

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHRISTOPHER P. OLSON, ROBERT A. STEVENS,
and MARK S. FRANKE

Appellants

Appeal 2008-4911
Application 10/331,956
Technology Center 3700

Decided: September 4, 2008

Before RICHARD E. SCHAFER, SALLY GARDNER LANE, and
MICHAEL P. TIERNEY, *Administrative Patent Judges*.

LANE, *Administrative Patent Judge*.

DECISION ON APPEAL

I. STATEMENT OF THE CASE

The appeal is from a Final Rejection of claims 1, 2, 5, and 9-12, which are all of the pending claims. 35 U.S.C. § 134. Claims 4, 6-8, and 13-21 have been withdrawn as being drawn to a non-elected species and claim 3 has been canceled. (*See* Amendments received Jan. 13, 2006, and June 2, 2006). We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

The application was filed December 30, 2002. It was published as Application Publication 2004/0127868 on July 1, 2004. The real party in interest is said to be Kimberly-Clark Worldwide, Inc. (App. Br. 2).

The Examiner relied on the following references.

<u>Name</u>	<u>Number</u>	<u>Date</u>
LeMahieu	5,620,431	Apr. 15, 1997
Zehner	2002/0052591	May 2, 2002

Appellants did not argue against the prior art status of these references.

Appellants appeal the rejection of claims 1, 2, 5, and 9-12 under 35 U.S.C. § 103(a) over the combination of the teachings of Zehner and LeMahieu. Appellants did not argue separately for the patentability of any of the rejected claims. We review claim 1 as a representative claim. *See* Bd. R. 37(c)(1)(vii).

II. FINDINGS OF FACT

The record supports the following findings of fact as well as any other findings of fact set forth in this opinion, by at least a preponderance of the evidence.

1. Appellants' claim 1 recites:

An absorbent article, comprising:

a chassis having a front waist region at a first longitudinal end, a back waist region at an opposite longitudinal end, and a crotch region extending longitudinally between said front and back waist regions;

an absorbent body structure extending longitudinally generally from said front waist region to said back waist region;

longitudinally extending leak guards, each said leak guard having a free laterally inward side extending longitudinally generally from said front waist region to said back waist region and a laterally outward side attached to said chassis so as to define respective containment pockets along opposite lateral sides of said absorbent body structure, said leak guards being substantially elastomeric in a transverse direction along their longitudinal length; and

wherein said chassis includes stretchable waistbands along at least a portion of said front and back waist regions, said leak guards having longitudinal ends attached to said chassis coextensive with said stretchable waistbands so as not to inhibit stretchability of said waistbands.

(App. Br., Claims Appx., 1).

2. Figure 2 of Appellants' specification is reproduced below.

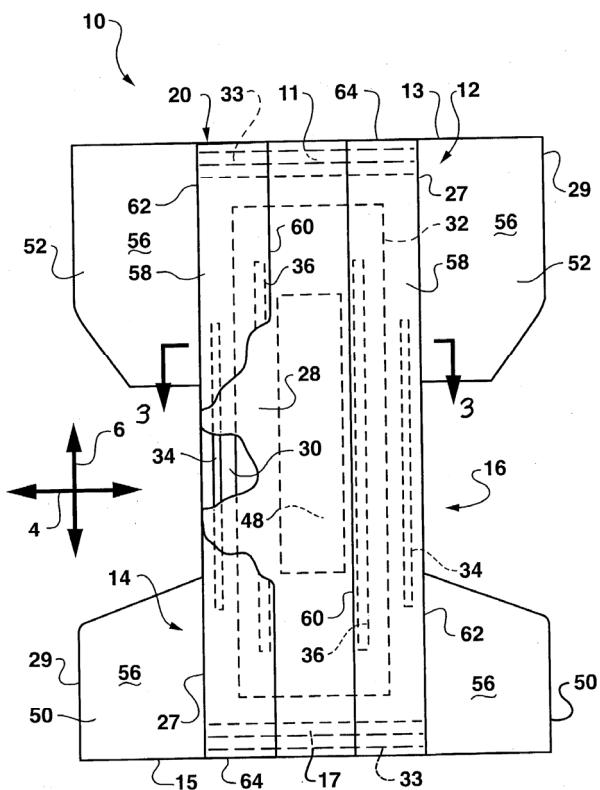


FIG. 2

Figure 2 depicts “elastomeric leak guards 58 [that] have a laterally outboard side 62 that is bonded along lines 27” (Spec. 9, ll. 3-9), and “a laterally inboard ‘free’ side 60 such that the guards essentially define a containment pocket along the lateral sides of the absorbent structure 32.” (Spec. 8, ll. 31-33).

