

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(2) is not binding precedent of the Board.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. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MATTHEW F. MURGIDA & WILLIAM E. TUCKER

Appeal No. 1999-0955
Application No. 08/687,872¹

ON BRIEF

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 16, 19 and 21 through 29, the only claims remaining in the application.² Claims 1 through 15, 17, 18 and 20 have been canceled.

¹ Application for patent filed July 26, 1996.

² Claim 19 was amended subsequent to the final rejection.

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We REVERSE and enter a new rejection pursuant to 37 CFR § 1.196(b).

The claims on appeal are drawn to an apparatus for dispensing an antiperspirant or deodorant composition and are reproduced in the appendix of appellants' brief (Paper No. 14).

The prior art applied in the final rejection is:

Berghahn et al. (Berghahn)	4,111,567	Sep. 05, 1978
Hall et al. (Hall) (Published Australian Appl.)	249,473	Oct. 25, 1962

The additional reference of record relied on by this merits panel is:

de Laforcade et al. ³ (de Laforcade)	5,567,073	Oct. 22, 1996 (filed Nov. 28, 1994)
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Claims 16, 19 and 21 through 29 stand finally rejected under 35 U.S.C. § 103(a) as unpatentable over Hall in view of Berghahn.

Rather than reiterate the conflicting viewpoints advanced

³ Cited by appellants in an "Information Disclosure Citation" filed April 21, 1997. See Paper No. 4.

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by the examiner and appellants regarding the above-noted rejection, we make reference to the answer (Paper No. 15) for the examiner's complete reasoning in support of the rejection and to the brief for appellants' arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellants' specification and claims, to the applied prior art references, and to the respective positions articulated by appellants and the examiner. As a consequence of our review, we make the determinations which follow.

Independent claim 16 calls for an "[a]pparatus for dispensing an antiperspirant or deodorant composition having a viscosity of about 12,000 to 50,000 cP . . . comprising: a container having . . . a container opening . . . said container opening at least partially filled with said composition, a transport mechanism . . . for transporting at least a portion of said composition . . . and a rigid, non-deformable, sintered polyolefin porous dome . . . having an externally disposed upper surface with a smooth rounded

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contoured shape . . . and an internally disposed bottom surface which, during use, is in contact with said composition over a major portion of said bottom surface"

Claim 19, the only other independent claim, calls for an apparatus for dispensing a viscous antiperspirant or deodorant

composition including, inter alia, an applicator head comprising "a rigid, non-deformable, sintered polyolefin porous dome with an externally disposed upper surface and an internally disposed bottom surface which, during use, is in contact with said viscous composition over a major portion of said bottom surface."

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

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retained by the cap 10.⁴ 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, non-deformable or sintered. Instead, Hall discloses that the pressure on the rim compresses

the pad and that the central portion bulges through the aperture in the cap, suggesting that application element 17 is both flexible and deformable.

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

⁴ 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.

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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.

In the examiner's statement of the ground of rejection, the examiner described Hall as disclosing "substantially similar structure, except for the dispensing material" and Berghahn as

disclosing "the recited material for use in dispensing deodorant." The examiner then concluded that "[i]t would have been obvious . . . to provide such material to dispense deodorant to a human body." See answer, p. 3. In addition,

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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. Id. at p. 4.

We do not consider that it would have been obvious to combine Hall with Berghahn 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 discloses a liquid applicator for applying antiperspirant or deodorant to human skin.

Assuming arguendo that it was known in the cosmetic art prior to appellants' 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 that one of

ordinary skill would not, in our view, have found in Berghahn

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a suggestion to provide Hall with a rigid and non-deformable porous application element, as recited in claims 16 and 19. In our view, the only suggestion for modifying Hall in the manner proposed by the examiner to meet the limitations of claims 16 and 19 stems from hindsight knowledge derived from appellants' 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 and Associates, 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 claims 16 and 19 under 35 U.S.C. § 103 based on Hall and Berghahn or of claims 21 through 29, dependent on claim 19.

The following rejection is entered pursuant to 37 CFR § 1.196(b).

Claims 19, 21, 22, 23, 26, 27/19, 27/21, 27/22, 27/23, 27/26, 28/27/19, 28/27/21, 28/27/22, 28/27/23, 28/27/26 and 29 are rejected under 35 U.S.C. § 102(e) as anticipated by de Laforcade.

