

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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

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*Ex parte* PAUL JOSEPH DATTA,  
MICHAEL FRANCIS DRYMALSKI,  
and KRISTI JO BRYANT

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Appeal 2008-5110  
Application 10/011,085  
Technology Center 3700

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Decided: November 28, 2008

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Before TONI R. SCHEINER, DONALD E. ADAMS, and FRANCISCO C. PRATS, *Administrative Patent Judges*.

PRATS, *Administrative Patent Judge*.

**DECISION ON APPEAL**

This is an appeal under 35 U.S.C. § 134 involving claims to a prefastened, refastenable absorbent article, such as a disposable diaper. The Examiner has rejected the claims as failing to comply with the written description requirement. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

## STATEMENT OF THE CASE

Claims 1, 5-25, 27, 30, and 33-35 stand finally rejected and are on appeal (App. Br. 2).<sup>1</sup> Claims 1 and 33, the appealed independent claims, are representative and read as follows:

1. A prefastened, refastenable absorbent article, comprising:

a chassis having a front waist region, a back waist region and a crotch region intermediate the front waist region and the back waist region, and defining an elasticized waist opening having a relaxed waist opening diameter;

a first side seam including passive bonds connecting a first edge portion of the front waist region to a first edge portion of the back waist region;

a second side seam including passive bonds connecting a second edge portion of the front waist region to a second edge portion of the back waist region;

a first leg elastic member positioned along a first side edge of the chassis at the crotch region; and

a second leg elastic member positioned along a second side edge of the chassis at the crotch region, the first leg elastic member and the second leg elastic member defining a crotch elastic spacing between an outside edge of the first leg elastic member and an outside edge of the second leg elastic member at a narrowest spacing of the leg elastic members in the crotch region,

wherein the crotch elastic spacing is less than the relaxed waist opening diameter.

33. A pants shaped prefastened, refastenable disposable absorbent article having a vertical axis, comprising:

an outer cover;

a bodyside liner;

an absorbent core positioned between the outer cover and the bodyside liner;

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<sup>1</sup> Appeal Brief filed April 18, 2006.

a chassis defined by the outer cover, the absorbent core and the bodyside liner, the chassis having a front waist region, a back waist region and a crotch region intermediate the front waist region and the back waist region;

a first side seam including passive bonds connecting a first edge portion of the front waist region to a first edge portion of the back waist region;

a second side seam including passive bonds connecting a second edge portion of the front waist region to a second edge portion of the back waist region;

a first leg elastic member positioned along a first side edge of the chassis at the crotch region;

a second leg elastic member positioned along a second side edge of the chassis at the crotch region;

a crotch elastic spacing defined by a lateral distance between an outside edge of the first leg elastic member and an outside edge of the second leg elastic member at a narrowest spacing of the leg elastic members in the crotch region; and

an elasticized waist opening formed by the chassis having a relaxed waist opening diameter greater than the crotch elastic spacing.

The following rejection is before us for review:

Claims 1, 5-25, 27, 30, and 33-35 stand under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.  
(Ans. 4-5).<sup>2</sup>

#### WRITTEN DESCRIPTION

#### ISSUE

The Examiner finds that the amendments filed July 26, 2004 and January 28, 2005 introduced new matter into the Specification, and that

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<sup>2</sup> Examiner's Answer mailed February 7, 2008. We note that the Examiner's Answer also lists claims 26, 29, 31, and 32 as being subject to this ground of rejection (Ans. 4). However, Appellants have canceled those claims (*see* App. Br. 2).

“[s]ince the language of the claims is interpreted in light of the specification, e.g. see the last section of each independent claim, . . . the claims also fail to comply with the written description requirement, i.e. include new matter” (Ans. 4).<sup>3</sup>

Specifically, the Examiner urges that the Specification as originally filed described the claimed article’s elastic spacing in the crotch region as being less than the “relaxed waist opening measurement,” or that the “relaxed waist opening measurement” was greater than the crotch elastic spacing, thus allowing the leg openings of the article to be visible through the waist opening for easier application of the article (*id.*). The Examiner also finds that the originally filed Specification “described that the relaxed waist opening measurement was the *circumference* of the waist opening when no tension force is applied to the waist opening” (*id.*) (emphasis added).

