

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 17

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte URBAN WIDLUND, ANDERS GUSTAFSSON
and ANNA SVERNLOV

Appeal No. 1999-2678
Application 08/704,705

ON BRIEF

Before COHEN, FRANKFORT and McQUADE, Administrative Patent Judges.

McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Urban Widlund et al. appeal from the final rejection of claims 12 through 30, all of the claims pending in the application. We affirm-in-part.

Appeal No. 1999-2678
Application 08/704,705

The invention relates to a diaper-like article which prevents urine and feces from mixing. A copy of claims 12 through 30 appears in the appendix to the appellants' main brief (Paper No. 13).

The references relied upon by the examiner as evidence of obviousness are:

| | | |
|---|-----------|---------------|
| Williams | 4,662,877 | May 5, 1987 |
| Foreman | 4,738,677 | Apr. 19, 1988 |
| Huffman et al. (Huffman) 1990 | 4,935,021 | Jun. 19, |
| Barrochelo et al., (Barrochelo) ¹ Brazilian Patent Document | 9202817-9 | Jan. 25, 1994 |

Claims 12 through 30 stand rejected under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the subject matter the appellants regard as the invention.

Claim 28 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Barrochelo.

Claims 29 and 30 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Barrochelo in view of Foreman and Williams.

¹An English language translation of this reference, prepared on behalf of the Patent and Trademark Office, is appended hereto.

Appeal No. 1999-2678
Application 08/704,705

Claims 24 through 27 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Barrochelo in view of Huffman.

Claims 12 through 23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Barrochelo in view of Foreman, Williams and Huffman.

Reference is made to the appellants' main and reply briefs (Paper Nos. 13 and 15) and to the examiner's final rejection and answer (Paper Nos. 9 and 14) for the respective positions of the appellants and the examiner with regard to the merits of these rejections.²

On pages 3 through 5 in the main brief and page 1 in the reply brief, the appellants raise and argue the propriety of the 35 U.S.C. § 112, first paragraph, objection to the specification which was set forth in the final rejection. This objection, however, is not directly connected with the merits of issues involving a rejection of claims. It is therefore reviewable by petition to the Commissioner rather

²The viewpoint expressed in the examiner's answer that certain arguments advanced in the appellants' main brief are untimely because they were not previously presented has no basis in PTO practice.

Appeal No. 1999-2678
Application 08/704,705

than by appeal to this Board. See In re Hengehold, 440 F.2d 1395, 1403-1404, 169 USPQ 473, 479 (CCPA 1971). Accordingly, we shall not review or further discuss the objection.

Turning now to the 35 U.S.C. § 112, second paragraph, rejection, the examiner considers claims 12 through 30 to be indefinite because

[i]n regard to claim 12, it is unclear where the preamble ends, the claim body begins and what the transitional phrase is, i.e. "with" on line 1 or "comprising" on line 2? Lines 10-14 are inaccurate, i.e. each opening does not have longitudinal, front and rear part lateral edges and crotch part lateral edges. Claim 14 is inaccurate, i.e. after "sheet" on line 4, --, respectively-- should be inserted. This last rejection also applies to claim 20. Also, in regard to claim 21, the terminology "two laterally separated side bodies" is unclear, i.e. what are the side bodies separated from? each other? The central body? Within themselves? In regard to claims 24-30, the rejections of claims 12-23 apply to similar language in these claims [final rejection, page 2].

The second paragraph of 35 U.S.C. § 112 requires claims to set out and circumscribe a particular area with a reasonable degree of precision and particularity. In re Johnson, 558 F.2d 1008, 1015, 194 USPQ 187, 193 (CCPA 1977). In determining whether this standard is met, the definiteness

Appeal No. 1999-2678
Application 08/704,705

of the language employed in the claims must be analyzed, not in a vacuum, but always in light of the teachings of the prior art and of the particular application disclosure as it would be interpreted by one possessing the ordinary level of skill in the pertinent art. Id.

When claims 12 through 30 are read in light of the disclosure, the only concern of the examiner which proves to be well founded is the one involving the definition of the opening edges in claims 12 and 29. These claims require that "each" of the first and second openings has longitudinal and front and rear part lateral edges and crotch part lateral edges. In contrast, the underlying disclosure (see Figure 2 and specification page 5) indicates that each opening has two longitudinal edges 20, 21 or 18, 19, either a front or a rear part lateral edge 23 or 22, and one crotch part lateral edge (unnumbered) adjacent bridge region 17. This discrepancy between claims 12 and 29 and the underlying disclosure renders the scope of these claims unclear.

Appeal No. 1999-2678
Application 08/704,705

For this reason alone, we shall sustain the standing 35 U.S.C. § 112, second paragraph, rejection of claims 12 and 29 and of claims 13 through 23 and 30 which depend therefrom. We shall not sustain the standing 35 U.S.C. § 112, second paragraph, rejection of claims 24 through 28.

As for the 35 U.S.C. § 103(a) rejections, Barrochelo, the examiner's primary reference, discloses a disposable diaper constructed to prevent the mixing of feces and urine. To this

end, the diaper includes a contoured top sheet 60 and lateral flaps 100 which together define rear and front pouches 135 and 145 for separately receiving the feces and urine, and on absorbent body 70 disposed beneath the top sheet.

Claims 12, 24 and 28, the three independent claims on appeal, recite an absorbent article which comprises, inter alia, an absorbent body/member, a top sheet that lies proximal to a wearer's body and has a first opening at the front part of the article and a second opening at the rear part of the article, and a flexible/tubular member connected to the top

Appeal No. 1999-2678
Application 08/704,705

sheet and the absorbent body/member (or its casing) to define a first pouch that opens at the first opening and a second pouch that opens at the second opening. Barrochelo, taken alone or in any combination with Williams, Foreman and/or Huffman, does not teach and would not have suggested this structure. In this regard, the examiner's determination (see page 3 in the final rejection and page 6 in the answer) that Barrochelo's fabric sheet 122 (see Figures 11 and 12) essentially corresponds to the flexible/tubular member recited in claims 12, 24 and 28 is not well taken. Fabric sheet 122 is connected to Barrochelo's top sheet 60 and lateral flaps 100 rather than to the top sheet and

absorbent body/member as claimed, and thus does not define the particular pouch/opening construction required by claims 12, 24 and 28.

Thus, the references applied by the examiner do not justify a conclusion that the differences between the subject matter recited in claims 12, 24 and 28, and in claims 13 through 23, 25 through 27, 29 and 30 which depend therefrom,

Appeal No. 1999-2678
Application 08/704,705

and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art. Consequently, we shall not sustain the standing 35 U.S.C. § 103(a) rejections of claims 12 through 30.

In summary, the decision of the examiner to reject claims 12 through 30 is affirmed with respect to claims 12 through 23, 29 and 30, and reversed with respect to claims 24 through 28.

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

Appeal No. 1999-2678
Application 08/704,705

AFFIRMED-IN-PART

| | | |
|-----------------------------|---|-----------------|
| IRWIN CHARLES COHEN |) | |
| Administrative Patent Judge |) | |
| |) | |
| |) | BOARD OF PATENT |
| CHARLES E. FRANKFORT |) | |
| Administrative Patent Judge |) | APPEALS AND |
| |) | |
| |) | INTERFERENCES |
| |) | |
| JOHN P. McQUADE |) | |
| Administrative Patent Judge |) | |

JPM/pgg
Young & Thompson
Second Floor
745 South 23rd Street

Appeal No. 1999-2678
Application 08/704,705

Arlington, VA 22202