UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HARRY BUSSEY JR. and HARRY (BUDDY) BUSSEY, III

Appeal 2008-2234
Application 10/211,683
Technology Center 1700

Decided: April 14, 2008

Before CHARLES F. WARREN, EDWARD C. KIMLIN, and
THOMAS A. WALTZ, *Administrative Patent Judges*.

KIMLIN, *Administrative Patent Judge*

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-5, 7-9 and 39. Claim 19 has been allowed. Claim 1 is illustrative:

1. A laminated construction comprising

at least a first layer having a plurality of criss-crossing foamed filaments integral with each other at points of crossing thereof and defining a net with mesh openings selected from the group consisting of an elongated diamond shape and a square shape, each said filament being of circular cross

section with a diameter of at least 1/8 inch, said layer characterized in being laterally stretchable with limited longitudinal stretch ability; and at least a

second layer laminated to said one layer, wherein said second layer is made of criss-crossing foamed filaments integral with each other at points of crossing thereof and being of the same size as said filaments of said first layer, said second layer characterized in being laterally stretchable with limited longitudinal stretchablilty,

said layers being disposed in alignment with each other whereby the filaments of one layer are disposed in alignment with the filaments in the other of said layers.

The Examiner relies upon the following references in the rejection of the appealed claims:

Penrose	WO 96/03100	Feb. 8, 1996
Lang	3,758,371	Sep. 11, 1973

Appellants' claimed invention is directed to a laminated construction comprising first and second layers having a plurality of criss-crossing foamed filaments that are integral with each other at their points of crossing. The layers define a net with mesh openings, and claim 1 recites that the layers are disposed in alignment with each other whereby the filaments of one layer are disposed in alignment with the filaments in the other layer. Claim 9 recites that the layers are disposed in offset relation to each other whereby the filaments of one layer are disposed in alignment with the openings in the other layer. Also, claim 7 specifies that the filaments of the first layer are of flattened cross section.

Appealed claims 1, 2, 4, 5 and 9 stand rejected under 35 U.S.C. §102(b) as being anticipated by Penrose. The appealed claims stand rejected under 35 U.S.C. §103(a) as follows:

(a) claim 8 over Penrose,

(b) claims 3, 7 and 39 over Penrose in view of Lang, and

(c) claims 1, 2, 4, 5 and 9 over Penrose.

We have thoroughly reviewed each of the arguments advanced by Appellants. However, we are in complete agreement with the Examiner's reasoned analysis and application of the prior art, as well as his cogent disposition of the arguments raised by Appellants. Accordingly, we will adopt the Examiner's reasoning as our own in sustaining the rejections of record, and we add the following for emphasis only.

We consider first the Examiner's §102 rejection of claims 1, 2, 4, 5 and 9 over Penrose. There is apparently no dispute that Penrose, like Appellants, describes a laminated construction comprising first and second layers having a plurality of criss-crossing foamed filaments adhered to each other which define a net having mesh openings. A principal argument of Appellants is that the layers of Penrose are not disposed in alignment with each other such that the filaments of one layer are disposed in alignment with the filaments in the other layer, as presently claimed. However, we fully concur with the Examiner that Appellants are attributing a too narrow interpretation to the claim language "disposed in alignment with each other". The Examiner correctly points out that "the limitation that the layers are disposed in alignment merely means that they are in a state of being in the correct relative position to each other" (Ans. 4, first Para.). The Merriam-

Webster Online Dictionary defines the term "alignment" as (1) "the act of aligning … the proper positioning or state of adjustment of parts (as of a mechanical or electronic device) in relation to each other". Consequently, the claimed alignment does not require that the filaments of one layer coincide with the positioning of the filaments in the other layer. In other words, the filaments in one layer may be properly aligned with the filaments in the other layer whether they are parallel, perpendicular or angled with respect to each other. The proper angle of alignment of the filaments is set by the designer of the laminate. While Appellants point to their drawings for defining the claimed alignment of filaments, the Specification does not set forth that the claimed term is limited to such narrow interpretation. When the claim language at issue is given its broadest reasonable interpretation consistent with Appellants' Specification, as it must, we agree with the Examiner that the alignment of filaments encompassed by the appealed claims is described by Penrose.