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Unlike claim 16, claim 19 does not require a container partially filled with an antiperspirant or deodorant composition having a viscosity of about 12,000 to 50,000 cP. Instead, claim 19 is directed to a dispensing apparatus per se which is capable of dispensing a viscous antiperspirant or deodorant composition. Also, unlike dependent claim 24, which requires that the dispensing apparatus be capable of dispensing an antiperspirant or deodorant composition having a viscosity of about 12,000 to 50,000 cP, the viscosity of the composition which the apparatus defined in claim 19 must be capable of dispensing is not recited in claim 19.

de Laforcade discloses an apparatus for dispensing a viscous antiperspirant or deodorant composition comprising a cylindrical can defining a reservoir 1 for the deodorant composition and a dispenser or applicator head 9 affixed at one end of the cylindrical can. de Laforcade teaches that the dispenser head 9 may be a non-deformable, sintered, porous polyethylene material with a porosity between 10 and 500 microns. See col. 3, ll. 32-37, 59 and 60. The applicator head 9 is mounted within dish 8 so as to provide an outer face

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or upper surface 9a and an inner face

or lower surface 9b. de Laforcade also provides a transport mechanism to force the composition from the reservoir to the inner face 9b of the dispenser head 9 and through the pores of the applicator head for distribution onto the upper surface.

To this end the reference teaches that:

[a] liquid to be dispensed has been stored under pressure in the reservoir 1. This liquid can be a body deodorant liquid composition having a viscosity of approximately 0.003 Pa.^[5] Pressurization can be effected either by bringing the liquid directly into contact with the propellant gas, or by separating the liquid and the propellant gas by a movable piston or by a deformable flexible bag, which, in this latter case, obviates the need to use the device in a determined position, with the valve upwards or with the valve downwards. In the example described, butane has been used as the propellant gas, the liquid being separated from the butane by a movable piston.

See col. 5, ll. 5-15. As de Laforcade teaches that the composition enters the applicator head through the inner face

⁵ Pa is the abbreviation for a pascal, a unit of pressure in the SI system equal to 1 newton per square meter. Since viscosity is typically given in centipoise (cP), poise (P) or pascal second (PaCs), it appears that "0.003 Pa" is a typographical error and should read --0.003 PaCs--. A pascal second equals 10 poise. Thus, 0.003 PaCs equals 0.03 poise or 3.0 cP.

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9b and emerges at the outer face 9a, the pores in the applicator head must be interconnected. Further, de Laforcade discloses that when the composition is dispensed from the container, it spreads over the whole of the inner face 9b of the dispenser

head, i.e., the inner face or bottom surface 9b is in contact with the composition over a major portion of the bottom surface as required by claim 19. See col. 6, ll. 3-8.

In summary:

a) the decision of the examiner to reject claims 16, 19 and 21 through 29 under 35 U.S.C. § 103 is reversed; and

b) a new rejection of claims 19, 21, 22, 23, 26, 27/19, 27/21, 27/22, 27/23, 27/26, 28/27/19, 28/27/21, 28/27/22, 28/27/23, 28/27/26 and 29 under 35 U.S.C. § 102 is entered pursuant to 37 CFR § 1.196(b).

This decision contains a new ground of rejection pursuant to 37 CFR § 1.196(b)(amended effective Dec. 1, 1997, by final rule notice, 62 Fed. Reg. 53,131, 53,197 (Oct. 10, 1997), 1203 Off. Gaz. Pat. & Trademark Office 63, 122 (Oct. 21, 1997)).

37 CFR

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§ 1.196(b) provides that, "[a] new ground of rejection shall not be considered final for purposes of judicial review."

37 CFR § 1.196(b) also provides that appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of proceedings (37 CFR § 1.197(c)) as to the rejected claims:

(1) Submit an appropriate amendment of the claims so rejected or a showing of facts relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the application will be remanded to the examiner

(2) Request that the application be reheard under § 1.197(b) by the Board of Patent Appeals and Interferences upon the same record

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

REVERSED; 37 CFR § 1.196(b)

IAN A. CALVERT)

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Administrative Patent Judge)	
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JOHN P. McQUADE)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
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JOHN F. GONZALES)	
Administrative Patent Judge)	

jfg/vsh

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Patent Counsel
The Gillette Company
Prudential Tower Building
39th Floor
Boston, MA 02199