In contrast, the Examiner urges, the amendments at issue changed the Specification to recite that “the crotch elastic spacing is less than the relaxed waist opening *diameter*, i.e. the relaxed waist opening *diameter* is greater than the crotch elastic spacing, but no longer sets forth that the spacing is also less than the relaxed waist opening measurement” (*id.* at 5). Thus, the Examiner reasons, the change from the term “measurement” to “diameter,” including the recitation of “relaxed waist opening diameter” in the final clause of each of independent claims 1 and 33, lacks adequate support in the originally filed Specification (*id.* at 5-6).

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<sup>3</sup> The Examiner’s Answer also refers to an amendment to the Specification “filed 7-27-05” (Ans. 4). Our review of the record does not show that an amendment was filed on that date, however.

Appellants argue that “the originally-filed application fully supports the limitation of the relaxed waist opening **diameter** being greater than the crotch elastic spacing” (App. Br. 3). Specifically, Appellants argue, while the Specification as filed used the broad term “‘relaxed waist opening measurement’” to refer to either the diameter or circumference of the article’s waist opening, “the particular ‘measurement’ used in comparison with the ‘crotch elastic spacing’ was the **diameter**” (*id.* at 4 (citing Spec. 16:1 to 17:2, 43:13 to 44:13; Abstract; original claims 26 and 29-33)).

The issue with respect to this rejection, then, is whether the Examiner erred in finding that, at the time the application was filed, Appellants were not in possession of a prefastened, refastenable absorbent article “wherein the crotch elastic spacing is less than the relaxed waist opening diameter” (claim 1), or a pants-shaped prefastened, refastenable disposable absorbent article having “an elasticized waist opening formed by the chassis having a relaxed waist opening diameter greater than the crotch elastic spacing” (claim 33).

*FINDINGS OF FACT (“FF”)*

1. Appealed claim 1 recites a prefastened, refastenable absorbent article “wherein the crotch elastic spacing is less than the relaxed waist opening diameter.”
2. Appealed claim 33 recites a pants-shaped prefastened, refastenable disposable absorbent article having “an elasticized waist opening formed by the chassis having a relaxed waist opening diameter greater than the crotch elastic spacing.”
3. Originally filed claim 26 reads as follows (emphasis added):

26. A prefastened, refastenable absorbent article, comprising:

a chassis having a front waist region, a back waist region and a crotch region intermediate the front waist region and the back waist region;

a waist opening defined by the chassis, the waist opening having a relaxed waist diameter; and

a crotch elastic spacing defined by a lateral distance between a first leg elastic member at the crotch region and a second leg elastic member at the crotch region, *wherein the relaxed waist diameter is greater than the crotch elastic spacing.*

4. Appellants' Specification as originally filed states on page 43 (emphasis added):

As shown in Fig. 7, a pant-like prefastened, disposable absorbent article of the present invention has two leg openings 35 which are positioned directly below and visible through the waist opening 33. *The width of the crotch elastic spacing at the crotch region 26 is less than the diameter of the relaxed waist opening measurement 90.* Thus, a wearer is able to directly place his or her foot into and through each leg opening 35 to easily apply the absorbent article.

#### *PRINCIPLES OF LAW*

As stated in *TurboCare Div. of Demag Delaval Turbomachinery Corp. v. General Elec. Co.*, 264 F.3d 1111, 1118 (Fed. Cir. 2001):

The written description requirement and its corollary, the new matter prohibition of 35 U.S.C. § 132, both serve to ensure that the patent applicant was in full possession of the claimed subject matter on the application filing date. When the applicant adds a claim or otherwise amends his specification after the original filing date . . . , the new claims or other added material must find support in the original specification.

