

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 23

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte VINCENT DE LAFORCADE

Appeal No. 1998-3309
Application No. 08/618,306

HEARD: DECEMBER 5, 2000

Before CALVERT, McQUADE, and GONZALES, Administrative Patent Judges.

GONZALES, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 3, 5 through 10 and 15 through 17. Claims 1, 2, 13 and 14 have been canceled. Claims 4, 11 and 12, the only other claims in the application, stand withdrawn from consideration under 37 CFR § 1.142(b).

We REVERSE.

The claims on appeal are drawn to an applicator for a product of a viscous consistency and are reproduced in the appendix of appellant's main brief (Paper No. 16).¹

The prior art applied in the final rejection is:

Jakubowski	2,917,765	Dec. 22, 1959
Berghahn et al. (Berghahn)	4,111,567	Sep. 5, 1978
Citterio	4,801,052	Jan. 31, 1989
Lathrop et al. (Lathrop)	5,073,057	Dec. 17, 1991
Hall et al. (Hall)	249,473	Oct. 25, 1962
(Published Australian Patent Application)		

The appealed claims stand finally rejected under 35 U.S.C. § 103(a) on the following grounds:

claims 3, 5 through 10 and 15, unpatentable over Hall in view of Berghahn and Lathrop; and

claims 16 and 17, unpatentable over Hall in view of Berghahn, Lathrop, Jakubowski and Citterio.

After fully considering the record in light of the arguments presented in appellant's main and reply briefs and the examiner's answer, we conclude that the appealed claims are patentable over the applied prior art, for at least the following reasons.

¹ Claim 15, as reproduced in the appendix, contains a typographical error. On page ii, line 3, "capillary action prevented" should read --capillary action is prevented--.

Claim 15, the only independent claim, calls for an applicator for a product of a viscous consistency, the applicator comprising, inter alia, a cylindrical container body having a first end and a rigid and non-deformable porous application element fitted on the first end of the cylindrical body and having pores which communicate with one another in all directions.

We observe that, in the embodiment illustrated in Figure 2, Hall discloses a device for dispensing "wax shoe polish" (p. 2, l. 26) or "fluid wax" (id. at l. 39) including a tube 9 closed at one end by a cap 11 and at the other end by a screw threaded cap 10. An apertured member 16 and a polishing pad 17 of opened-cell polyurethane foam (id. at ll. 15-17) are retained by the cap 10.² In use, a screw threaded stem 12 is rotated by way of a knob 14 moving a piston 13 toward the cap 10 and forcing the wax through the apertures in member 16 and through the applicator pad 17 so that the wax may be applied to the shoes.

Hall clearly lacks any teaching or suggestion that the application element 17 is "rigid and non-deformable." To the

² With regard to the Figure 2 embodiment, Hall states that "[a] polishing pad 17 of polyurethane plastic, corresponding to the disc 7 is again used to form the applicator." See p. 2.

contrary, Hall discloses that the pressure on the rim compresses the pad and that the central portion bulges through the aperture in the cap.

Berghahn's invention is directed to an improvement over prior art antiperspirant or deodorant applicators which use a shaped, non-flexible, non-deformable, sintered porous synthetic plastic resin applicator element having a controlled porosity and omni-directional interconnecting pores. See col. 1, ll. 49-60. Berghahn's improvement includes the addition of venting means, e.g., vent 31 in Figure 5, for venting the interior of the container to the atmosphere and fluid restricting means 34 for restricting the flow of the product from within the interior of the container body to the applicator element. Berghahn also teaches that the pore size for the applicator element 4 may range from 10 to 500 microns with 20 to 200 microns being preferred. See col. 5, ll. 3 and 4.

