

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 11

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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**Ex parte** GERRIT H. BRUNSVELD  
and  
JOHANNES T. MINNIGH

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Appeal No. 1997-1018  
Application No. 08/369,944

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ON BRIEF

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Before HANLON, WALTZ, and KRATZ, **Administrative Patent Judges.**

WALTZ, **Administrative Patent Judge.**

**DECISION ON APPEAL**

This is an appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 21 through 28, which are the only claims remaining in this application.

According to appellants, the invention is directed to a surgical or medical dressing having a continuous, water vapor permeable coating with a water vapor transmission rate (MVTR)

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of at least 1000 liters vapor/m<sup>2</sup>/24 hours at 40EC. and 80% relative humidity, where the pressure sensitive adhesive coating composition contains hydroxyalkyl acrylate in the amount of 15 to 40% by weight (Brief, page 2). Illustrative claim 21 is reproduced below:

21. A surgical or medical dressing comprising a backing material coated with a continuous water vapor permeable, pressure sensitive adhesive composition comprising a polymer derived from monomers consisting essentially of:

- a) from about 50 to 80% by weight of alkyl acrylate or methacrylate wherein the alkyl group contains from about 4 to 12 carbon atoms;
- b) from about 15 to 40% by weight of hydroxyalkyl acrylate or methacrylate wherein the alkyl group contains from about 2 to 4 carbon atoms;
- c) from about 0 to 35% by weight of alkyl acrylate or methacrylate wherein the alkyl group contains from about 1 to 3 carbon atoms;
- d) from about 0 to 10% by weight of glycidyl acrylate or methacrylate; and
- e) from about 0 to 10% by weight of acrylic acid,

the dressing having a water vapor transmission rate of at least 1000 liters vapor/m<sup>2</sup>/24 hours at 40EC and 80% relative humidity difference.

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The examiner has relied upon the following references as evidence to support the rejections under §§ 102 and 103:

Hodgson 1972	3,645,835	Feb. 29,
Cole 1991	5,009,224	Apr. 23,
Salve S.A. (Salve) 1975 (Published UK patent Specification)	1 381 185	Jan. 22,
Howes 1986 (Published European Patent Application)	0 194 881	Sep. 17,

Claims 21-28 stand rejected under 35 U.S.C. § 102(b) as anticipated by Howes or, in the alternative, under 35 U.S.C. § 103 as unpatentable over Howes in view of Hodgson or Cole (Answer, page 4). Claims 21-24 stand rejected under 35 U.S.C. § 102(b) as anticipated by Salve or, in the alternative, under 35 U.S.C. § 103 as unpatentable over Salve in view of Hodgson or Cole (Answer, page 5). We *affirm* the rejection of claims 21-24 under § 103 over Salve in view of Hodgson or Cole but *reverse* all other rejections. Our reasoning follows.

#### OPINION

##### A. *The Rejections under § 102(b)*

The examiner finds that "Howes (EP) discloses the claimed

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composition but fails to disclose the vapor transmission rate of the adhesive layer," citing the abstract; page 5, l. 5-page 7,

l. 23; page 8, l. 19-page 9, l. 6 (Answer, page 4). The examiner finds that the amount of hydroxylated esters of methacrylate disclosed by Howes is 0.1 to 20% by weight and this range "is clearly set forth on page 6 of Howes (EP)." (Answer, page 7). The examiner's position is that the adhesive composition of Howes inherently has the vapor transmission rate recited in claim 21 on appeal (*id.*).

Appellants argue that Howes is directed to a different composition than that claimed, namely that the amount of hydroxyethyl methacrylate in Howes is disclosed as 0.3 to 5% by weight while the lower limit of this monomer recited in claim 21 is 15% by weight (Brief, page 3; see claim 21, component b)).

"To anticipate a claim, a prior art reference must disclose every limitation of the claimed invention, either explicitly or inherently. [Citation omitted]." *In re*

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*Schreiber*, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed. Cir. 1997). Accordingly, we must determine if Howes describes amounts of hydroxyethyl methacrylate (component b)) within the scope of claim 21 on appeal.