3. Appellants’ specification provides that “[i]n an alternate embodiment, the lateral side 62 may not be outboard of the absorbent body structure, but extends over a portion of the absorbent body structure 32.” (Spec. 8, ll. 27-29).

4. Figure 2 of Zehner is reproduced below.

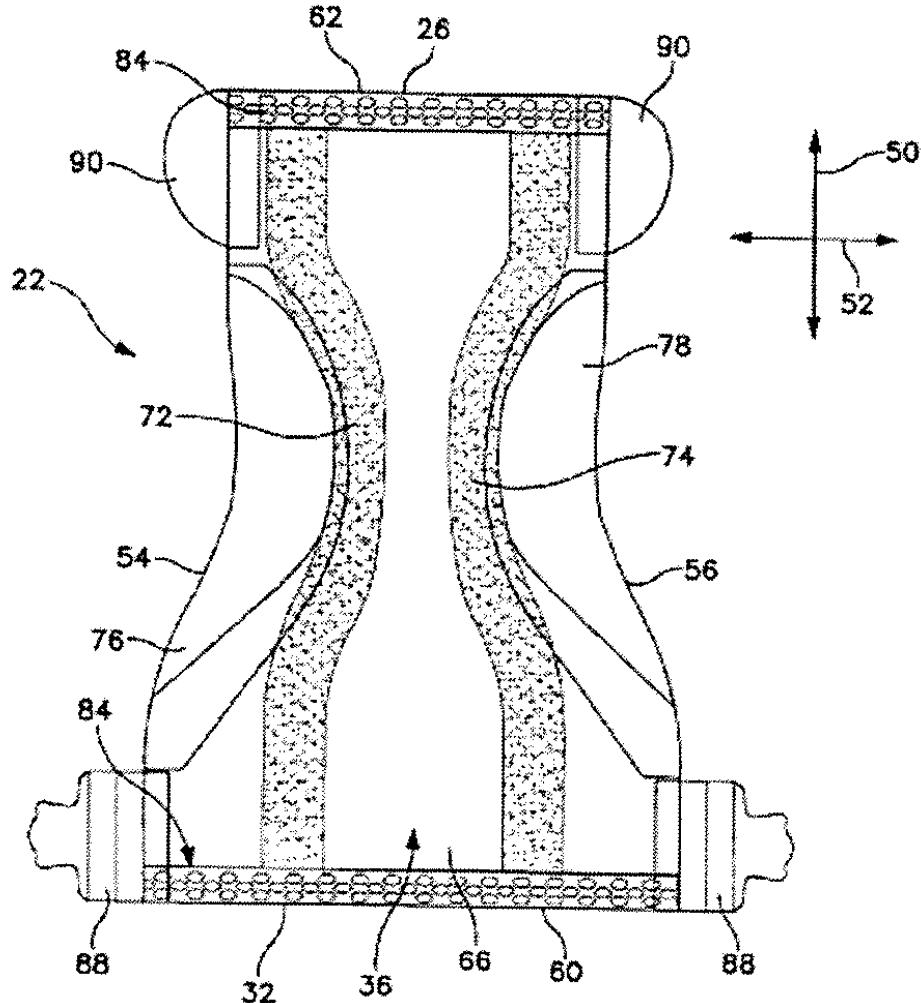


Figure 2 depicts a disposable or diaper absorbent article with a chassis 22 and further includes or defines a front waist area or region 24 forming a front edge 26, a back waist area or region 30 forming a back edge 32, and a crotch area or region 34 disposed between the front and back waist areas, 24 and 30, respectively.

(Zehner ¶ [0076]).

5. Zehner provides for “[a]n absorbent core assembly 70 . . .” (Zehner ¶ [0080]).

6. Figure 2 of Zehner provides that

the chassis 22 includes a pair of laterally-spaced apart and longitudinally-extending containment flap or gasket members, 72 and 74, respectively, such as disposed along the wearer adjacent surface 36 of the bodyside liner 66 and which are configured to provide a barrier to the transverse or lateral flow of body exudates. The containment flap members 72 and 74 each generally define an unattached edge which assumes an upright, generally perpendicular configuration in at least the crotch area 34 of the diaper 20 to form a seal against the wearer's body. Containment flap member constructions and arrangements are generally well known to those skilled in the art and are described in U.S. Pat. No. 4,704,116 issued Nov. 3, 1987 to Enloe, which is incorporated herein by reference.

