

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte GEORGE LEONARD BAYSS
and MARCEL MILLER

Appeal 2008-4721
Application 10/466,032
Technology Center 1700

Decided: November 26, 2008

Before BRADLEY R. GARRIS, THOMAS A. WALTZ, and
CATHERINE Q. TIMM, *Administrative Patent Judges*.

WALTZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 from the Primary Examiner's rejection of claims 24-43, which are the only claims pending in this application. Although the action appealed from was a non-final rejection (mailed Oct. 17, 2006), we have jurisdiction since the claims have been twice presented and rejected. *See* 35 U.S.C. §§ 6(b) and 134; and *Ex parte Lemoine*, 46 USPQ2d 1420, 1423 (BPAI 1998).

According to Appellants, the invention is directed to signaling to users of common disposable beverage containers when a lid placed over a container to prevent spillage of its contents is not properly sealed to the container (App. Br. 3). This signaling is achieved by incorporating a skirt in the lid that has thermochromic properties. When the skirt is sealed, no color change occurs in the skirt, but when it is not sealed against the container, heat transfer occurs to the non-sealed portions of the skirt causing a color change to these parts which indicates a lack of sealing integrity (*id.*). Further details of the invention may be gleaned from illustrative independent claim 24, which is reproduced below:

24. A disposable beverage container with a lid,

the container comprising a closed end from which a side wall or side walls extend to an open end surrounded by a circular rim, and

the lid comprising:

a peripheral skirt comprising a circular part from which an outwardly flared part depends, the circular part of the peripheral skirt sealingly engaging with the circular rim, the outwardly flared depending part of the peripheral skirt not being in contact with and being spaced away from any part of the container;

at least a region having thermochromic properties which is adapted to change color upon reaching a predetermined heated non-ambient temperature in response to heat transfer from or to the contents of the container; and

thermochromic material applied either to all of the lid including the skirt, or only to the skirt, to provide the thermochromic properties whereby the color of the skirt provides a visual indication as to whether or not the lid is properly sealed with respect to the beverage container.

The Examiner has relied on the following prior art references as evidence of obviousness:

Elele	US 5,720,555	Feb. 24, 1998
Zinngrebe (DE '797), as translated	DE 200 02 797	Aug. 10, 2000

ISSUE ON APPEAL

Claims 24-43 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Elele in view of DE '797 (Ans. 3).

Appellants contend that the Examiner has incorrectly read Elele, since there is no mention in the Abstract of Elele or Figures 5-6 that the downwardly depending flange of Elele's lid flares or is spaced away from the container as required by the claims on appeal (App. Br. 9). Appellants further contend that element #24 cited by the Examiner from Figures 5-6 of Elele is a lid assembly, not a skirt portion that flares and is not in contact with the container (App. Br. 9; Reply Br. 3-4). Appellants agree that element #24 of Elele points to what appears to be a downwardly depending flange of the lid assembly, but a skirt that is "flared" or "open and spread outward" is not the same as the claimed skirt "not being in contact with and being spaced away" from the container (App. Br. 11-12). Appellants also contend that DE '797 does not cure this deficiency of Elele (App. Br. 10).

The Examiner contends that Elele discloses a lid which includes a skirt, and the skirt "flares or is spaced away [sic, from] any part of the container (Abstract, lines 18-21; Figures 5 and 6, #24)." (Ans. 3 and 7).

Accordingly, we determine that the dispositive issue presented from the record in this appeal is whether Appellants have established that the Examiner committed reversible error in determining that the skirt of the lid shown by Elele meets the claimed limitation for a skirt.

We determine that Appellants have established that the Examiner committed reversible error in the factual findings presented in the Answer. Therefore, we cannot sustain the sole ground of rejection presented in this appeal essentially for the reasons stated in the Brief, Reply Brief, and those set forth below. The decision of the Examiner is REVERSED.

OPINION

The Examiner finds that Elele discloses a lid including a skirt where the skirt “flares or is spaced away [sic, from] any part of the container,” citing the Abstract, ll. 18-21, and Figures 5-6, #24, from Elele (Ans. 3, 7). As noted above, Appellants dispute that Elele discloses or suggests this limitation (App. Br. 9-12; Reply Br. 3-4).

First, we note that the actual claim limitation in dispute is the outwardly flared depending part of the peripheral skirt “not being in contact with and being spaced away from any part of the container” (*see* claim 24 as reproduced above). As correctly noted by Appellants (App. Br. 9-12; Reply Br. 3-4), the Abstract of Elele does not refer to any skirt, and #24 of Figures 5-6 is a “lid assembly” (e.g., col. 6, l. 3). Although we agree with the Appellants and the Examiner that Figures 5-6 of Elele show a lid with a downwardly depending flange or skirt (Ans. 3, 7; App. Br. 10), we cannot ascertain from these Figures, and the Examiner has not pointed to any element in the Figures or other evidence, whether the lid of Elele contacts the container or is spaced away from the container. The Examiner relies solely on Elele for this limitation of the claims (Ans. 3-4). Accordingly, we determine that the Examiner’s legal conclusion of obviousness is not supported by proper factual findings in the record of this appeal. *See In re*

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Warner, 379 F.2d 1011, 1017 (CCPA 1967) (Where the legal conclusion of obviousness is not supported by facts, it cannot stand).

The decision of the Examiner is REVERSED.

REVERSED

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