

UNITED STATES PATENT AND TRADEMARK OFFICE

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

Ex parte PATSY A. KRAUTKRAMER, WILLIAM G. REEVES,
HEATHER A. SOREBO, GARRY R. WOLTMAN,
WENDY L. HAMILTON, EMMANUELLE C. DAMAY,
BERNHARDT E. KRESSNER, and WILLIAM G. STOEGER

Appeal No. 2007-1918
Application No. 10/316,392
Technology Center 3700

Decided: November 30, 2007

Before DONALD E. ADAMS, DEMETRA J. MILLS, and NANCY J. LINCK,
Administrative Patent Judges.

MILLS, *Administrative Patent Judge.*

REMAND TO THE EXAMINER

The Appellants appeal the Examiner's final rejection of claims 1-28. We have jurisdiction under 35 U.S.C. § 6(b) (2006).

Representative claim 1 reads as follows:

1. An absorbent article, comprising:
an absorbent retention portion; and

a body-conformance system which is positioned at least operatively proximate a bodyside surface of said article;

said body conformance system including

at least one liquid-permeable, flexible containment layer, and an operative quantity of substantially free-flowing particulate material constrained by said at least one flexible containment layer;

said substantially free-flowing particulate material having

an avalanche-time of less than 10 sec between avalanches, and a retention capacity that is within the range of about 1 - 15 g/g menses-simulant;

said substantially free-flowing particulate material including an adsorbent material that neither substantially softens nor substantially swells during its handling of liquids; and

said adsorbent material present in an amount which is within the range of about 80 to about 100 wt%, based on a total weight of the adsorbent and other material that is constrained by the at least one flexible containment layer.

Cited Reference

Bewick-Sonntag (Bewick) US 5,762,641 Jun. 9, 1998

Grounds of Rejection

Claims 1-2, 7, 12, 16, 24, and 28 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite.

Claims 1-28 stand rejected under 35 U.S.C. § 103 as obvious over Bewick-Sonntag (Bewick).

DISCUSSION

Our consideration of the record leads us to conclude that this case is not in condition for a decision on appeal. Accordingly, we remand the application to the Examiner to consider the following issues and to take appropriate action.

Definiteness:

The Examiner rejected claims 1-2, 7, 12, 16, 24, and 28 under 35 U.S.C. § 112, second paragraph, as being indefinite (Final Rej. 2-3). Appellants' Brief did not address this rejection. In response, the Examiner found that because Appellants did not address this rejection it was "not under review on [this] appeal" (Answer 3). 37 C.F.R. § 41.37(c)(1)(vi). Appellants then filed a Reply Brief, addressing the 35 U.S.C. § 112, second paragraph rejection, which the Examiner entered without comment.

37 C.F.R. § 41.37(c)(1)(vii) states that "[a]ny arguments or authorities not included in the brief or reply brief filed pursuant to § 41.41 will be refused consideration by the board." Therefore, it would appear that Appellants arguments with regard to the rejection under 35 U.S.C. § 112, second paragraph cannot be ignored by the Examiner. Accordingly, we remand the application to the Examiner to address Appellants' response to the rejections under 35 U.S.C. § 112, second paragraph. In the event the Examiner remains of the opinion that this rejection was not properly presented for our review, the Examiner should specifically identify the legal precedent to support this position.

Obviousness:

The Examiner rejected claims 1-28 under 35 U.S.C. § 103 as obvious over Bewick-Sonntag (Bewick) (Final Rej. 4-7). While Appellants' Brief did not specifically argue or group any particular claim, Appellants' Reply Brief provided separate arguments for a number of rejected claims or claim groupings. The Examiner entered the Reply Brief without responding to Appellant's separately argued claims. Accordingly, we remand the application to the Examiner to address Appellants' arguments with regard to each separately argued claim, or group of claims, as presented in the Reply Brief.

In addition, claim 1 is drawn to an absorbent article. The absorbent article comprises two elements:

1. an absorbent retention portion; and
2. a body-conformance system.

Claim 1 requires that the body-conformance system is positioned at least operatively proximate a bodyside surface of the article.

Claim 1 requires that the body conformance system comprise two elements:

- a. at least one liquid-permeable, flexible containment layer, and
- b. an operative quantity of substantially free-flowing particulate material.

Claim 1 requires that the substantially free-flowing particulate material:

- i. is constrained by at least one flexible containment layer,
- ii. has an avalanche-time of less than 10 sec between avalanches,
- iii. has a retention capacity that is within the range of about 1 - 15 g/g menses-simulant,

- iv. comprises an adsorbent material that neither substantially softens nor substantially swells during its handling of liquids and is within the range of about 80 to about 100 wt%, based on a total weight of the adsorbent and other material that is constrained by the at least one flexible containment layer.

We understand the Examiner's arguments that items (ii-iv) of claim 1 are inherent properties of the particulate material. Upon return of the application to the Examiner, the Examiner should take a step back and line up each of the elements of the claimed absorbent article with a specific structure in the prior art absorbent article. For example, the Examiner should articulate which structure in the prior art (citing page and line number and/or Figure number) corresponds to the absorbent retention portion; and which structure corresponds to the body-conformance system claimed. Likewise, the Examiner should point to prior art structure corresponding to the at least one liquid-permeable, flexible containment layer, and indicate which particles in the prior art represent an operative quantity of substantially free-flowing particulate material.

Furthermore, we encourage the Examiner to take this opportunity to properly interpret the pending claims and clarify whether and to what extent the "free-flowing particulate material" claimed includes absorbent material. For example, page 10 of the Specification indicates that the free flowing particulate material "can include particles of an absorbent material." Page 10, lines 27-35 of the Specification indicates that the absorbent material includes cellulosic particles. The Examiner should make a clear finding as to whether the cellulosic fibers of Bewick (col. 5, ll. 7-13) constitute cellulosic particles, or absorbent material and/or free flowing particulate material; and whether these cellulosic fibers meet the requirements of Appellants' claimed invention.

CONCLUSION

The application is remanded to the Examiner to address the arguments set forth in Appellants' Reply Brief and consider the above issues and take appropriate action consistent with the discussion herein.

This remand to the Examiner pursuant to 37 C.F.R. § 41.50(a)(1) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)) is made for further consideration of a rejection. Accordingly, 37 C.F.R. § 41.50(a)(2) applies if a Supplemental Examiner's Answer is written in response to this remand by the Board.

REMANDED

Ssc

KIMBERLY-CLARK WORLDWIDE, INC.
CAHTERINE E. WOLF
401 NORTH LAKE STREET
NEENAH, WI 54956