Claim 9 on appeal recites that "said layers are disposed in offset relation to each other whereby the filaments of one layer are disposed in alignment with openings in the other of said layers". Contrary to the position taken by Appellants, we agree with the Examiner that Penrose meets this limitation by expressly disclosing that the mesh size of the second foamed net layer is smaller than the mesh size in the first layer. As set forth by the Examiner, this would necessarily result in the filaments of one layer being disposed in alignment with the openings in the other layer. Also, Penrose specifically teaches that the filaments of the first layer are angled with respect to the filaments of the second layer (*see* Abstract). In addition,

we do not subscribe to Appellants' position that claim 9 require that all the filaments of one layer be aligned with every opening in the other layer. Claim 9 does not recite the term "all".

We further agree with the Examiner that Penrose describes a laminated construction "wherein said layers are made of dissimilar materials" (Appealed claim 2). We find no error in the Examiner's reasoning that since the layers of Penrose are formed at different mesh sizes they are made of dissimilar materials. Again, Appellants' Specification sets forth no particular meaning of "dissimilar materials" that would preclude layers of different mesh size. Stated otherwise, Appellants' Specification does not define "dissimilar materials" as materials of different chemical composition. Dissimilar materials would also include, for example, filaments having a different cross section diameter.

Since we find that Penrose describes the subject matter of claims 1,2,4,5 and 9 within the meaning of §102, it logically follows that we will sustain the Examiner's rejection of these claims under 35 U.S.C. §103(a). Manifestly, anticipation is the epitome of obviousness. Moreover, even if the claims where interpreted to require the filaments in the two layers to coincide with each other, we agree with the Examiner that it would have been obvious to do so "because aligning the filaments would maximize the separation the filaments provide between the casting resin and the wearer"(Ans. 11, second Para.). Furthermore, it is our view that it would have been a matter of obviousness for one of ordinary skill in the art to resort to routine experimentation to determine the particular orientation of the two layers which optimizes the properties that are sought for a particular

use. Likewise, we are convinced that nothing more than routine experimentation would have been necessary to arrive at the weight for each layer of the laminated construction, as recited in claim 39.

Regarding the claim 7 recitation that each filament of the first layer has a flattened cross section, we agree with the Examiner that, based on the collective teachings of Penrose and Lang, it would have been *prima facie* obvious for one of ordinary skill in the art to flatten the filaments in one of Penrose's layers to effect a better bond to the adjacent layer. The Examiner properly explains that Lang teaches that "when forming a plastic net laminate material intended for cushioning, the filaments are flattened in order to provide enhanced adhesion of adjoining layers or material, since if the net filaments remain circular the adhesion is only obtained on the high spots or small peripheral portions of the filaments (col.4, l. 30-50)" (p. 9 of Ans. second Para.).

Furthermore, it is well settled that where patentability is predicated upon a change in a condition of a prior art product or composition, such as a change in size, weight, concentration or the like, the burden is on the Applicant to establish with objective evidence that the change is critical, *i.e.*, it leads to a new, unexpected result. *In re Woodruff,* 919 F.2d 1575, 1578 (Fed. Cir. 1990); *In re Aller,* 225 F.2d 454, 456 (CCPA 1955). In the present case, Appellants have offered no objective evidence which demonstrates any criticality attached to the claimed alignment, weight, or flattened configuration of the filaments.

Appellants query "[i]f aligning filaments with each other would maximize the separation alleged in rejecting claim 1, how could aligning

filaments with openings accomplish the same purpose" (Reply Br. 6, second Para.). The answer is by having the continuous filaments in adjacent layers coincident with each other, the distance between the wearer and the cast is maximized. On the other hand, when the filaments of one layer overlie the openings in the adjacent mesh, there is less of an opening for the casting dust to permeate. It would have been obvious for one of ordinary skill in the art to determine the proper balance of these effects.

As a final point, with respect to the §103 rejections, we note that Appellants base no arguments upon objective evidence of non-obviousness, such as unexpected results, which would serve to rebut the *prima facie* case of obviousness established by the Examiner.

In conclusion, based on the foregoing and the reasons well stated by the Examiner, the Examiner's decision rejecting the appealed claims is affirmed.

No time period for taking any subsequent action in connection with this appeal maybe extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

tc

FRANCIS C. HAND ESQ.,
c/o CARELLA, BYRNE, BAIN, GILFILLAN, CECCHI,
STEWART & OLSTEIN
6 BECKER FARM ROAD
ROSELAND, NJ 07068