THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 22

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

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Ex parte JOHN C. CASTEL, DAWN S. CASTEL
and MICHAEL R. HALL

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Appeal No. 96-1830
Application 08/101,668[1]

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ON BRIEF

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Before McQUADE, NASE and CRAWFORD, Administrative Patent Judges.

McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

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[1] Application for patent filed August 3, 1993. According to appellants, the application is a continuation of Application 07/953,570, filed September 29, 1992, now abandoned, which is a continuation of Application 07/771,505, filed October 4, 1991, now Patent No. 5,188,586, issued February 23, 1993.

This appeal is from the final rejection of claims 1 through 5 and 23, all of the claims pending in the application.

The invention relates to “a back support belt to be worn by a worker to reduce the risk of back injury during lifting activities” (specification, page 1). Claim 1 is illustrative and reads as follows:

1. In a brace for preventing back injuries to a wearer of the brace during lifting activities, the improvement comprising:

(a) a back section adapted to generally extend across the back of the wearer of the brace;

(b) a left side section and a right side section secured to the opposite ends of said back section such that said left side section is adapted to extend around the left side of the wearer and the right side section is adapted to extend around the right side of the wearer during use;

(c) said back section, said left side section and said right side section forming a first support belt having a supporting configuration wherein said left side and right side sections are secured together and said support belt is adapted to encircle a user and support the back of a user and a nonsupporting configuration wherein said left side and said right side sections are not secured together and said support belt does not encircle a user; said support belt, when in the supporting configuration thereof, having an inward facing surface adapted to snugly encircle a user;

(d) adjustable fastening means for adjustably fastening

said left side section relative to said right side section such that said brace encircles the wearer and such that the fit of the brace with respect to the wearer may be adjusted; and

(e) position maintaining means located on said brace so as to be adapted to cooperatively engage underlying clothing of a user for releasably securing said brace to the clothing so as to prevent said brace from being urged upward and out of a preselected position during use in both said supporting configuration and said non-supporting configuration; said position maintaining means comprising first and second loops sized and aligned to receive a second pant's belt that also passes through loops of pants of a user when said brace is in a user encircling configuration; and said first loop being located on said left side section and said second loop being located on said right side section and said first and second loops are located so that during use said first and second loops are located to the front side of the user so as to facilitate the placement of said pant's belt through said first and second loops; and further said first and second loops being located on said belt inward facing surface.

The references relied upon by the examiner are:

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| Votel et al. (Votel) | 5,176,131 | Jan. 5, 1993 (filed Jun. 21, 1990) |
| Castel et al. (Castel)[2] | 5,188,586 | Feb. 23, 1993 |

Claims 1 through 5 and 23 stand rejected:

a) under 35 U.S.C. § 102(e) as being anticipated by

[2] As indicated in note 1, supra, the instant application is the grandchild of the application from which the Castel patent issued.

Votel;[3] and

b) under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 through 3 of the Castel patent.[4]

With regard to the first of these rejections, anticipation is established only when a single prior art reference discloses, expressly or under principles of inherency, each and every element of a claimed invention. RCA Corp. v. Applied Digital Data Systems, Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984).

Votel discloses a back support or brace 10 consisting of a waistband 11 adapted to be secured about the waist of a wearer to provide abdominal and lumbosacral support. As shown

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[3] Although the rejection of claims 1 through 5 and 23 as being anticipated by Votel was made under § 102(a) in the final rejection (Paper No. 15) and answer (Paper No. 19), it is apparent given the relevant dates involved that the rejection instead should have been made under § 102(e). We have assumed that the examiner intended to make the rejection under § 102(e) and that the failure to do so was the result of an inadvertent, and ultimately harmless, oversight.

[4] In the final rejection, claim 23 also was rejected under 35 U.S.C. § 112, first and second paragraphs. Upon reconsideration, the examiner has withdrawn these rejections (see page 3 in the answer).

in Figure 3 and described by Votel,

> [a] belt 50, having a buckle 51 operatively connected thereto, is attached to the waistband 11. Four straps 51, 52, 53 and 54 have their first ends operatively connected, such as by stitching, to the waistband 11. Their second ends have a loop through which belt 50 may pass and be supported thereby. On the belt 50 may be hung a variety of carriers or attachments. For instance, a simple strap 55 may have a first loop 55a through which the belt 50 may be passed and a second loop 55b through which a tool may be hung. Similarly, a pouch 56 may have two straps 57 and 58 attached thereto. The straps 57 and 58 have a loop through which the belt 50 may be passed. The pouch 56 may then be utilized to place various piece[s] of equipment or items to be used by the wearer. The belt 50 may be specifically designed for the support 10, or may be any belt, such as a miner's belt, which may have a variety of well-known constructions [column 5, lines 19 through 36].

Claims 1 and 23, the two independent claims on appeal, respectively recite a brace (claim 1) and the combination of a brace and a pant's belt (claim 23) wherein the brace forms a support belt having an inward facing surface. Both claims require, inter alia, position maintaining means comprising loops located on the inward facing surface of the support belt for receiving the pant's belt. In response to the appellants' argument that "Votel includes no loops located on the belt inward facing surface" (main brief, Paper No. 18, pages 10 and

11), the examiner contends that Votel's loops 51 through 54 "are located on the inward face of the support. The loops do extend beyond the support. However, the base[s] of the loops are located on the inward face of the support (Figure 3)" (answer, page 3). Votel, however, does not provide any factual support for the examiner's finding that the bases of straps 51 through 54 are located on the inward facing surface of support 10. Moreover, even if the bases of the straps 51 through 54 were located on the inward facing surface of the support 10, the loops defined by the straps are not as is clearly evident from Figure 3. Since Votel does not disclose any other loops located on the inward facing surface of the support, this reference does not meet the above noted limitations in claims 1 and 23. It therefore follows that the subject matter recited in these claims is not anticipated by Votel.

Accordingly, we shall not sustain the standing 35 U.S.C. § 102(e) rejection of claims 1 and 23, or of claims 2 through 5 which depend from claim 1, as being anticipated by Votel.

As for the standing rejection of claims 1 through 5 and

23 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 through 3 of the Castel patent, the appellants have not disputed the merits of such rejection and have offered to file a terminal disclaimer to obviate same (see pages 11 and 12 in the main brief).[5] Under these circumstances, we shall summarily sustain the standing obviousness-type double patenting rejection of claims 1 through 5 and 23.

In summary and for the above reasons, the decision of the examiner to reject claims 1 through 5 and 23 is reversed with respect to the 35 U.S.C. § 102(e) rejection and affirmed with respect to the obviousness-type double patenting rejection.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR

[5] The examiner has indicated that a terminal disclaimer would indeed overcome the rejection (see page 3 in the answer).

§ 1.136(a).

AFFIRMED

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| JOHN P. McQUADE<br>Administrative Patent Judge | ) | |
| JEFFREY V. NASE<br>Administrative Patent Judge | ) | BOARD OF PATENT APPEALS AND INTERFERENCES |
| MURRIEL E. CRAWFORD<br>Administrative Patent Judge | ) | |

Litman, McMahon & Brown
1200 Main Street
Suite 1600
Kansas City, MO 64105