

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 15

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MICHAEL W. SPECK

Appeal No. 2002-0357
Application 09/433,988

ON BRIEF

Before ABRAMS, MCQUADE, and NASE, Administrative Patent Judges.
MCQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Michael W. Speck appeals from the final rejection of claims 1 through 40. Claims 41 through 47, the only other claims pending in the application, stand withdrawn from consideration pursuant to 37 CFR § 1.142(b).

THE INVENTION

The invention relates to "baseball/softball equipment bags, and more particularly to bags adapted to hang from a fence"

(specification, page 1). Representative claim 1 reads as follows:

1. A hanging baseball equipment bag comprising:

an elongated bag having a length, a top end and a bottom end, a front, a back, a left side and a right side, said elongated bag forming a non-rigid and flexible enclosure;

a fence clip for vertically hanging said elongated bag from a chain link fence;

a substantially planar interior shelf positioned between said top and bottom ends within said elongated bag, said interior shelf is substantially horizontal when said elongated bag vertically hangs from said fence clip in a substantially vertical position;

an interior rear panel attached to the interior of said elongated bag and oriented substantially parallel to said back, said interior rear panel dividing said elongated bag into a front compartment and a rear compartment, said front compartment divided into an upper front compartment and a lower front compartment by said interior shelf,

wherein said front compartment is located between said front and said interior rear panel and said rear compartment is located between said back and said interior rear panel;

first means for accessing said rear compartment in said top end; and

means for substantially fully exposing said upper front compartment from a frontal view of said elongated bag.

THE EVIDENCE

The items relied on by the examiner to support the final rejection are:

Plough et al. (Plough)	4,301,898	Nov. 24, 1981
Gerch (Gerch '748)	4,805,748	Feb. 21, 1989
Gerch et al. (Gerch '154)	4,830,154	May 16, 1989
Shyr et al. (Shyr)	5,042,664	Aug. 27, 1991

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Speck (Speck '529) ¹	5,588,529	Dec. 31, 1996
Speck (Speck '995) ¹	6,009,995	Jan. 4, 2000

Softball Sales 93, p. 35, Mizuno #MTB Bag (Mizuno)²

The items relied on by the appellant as evidence of non-obviousness are:

The 37 CFR § 1.132 Declaration of Michael W. Speck made of record on October 2, 2000 (Paper No. 7)

The 37 CFR § 1.132 Declaration of Jay Strange made of record on October 2, 2000 (Paper No. 7)

THE REJECTIONS

Claims 1 through 40 stand rejected under the judicially created doctrine of obviousness-type double patenting as claiming obvious variations of the inventions set forth in claims 1 through 9 of the Speck '995 patent and claims 1 through 5 of the Speck '529 patent.

Claims 1 through 13, 15 through 20 and 22 through 40 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Mizuno in view of Shyr and any one of Gerch '748, Gerch '154 or Plough.

¹ The record indicates that the instant application is a continuation of the Speck patents.

² The information disclosure statement filed March 27, 2000 (Paper No. 4) indicates that the Mizuno item is from a 1993 sales catalog and expressly admits it to be prior art.

Attention is directed to the appellant's main and reply briefs (Paper Nos. 11 and 13) and to the examiner's answer (Paper No. 12) for the respective positions of the appellant and the examiner with regard to the merits of these rejections.

DISCUSSION

I. The obviousness-type double patenting rejections

We shall summarily sustain the standing obviousness-type double patenting rejections of claims 1 through 40 based on Speck '995 and Speck '529, respectively, as the appellant, stating an intention to file a curative terminal disclaimer (see page 2 in the main brief), has not contested the merits thereof.

II. The 35 U.S.C. § 103(a) rejection

Mizuno, the examiner's primary reference, discloses a bag which the appellant characterizes as follows:

[t]he Mizuno #MTB bag . . . is a baseball equipment bag having an elongated bag forming a non-rigid, flexible enclosure, a rear compartment for holding bats, a means for accessing the rear compartment at the upper end of the bag, a large front compartment for holding gloves, shoes, clothing, etc., a means for accessing the front compartment, and a smaller compartment on the inside of the bag having a zipper closure. The Mizuno #MTB bag also has handles and shoulder straps for carrying. While it is not clear whether the Mizuno #MTB bag includes a fence clip for hanging, Appellant acknowledges that there were prior art equipment bags with fence clips prior to Appellant's invention [main brief, pages 10 and 11].

Conceding that the Mizuno bag does not meet the limitations in independent claims 1, 11, 13, 17, 20, 24 and 25 requiring an interior shelf, the examiner nonetheless concludes that "it would have been obvious to place shelves, such as that in Shyr et al. into the Mizuno #MTB bag . . . which could be frameless as taught by Gerch '748, Gerch et al.['154], or Plough et al., to help organize the bag by separating it into individual compartments" (answer, page 4). Gerch '748, Gerch '154 and Plough, cited as being exemplary of frameless bags which hold their shape, respectively disclose a sports duffel bag having an expandable side pocket for receiving a tennis racket head, a general purpose sports/travel bag, and a bag particularly designed to accommodate police equipment. Shyr discloses a soft-sided sports locker bag having a hinged door-like end wall and removable interior shelves which divide the bag into separate compartments for sports shoes, uniforms, baseball caps, sweat bands, sunglasses, and the like.

The appellant's position that the foregoing reference combination advanced by the examiner stems solely from impermissible hindsight is well taken. In short, there is nothing in Gerch '748, Gerch '154, Plough and/or Shyr, and particularly in Shyr, which would have suggested incorporating one or more interior shelves into the particular baseball

equipment bag disclosed by Mizuno so as to respond to the shelf limitations in independent claims 1, 11, 13, 17, 20, 24 and 25.

Hence, Mizuno, Gerch '748, Gerch '154, Plough and Shyr, applied in the manner proposed by the examiner, fail to establish a prima facie case of obviousness with respect to the subject matter recited in independent claims 1, 11, 13, 17, 20, 24 and 25.³ Accordingly, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of claims 1, 11, 13, 17, 20, 24 and 25, and dependent claims 2 through 10, 12, 15, 16, 18, 19, 22, 23 and 26 through 40, as being unpatentable over Mizuno in view of Shyr and any one of Gerch '748, Gerch '154 or Plough.

III. Matter for further consideration

Upon return of the application to the technology center, the examiner should consider whether it would have been obvious to one of ordinary skill in the art to add fence clips, admitted to be prior art by the appellant, to the locker bag disclosed by Shyr, and if so whether this prior art combination, considered in conjunction with the appellant's declaration evidence of non-obviousness, warrants a 35 U.S.C. § 103(a) rejection of any of the appealed claims.

³ This being so, we find it unnecessary to delve into the merits of the appellant's declaration evidence of non-obviousness.

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SUMMARY

Since at least one rejection of each of claims 1 through 40 is sustained, the overall decision of the examiner to reject these claims is affirmed.

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

AFFIRMED

NEAL E. ABRAMS)	
Administrative Patent Judge)	
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JOHN P. MCQUADE)	
Administrative Patent Judge)	INTERFERENCES
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JEFFREY V. NASE)	
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