(Zehner ¶ [0081]).

7. Zehner provides that “each of the pair of containment flap members 72 and 74 desirably comprises a biaxially stretchable material.”

(Zehner ¶ [0090]).

8. LeMahieu relates to disposable absorbent articles and provides ways “to improve the containment and absorption abilities of such products . . .” (LeMahieu col. 1, ll. 21-22).

9. LeMahieu teaches

elastic members 25 . . . [which] are disposed at the longitudinal sides of the garment 20 and form both outer leg cuffs 28 and inner freestanding leg cuffs 29. The elastic members 25 provide relatively high levels of tension so that the absorbent article 20 tends to maintain a close fit to the body of the wearer. Due to the nature of the elastic members 25 employed and their integration with the other components of the garment 20, the garment readily conforms to the wearer while minimizing the occurrences of skin marking. As a result, the garment 20 provides enhanced containment of wastes while maintaining the comfort of the wearer.

(LeMahieu col. 4, ll. 42-52).

10. Appellants did not dispute that it would be a predictable variation to use the elastomeric material taught in LeMahieu for the “biaxially stretchable material” of Zehner.

III. LEGAL PRINCIPLES

The Supreme Court has recently noted that

[w]hen a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.

KSR Int'l v. Teleflex Inc., 127 S.Ct. 1727, 1740 (2007).

IV. ANALYSIS

Appellants' claim 1 recites

An absorbent article, comprising:
a chassis having a front waist region at a first longitudinal end, a back waist region at an opposite longitudinal end, and a crotch region extending longitudinally between said front and back waist regions;
an absorbent body structure extending longitudinally generally from said front waist region to said back waist region;
longitudinally extending leak guards, each said leak guard having a free laterally inward side extending longitudinally generally from said front waist region to said back waist region and a laterally outward side attached to said chassis so as to define respective containment pockets along opposite lateral sides of said absorbent body structure, said leak guards being substantially elastomeric in a transverse direction along their longitudinal length; and

wherein said chassis includes stretchable waistbands along at least a portion of said front and back waist regions, said leak guards having longitudinal ends attached to said chassis coextensive with said stretchable waistbands so as not to inhibit stretchability of said waistbands.

(FF 1). Zehner discloses an absorbent article that includes a chassis with front and back waist areas, a crotch region between them (FF 4), and an absorbent core assembly (FF 5). Zehner also discloses “longitudinally-extending containment flap or gasket members, 72 and 74, respectively, such as disposed along the wearer adjacent surface 36 of the bodyside liner 66 and which are configured to provide a barrier to the transverse or lateral flow of body exudates.” (FF 6). These containment flaps “generally define an unattached edge which assumes an upright, generally perpendicular configuration in at least the crotch area 34 of the diaper 20 to form a seal against the wearer's body.” (FF 6). Figure 2 of Zehner depicts the containment flaps 72 and 74 as extending “longitudinally generally from said front waist region to said back waist region,” (FF 4). Thus, these containment flaps are similar to the “longitudinally extending leak guards” recited in Appellants’ claim 1.

Zehner teaches that each of the containment flaps “comprises a biaxially stretchable material.” (FF 7). LeMahieu, which provides ways to “improve the containment and absorption abilities” of disposable absorbent articles (FF 8), teaches that elastic materials can be used on leg cuffs to “provide enhanced containment of wastes while maintaining the comfort of the wearer.” (FF 9). Thus, to the extent that Zehner’s “biaxially stretchable material, is not elastomeric, Appellants did not dispute that the elastomeric material of the type used by LeMahieu to provide tension would have been a

“predictable variation.” (FF 10). *KSR, supra.* Thus, the combination of the teachings of Zehner and LeMahieu render the subject matter of Appellants’ claim 1 obvious.

Appellants argued that

independent claim 1 requires that the leak guards define respective containment pockets along opposite lateral sides of the absorbent body structure. . . .

Zehner '590 may disclose containment flaps (72, 74) disposed along opposite sides of the wearer adjacent surface (36) of the bodyside liner (66). However, as shown in Figure 2 and described in paragraph [0079] of Zehner '590, the flaps are upright and generally perpendicular in at least the crotch area (absorbent body), thus defining, if at all, **one containment pocket** that extends from flap to flap, with the absorbent body in between the flaps.