Howes discloses that the pressure sensitive adhesives of his invention may advantageously contain "residues of other acrylic monomers" which includes "optionally hydroxylated or alkoxyated alkyl esters of acrylic or methacrylic acid," with specific examples of methyl methacrylate, n-butyl methacrylate, hydroxyethyl methacrylate and methoxyethyl methacrylate (Howes, page 6). Howes teaches that these residues "may form 0.1 to 20% by weight of the polymerr [sic]" (*id.*). Howes further teaches that the proportion of such residues depends on several factors and "[t]hus hydroxyethyl methacrylate residues may be present from 0.3 to 5% by weight of the polymer and lower alkyl methacrylate residues may be present as 1 to 15% by weight of the polymer." (Howes, page 7). All further disclosures of the hydroxyethyl methacrylate monomer by Howes refer to amounts of or within the range of 0.3 to 5% by weight

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(page 7, ll. 19-20; page 8, ll. 5 and 11-12; and claim 5). It is clear from the disclosures and teachings of Howe that the range "0.1 to 20%" referred to the total amount of acrylic residues while the range "0.3 to 5%" was taught as the limits for the amount of the hydroxyethyl methacrylate monomer. Accordingly, we determine that the subject matter of claim 21 on appeal is not described within the meaning of 35 U.S.C. § 102(b) by Howes. Therefore the rejection of claim 21, and claims 22-28 dependent on claim 21, under 35 U.S.C. § 102(b) as anticipated by Howes is reversed.

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The examiner finds that "Salve S.A. (GB 1,381,185) discloses the claimed composition but fails to disclose the vapor transmission rate" with the examiner taking the position that "12% of component (b) of Salve S.A. constitutes about 15% as claimed" and that the composition of the adhesive of Salve inherently has the claimed vapor transmission rate (Answer, page 5).

Appellants argue that the difference in amount of hydroxyethyl methacrylate in the composition recited in claim 21 on appeal is at least 25% higher than that disclosed by Salve (Brief, page 5).

The examiner argues that the lower limit recited in claim 21 on appeal is "about 15%" and this amount "encompasses the upper limit of '12%' disclosed by Salve" (Answer, page 8). Since both the examiner and appellants contest the limitation of "about 15%," we must construe this term to define its scope and meaning. *Gechter v. Davidson*, 116 F.3d 1454, 1457, 43 USPQ2d 1030, 1032 (Fed. Cir. 1997).

" . . . [T]he PTO applies to the verbiage of the proposed claims the broadest reasonable meaning of the words in their

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ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant's specification." *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997). The meaning of the word "about" is dependent on the facts of each case. *Eiselstein v. Frank*, 52 F.3d 1035, 1040, 34 USPQ2d 1467, 1471 (Fed. Cir. 1995). The meaning of the word "about" is not specifically defined in appellants' specification. Accordingly, the words of a claim will be given their ordinary meaning unless it appears that appellants used them differently. The ordinary meaning of "about" is "with some approach to exactness in quantity, number, or time." *See Conoco Inc. v. May Department Stores Co.*, 46 F.3d 1556, 1561, n. 2, 32 USPQ2d 1225, 1227, n.2 (Fed. Cir. 1994). Appellants' original disclosure and claims were directed to a lower limit of "about 10%" for the hydroxyethyl methacrylate monomer but this limit was amended to "about 15%" to emphasize the "high amounts of hydroxyalkyl acrylate component" as

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compared to the amounts of this monomer disclosed by Salve (see Application No. 07/934,060, amendment dated May 10, 1993, Paper No. 5, page 3).

The examiner has not pointed to any facts or reasoning to support his construction of the word "about" to include amounts 3% by weight below the lower limit recited in claim 21 on appeal (see the Answer, pages 5 and 8). We do not find such a construction reasonable in view of the ordinary meaning of the word "about" and the facts of this case. See *In re Woodruff*, 919 F.2d 1575, 1577, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990) (Disclosure of "about 1-5%" does allow for concentrations *slightly* above 5%). Accordingly, we cannot sustain the examiner's rejection of claims 21-24 under 35 U.S.C. § 102(b) as anticipated by Salve.

*B. The Rejections under § 103*

We adopt our analysis of the primary references of Howes and Salve and our claim construction as discussed above.