Lathrop, like Berghahn, discloses an improvement over prior art antiperspirant or deodorant applicators which use a shaped, non-flexible, non-deformable, sintered porous synthetic plastic resin applicator element having a controlled porosity and omni-directional interconnecting pores. See col. 1, ll. 16-35. Lathrop attempts to improve the capillary flow of the product through the porous applicator head by including a capillary pressure compensation valve 45 and a "means to generate pressure within the container." See col. 2, ll. 58-65. The "means to

generate pressure within the container" includes a spring 35 which mounts the applicator head on the container for movement into and out of the container. In operation, the container is first inverted wetting the inner surface 28 of the applicator head and then, by capillary action, liquid flows through the pores of the applicator head. When the head is applied to the skin, the pressure on the head pushes the head into the container increasing the pressure in the container, forcing liquid out through the pores of the head and supplementing the capillary flow. The capillary pressure compensation valve 45 allows air to enter the container to prevent a vacuum from building up within the container when pressure on the head is released and the head moves out of the container. See col. 4, l. 60 et seq.

In the examiner's statement of the grounds of the rejections, the examiner described Berghahn as disclosing the recited pore size (although pore size is not recited in claim 15) and determined that it would have been obvious to substitute "such a material [presumably the applicator element 4 of Berghahn] with the given pore size." See answer, p. 3. The examiner identified the motivation for this substitution as "the

known substitution of equivalents."³ Id. at p. 4. In addition, the examiner described Berghahn as teaching both the use and non-use of a metering element 34 and determined that it would have been obvious to eliminate the apertured member 16 of Hall in view of this teaching in Berghahn. Lathrop is cited for its disclosure of "pressurizing the container to dispense the contents." Id.⁴

We do not consider that it would have been obvious to combine Hall with Berghahn and Lathrop as proposed by the examiner. Hall is concerned with a dispenser for applying cleaning fluid or polish in the form of wax or liquid to shoes. To this end, Hall provides a container having a flexible, compressible, opened-cell foam polyurethane applicator pad mounted in the cap for the container. Berghahn and Lathrop both disclose liquid applicators for applying antiperspirant or deodorant to human skin. Assuming arguendo that it was known in

³ For a teaching of the equivalency of the flexible polyurethane pad of Hall with the rigid, sintered applicator of Berghahn, the examiner refers to column 5, line 8 et seq. of Berghahn which describes a patent to Gazzani as containing a suggestion that the porous, flexible, deformable applicator pad disclosed therein could be porous and rigid.

⁴ It is unclear why the examiner cited Lathrop for this teaching, since Hall teaches ejecting the product in the container by piston 13, threaded stem 12 and knob 14.

the cosmetic art prior to appellant's invention to replace a porous, flexible and deformable applicator pad with a porous, rigid applicator, the purpose of the Hall applicator pad is so different from that of Berghahn and Lathrop that one of ordinary skill would not, in our view, have found in Berghahn or Lathrop a suggestion to provide Hall with a rigid and non-deformable porous application element, as recited in claim 15. In our view, the only suggestion for modifying Hall in the manner proposed by the examiner to meet the limitations of claim 15 stems from hindsight knowledge derived from appellant's own disclosure. The use of such hindsight knowledge to support an obviousness rejection under 35 U.S.C. § 103 is, of course, impermissible. See, for example, W. L. Gore & Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984).

It follows that we cannot sustain the examiner's rejection of claim 15 under 35 U.S.C. § 103 based on Hall, Berghahn and Lathrop or of claims 3 and 5 through 10, dependent thereon.

As to claims 16 and 17, which depend from claim 15, neither Jakubowski nor Citterio cures the deficiencies of the Hall, Berghahn, Lathrop combination. Therefore, we must reverse the rejections of claim 16 and 17 as well.

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CONCLUSION

The decision of the examiner rejecting claims 3, 5 through 10 and 15 through 17 under 35 U.S.C. § 103 is reversed.

REVERSED

IAN A. CALVERT)	
Administrative Patent Judge)	
)	
)	BOARD OF PATENT
JOHN P. McQUADE)	
Administrative Patent Judge)	APPEALS AND
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JFG:hh

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