(App. Br. 4 (emphasis in original)). According to Appellants,

[a]s described in paragraph [0036] and shown in figures 3 and 3A of the present application, when the absorbent article is bent from its flat configuration, the leak guards (58) will move to an upright position and slightly sink to form containment pockets along the opposite lateral sides of the absorbent body structure (32).

(App. Br. 4 (emphasis in original)). We do not find the requirement of “slightly sinking” in paragraph [0036] or elsewhere in Appellants’ specification. Nor do the claims require that leak guards “slightly sink” when the diaper is bent from its flat configuration. Thus, we are not convinced that claimed “containment pockets” are limited to structures that form when the leak guards “move to an upright position and slightly sink” upon bending of the absorbent articles.

Appellants also tried to distinguish the claimed “containment pockets” from the structures disclosed in Zehner by noting:

As correctly noted in the present Office Action, U.S. Patent 4,704,116 (Enloe '116) is incorporated by reference in both the present application and in Zehner '590. Enloe '116 discloses flaps that form pockets into which solid fecal material collects and is contained or fluidic fecal material is collected and strained, allowing the liquid portion to be absorbed by the absorbent pad. However, as seen in Figure 1 and described at Col. 4, lines 60-69 of Enloe '116, the pockets are formed atop the absorbent body and allow a liquid portion to be strained into the absorbent body. Therefore, Enloe '116 fails to disclose or teach containment pockets along opposite lateral sides of the absorbent body as recited in claim 1. In addition, the pockets described in Enloe '116 are merely ruffles in the bodyside liner, and do not qualify as pockets according to the present invention.

(App. Br. 5 (emphasis in original)). Claim 1 provides that “containment pockets” are structures formed by “longitudinally extending leak guards, each said leak guard having a free laterally inward side extending longitudinally generally from said front waist region to said back waist region and a laterally outward side attached to said chassis.” (FF 1). Claim 1 does not include any terms that limit where the “longitudinally extending leak guards” are positioned relative to the “absorbent body structure.” Furthermore, Appellants’ specification does not prohibit the “longitudinally extending leak guards” from being positioned “atop” the “absorbent body structure.” In fact, Appellants’ specification allows that the lateral side 62 may not be outboard of the absorbent body structure, but in an embodiment “extends over a portion of the absorbent body structure 32.” (FF 3). “During examination, ‘claims . . . are to be given their broadest reasonable interpretation consistent with the specification, and . . . claim language should be read in light of the specification as it would be interpreted by one

of ordinary skill in the art.”” *In re American Academy of Sci. Tech Center*, 367 F.3d 1359, 1364 (Fed. Cir. 2004)(citations omitted). Thus, we do not read a limitation into Appellants’ claim 1 such that the “containment pockets” are formed by “longitudinally extending leak guards” that do not extend “atop” the “absorbent body structure.”

We note that Appellants have attempted to define the claim term “containment pockets” to distinguish it over structures in the prior art. Appellants’ construction is not supported by the evidence and represents mere attorney argument. Specifically, Appellants did not direct us to sufficient evidence of what those of skill in the art would have considered to be “containment pockets” at the time of filing. (*See* App. Br. 6 (“Applicants do not rely on any evidence submitted pursuant to 37 CFR 1.130, 1.131, or 1.132 or any other evidence entered by the examiner in this appeal.”)).

The Examiner determined that “[t]he unattached edge [of the containment flaps 72 and 74] forms a seal against the skin and provides a pocket therein as shown in figures 15 and 23-24 [of Zehner]. One pocket is formed on each lateral side of the article as it corresponds to each containment flap.” (Ans. 5). Appellants have not directed us to sufficient evidence showing that the Examiner’s understanding would have been considered inconsistent with the broadest reasonable interpretation of the claims by those of skill in the art.

Appellants have not convinced us that the claimed invention would not have been obvious over the cited references. Thus, Appellants have not convinced us that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 103(a) over the combination of Zehner and LeMahieu.

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V. ORDER

Upon consideration of the record and for the reasons given, the Examiner's rejection of claims 1, 2, 5, and 9-12 under 35 U.S.C. § 103(a) over the combination of the teachings of Zehner and LeMahieu is AFFIRMED.

AFFIRMED

qsg

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