The examiner has rejected claims 21-28 under § 103 as unpatentable over Howes in view of Hodgson or Cole. As

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discussed above, we find that Howes discloses and teaches an amount of hydroxyethyl methacrylate monomer in the range of 0.3 to 5% by weight (page 6). The lower limit of the corresponding monomer component recited in claim 21 on appeal is "about 15%" and the examiner has not pointed to any reference disclosure or convincing reason why one of ordinary skill in the art would have modified the amounts of hydroxyethyl methacrylate monomer disclosed by Howes. Hodgson and Cole have been applied by the examiner to show that it was known in the art to vary the parameters of production to result in a desired MVTR (Answer, pages 4-5). Accordingly, Hodgson and Cole do not remedy the above noted deficiency of Howes. Therefore, we determine that the examiner has not established a *prima facie* case of obviousness and we cannot sustain the examiner's rejection based on Howes, Hodgson and Cole.

In view of our claim construction above regarding "about," we determined that the 12% upper limit of the hydroxyethyl methacrylate monomer disclosed by Salve did not anticipate the "about 15%" lower limit for the same monomer as recited in claim 21 on appeal. However, the amount of this

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monomer taught by Salve is so close to the amount claimed that *prima facie* one skilled in the art would have expected the compositions to have the same or similar properties. *Titanium Metals Corp. v. Banner*, 778 F.2d 775, 783, 227 USPQ 773, 779 (Fed. Cir. 1985). See also *In re Geisler*, 116 F.3d 1465, 1469-70, 43 USPQ2d 1362, 1365 (Fed. Cir. 1997); *Haynes Int'l, Inc. v. Jessop Steel Co.*, 8 F.3d 1573, 1577, n. 3, 28 USPQ2d 1652, 1655, n. 3 (Fed. Cir. 1993). We agree with the examiner that Hodgson or Cole teaches that, for similar adhesives and medical dressings, the control of MVTR was well known by the variation of the adhesive ingredients (Cole, col. 4, ll. 23-34) and the type and thickness of the backing material, as well as the nature and thickness of the adhesive (Hodgson, col. 5, ll. 22-28). In light of Salve's discussion regarding the permeability of the dressing to water vapor, it would have been well within the ordinary skill in the art to have controlled the MVTR of the dressing of Salve, as taught by Hodgson or Cole, to yield any desired MVTR. Accordingly, we determine that the examiner has established a *prima facie* case of obviousness in view of the reference evidence.

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Appellants argue that the data from the specification shows the "important relationship" between the MVTR and the hydroxyethyl acrylate content (Brief, page 3, citing Tables I, II and III on page 14 of the specification). Therefore, we reevaluate the evidence of *prima facie* obviousness in view of the countervailing evidence of nonobviousness. However, appellants' evidence is not persuasive of nonobviousness since there is no comparison with the closest prior art (i.e., the 12% hydroxyethyl methacrylate of Salve). *In re Burckel*, 592 F.2d 1175, 1179, 201 USPQ 67, 71 (CCPA 1979). Furthermore, the comparison is not commensurate with or predictive of the scope of the claimed subject matter. *In re Boesch*, 617 F.2d 272, 277, 205 USPQ 215, 220 (CCPA 1980). The comparison involves specific monomers at certain concentrations while the claims are not so limited. Finally, the amount of the hydroxyethyl acrylate is not the only variable in the comparison and thus the cause and effect sought to be shown is lost. *In re Dunn*, 349 F.2d 433, 439, 146 USPQ 479, 483 (CCPA 1965). The comparison involves adhesive coatings of different thicknesses. As noted by

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Hodgson, the thickness of the adhesive coating will affect the MVTR (col. 5, ll. 22-28).

For the foregoing reasons, based on the totality of the record, giving due consideration to appellants' arguments and evidence, we determine that the preponderance of evidence weighs in favor of obviousness. Accordingly, the rejection of claims

21 through 24 under 35 U.S.C. § 103 as unpatentable over Salve in view of Hodgson or Cole is affirmed.

*C. Summary*

The rejection of claims 21-28 under 35 U.S.C. § 102(b) over Howes is reversed. The rejection of claims 21-24 under 35 U.S.C. § 102(b) over Salve is reversed. The rejection of claims 21-28 under 35 U.S.C. § 103 over Howes in view of Hodgson or Cole is reversed. The rejection of claims 21-24 under 35 U.S.C. § 103 over Salve in view of Hodgson or Cole is affirmed.

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The decision of the examiner is affirmed-in-part.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

**AFFIRMED-IN-PART**

	)	
ADRIENE LEPIANE HANLON	)	
Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT
THOMAS A. WALTZ	)	
Administrative Patent Judge	)	APPEALS AND
	)	
	)	INTERFERENCES
	)	
PETER F. KRATZ	)	)
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TAW:hh

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