.

The references set forth below are relied upon by the examiner as evidence of anticipation and obviousness:

|                    |           |               |
|--------------------|-----------|---------------|
| Brey et al. (Brey) | 3,859,152 | Jan. 7, 1975  |
| Marbach            | 4,140,046 | Feb. 20, 1979 |
| McLean             | 4,317,697 | Mar. 2, 1982  |
| Diez et al. (Diez) | 4,767,482 | Aug. 30, 1988 |
| Fukuyama           | 5,358,592 | Oct. 25, 1994 |
| Linkiewicz         | 6,012,264 | Jan. 11, 2000 |

Under 35 U.S.C. § 102(b):

All appealed claims are rejected as anticipated by Diez;

Claims 1 and 5 are rejected as anticipated by Fukuyama;

Claims 1 and 5 are rejected as anticipated by Marbach; and

Claim 5 is rejected as anticipated by Linkiewicz.

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Under 35 U.S.C. § 103(a):

Claim 2 is rejected as being unpatentable over Fukuyama in view of McLean and/or Brey; and

Claim 2 is rejected as being unpatentable over Marbach in view of McLean and/or Brey.

We refer to the Brief and to the Answer respectively for a complete exposition of the opposing viewpoints expressed by the appellants and by the examiner concerning the above-noted rejections.

OPINION

We fully agree with the findings of fact, conclusions of law and rebuttals to argument expressed by the examiner in her Answer. We add the following comments for emphasis.

Each of the § 102 rejections is based on the examiner's position that each of the applied references expressly discloses structure (i.e., a heating element, a plunger and a blade) corresponding to the appellants' claimed structure and that the prior art structure would be capable of performing the function recited in the rejected claims (e.g., cutting and producing tack-seals on a zipper). In support of their patentability viewpoint, the appellants point out that none of the references

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applied under § 102 discloses performing the here-claimed function and argue without embellishment that there is no foundation for the examiner's position that the prior art structure of these respective references is capable of performing the claimed function. This argument is not well taken.

Each of the applied prior art devices contains all of the structural limitations recited in the rejected claims. Therefore, it was reasonable for the examiner to determine that each of these prior art devices is capable of performing the here-claimed function. In re Schreiber, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed. Cir. 1997). As fully explained in the Answer, the function of cutting and producing tack-seals on a zipper relates to the material upon which the device operates and the manner in which the device operates. In terms of structure, there is nothing in the appealed claims or even in the subject specification which distinguishes the device or apparatus claimed by the appellants from the device or apparatus disclosed in the Diez, Fukuyama, Marbach and Linkiewicz references.

Although the applied references do not address the use of their disclosed structures for cutting and producing tack-seals

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on a zipper, this functional recitation in the appealed claims of a new intended use for old structure does not make the claims to the old structure patentable. Id. As explained above and in the Answer, the examiner has a reasonable basis for considering the prior art structure to be capable of performing the functional use recited in the appealed claims and therefore has established a prima facie case of anticipation. Id., 128 F.3d at 1477, 44 USPQ2d at 1432. Moreover, the appellants have failed to overcome this prima facie case by showing that the prior art structures of the applied references do not inherently possess the functional capabilities recited in the rejected claims. Id. The aforementioned expression by appellants of a contrary viewpoint without embellishment falls far short of the showing necessary to overcome the examiner's prima facie case.

In light of the foregoing, we hereby sustain each of the § 102 rejections advanced by the examiner based on the Diez, Fukuyama, Marbach and Linkiewicz references. We also hereby sustain each of the examiner's § 103 rejections since they have not been contested by the appellants separately from the § 102 rejections (see pages 7 and 8 of the Brief) as correctly observed by the examiner (see page 12 of the Answer).

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The decision of the examiner is affirmed.

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

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| BRADLEY R. GARRIS           | ) |
| Administrative Patent Judge | ) |
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| CHARLES F. WARREN           | ) |
| Administrative Patent Judge | ) |
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| BEVERLY A. FRANKLIN         | ) |
| Administrative Patent Judge | ) |

BAF:cjm

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