The test for determining whether a specification is sufficient to support a particular claim “is whether the disclosure of the application relied upon ‘reasonably conveys to the artisan that the inventor had possession at that time of the later claimed subject matter.’” *Ralston Purina Co. v. Far-Mar-Co, Inc.*, 772 F.2d 1570, 1575 (Fed.Cir.1985) (quoting *In re Kaslow*, 707 F.2d 1366, 1375 (Fed.Cir.1983)).

Thus, “[i]t is not necessary that the application describe the claim limitations exactly, but only so clearly that persons of ordinary skill in the art will recognize from the disclosure that appellants invented processes including those limitations.” *In re Wertheim*, 541 F.2d 257, 262 (CCPA 1976) (citation omitted); *see also Purdue Pharma L.P. v. Faulding, Inc.*, 230 F.3d 1320, 1323 (Fed. Cir. 2000) (“In order to satisfy the written description requirement, the disclosure as originally filed does not have to provide *in haec verba* support for the claimed subject matter at issue.”).

Moreover, when evaluating whether amendatory language finds support in the original application, “[i]t is elementary that claims contained in an application as originally filed may be considered part of the disclosure of the application.” *In re Myers*, 410 F.2d 420, 427 (CCPA 1969); *see also Turbocare*, 264 F.3d at 1119 (considering whether language in originally filed claim was sufficient to support limitations at issue).

#### *ANALYSIS*

We agree with Appellants that the Examiner erred in finding that, at the time the application was filed, Appellants were not in possession of the absorbent articles recited in claims 1 and 33.

As Appellants point out, the originally filed Specification at page 43 describes a pant-shaped prefastened, disposable absorbent article with two

leg openings positioned directly below and visible through the waist opening, in which the “width of the crotch elastic spacing at the crotch region . . . is less than the *diameter* of the relaxed waist opening measurement” (Spec. 43 (FF 4) (emphasis added)). Similarly, originally filed claim 26 recites “prefastened, refastenable absorbent article, comprising . . . a crotch elastic spacing defined by a lateral distance between a first leg elastic member at the crotch region and a second leg elastic member at the crotch region, *wherein the relaxed waist diameter is greater than the crotch elastic spacing*” (FF 3) (emphasis added).

Given these disclosures in the application as originally filed, we agree with Appellants that a person of ordinary skill in the art would have concluded that when the application was filed, Appellants were in possession of a prefastened, refastenable absorbent article “wherein the crotch elastic spacing is less than the relaxed waist opening diameter” as recited in claim 1, and a pants-shaped prefastened, refastenable disposable absorbent article having “an elasticized waist opening formed by the chassis having a relaxed waist opening diameter greater than the crotch elastic spacing” as recited in claim 33.

The Examiner argues that Appellants’ amendments changed the term “measurement” to “diameter” in portions of the Specification not relating to the context of the crotch elastic spacing (Ans. 6). The Examiner does not explain, however, how those amendments support Examiner’s position with respect to the rejection under review. We are therefore not persuaded that the asserted amendments undermine the original disclosure’s support of the claim limitations at issue.

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The Examiner argues that the asserted supportive portions of the originally filed disclosure do not clearly convey possession of the claimed subject matter because the originally filed disclosure does not use the terms “measurement” and “diameter” in consistent contexts (Ans. 6-8). We are not persuaded by these arguments.

It is well settled that an application need not provide word-for-word support for a claim limitation in order to satisfy the written description requirement. *See, e.g., Purdue Pharma L.P. v. Faulding, Inc.*, 230 F.3d at 1323. In the instant, even if one considers the claim language at issue as not being exactly present in the as-filed disclosure, we agree with Appellants, as is evident from the discussion above, that the language of the supporting disclosure is so close to the words of independent claims 1 and 33 that a person of ordinary skill would have reasonably recognized that Appellants were in possession of the claimed subject matter.

We therefore reverse the Examiner’s rejection of claims 1 and 33, and their dependent claims 5-25, 27, 30, 34, and 35, under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

REVERSED

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Dority & Manning, P.A.  
Post Office Box 1449  
Greenville, SC 29602-1449