

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.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 PAUL N. GEORGELOS
and
PAUL D. TATARKA

Appeal No. 2003-0501
Application No. 09/110,455

ON BRIEF

Before KIMLIN, WALTZ and MOORE, Administrative Patent Judges.
KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-18, 20 and 21. The examiner has withdrawn the final rejection of claims 10, 12, 20 and 21.¹ Accordingly, the claims remaining on

¹ See page 5 of Answer, fourth paragraph.

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appeal are claims 1-7, 9, 11 and 13-18.² Claim 1 is

illustrative:

1. A heat-shrinkable patch-bag combination suitable for use in packaging bone-in primal and subprimal cuts of meat comprising:

a) a bag formed of an oriented, multilayer heat shrinkable film from 2.25 to 3.5 mils (0.057 to 0.089 mm) thick having an inner heat sealable layer that defines an interior surface of said bag and an outer abuse layer that defines an exterior surface of said bag;

b) a patch formed of an oriented, monolayer heat shrinkable film from 2.5 to 3.5 mils (0.064 to 0.089 mm) thick having an exterior surface adhered to said bag exterior surface;

c) said bag film heat seal layer and said patch film both being formed of a polymer blend comprising

i) a first polymer which is a copolymer of ethylene and at least one C₃ - C₁₀ alpha-olefin, said first polymer having a density of 0.900 g/cc or less, a melting point of about 55°C to 90°C, a melt index not greater than 1.5 dg/min. and an \bar{M}_w/\bar{M}_n of less than 3,

ii) a second polymer which is a copolymer of ethylene and at least C₃ - C₁₀ alpha-olefin, said second polymer having a density of from about 0.900 g/cc to about 0.915 g/cc, a melting point of from 90°C to 110°C, a melt index of 2 dg/min. or less and an \bar{M}_w/\bar{M}_n of less than 3.5 and

iii) a third polymer which is a copolymer of ethylene and at least C₃ - C₁₀ alpha-olefin, said third polymer having a density of from about 0.900 g/cc to about 0.915 g/cc, a melting point of from 115°C to 130°C, a melt index of 2 dg/min. or less and an \bar{M}_w/\bar{M}_n of 2 to 12; and

² The examiner's statement of the rejection in the Answer does not include a rejection of claim 8. Accordingly, we consider that the final rejection of claim 8 has also been withdrawn by the examiner.

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d) said multilayer oriented bag film and said monolayer oriented patch film each having a shrink of at least 20% in at least one direction at 90° [sic, 90°C].

The examiner relies upon the following references as evidence of obviousness:

Walton et al. (Walton)	5,562,958	Oct. 08, 1996
Wilhoit et al. (Wilhoit)	5,928,740	Jul. 27, 1999

Appellants' claimed invention is directed to a heat-shrinkable patch-bag combination that is used in packaging bone-in meat. The bag comprises an inner heat sealable layer and an outer abuse layer, as well as a patch that is adhered to the exterior surface of the bag. Both the inner heat sealable layer and the patch are formed from the same polymer blend comprising first, second and third copolymers of ethylene and at least C₃-C₁₀ alpha-olefin.

Appealed claims 1-7, 9, 11 and 13-18 stand rejected under 35 U.S.C. § 103 as being unpatentable over Wilhoit in view of Walton. These claims also stand rejected under obviousness-type double patenting over Wilhoit in view of Walton.

Appellants submit at page 4 of the Brief that the following groups of claims stand or fall together: (I) claims 1-7, 9 and 13-15; (II) claims 8, 11 and 18; and (III) claims 16 and 17.

We have thoroughly reviewed each of appellants' arguments for patentability. However, we are of the opinion that the

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claimed subject matter would have been obvious to one of ordinary skill in the art within the meaning of § 103 (and under the judicially created doctrine of obviousness-type double patenting) in view of the applied prior art. Accordingly, we will sustain the examiner's rejections for essentially those reasons expressed in the Answer.

There is no dispute that Wilhoit, like appellants, discloses a heat-shrinkable bag formed of an oriented, multilayer heat shrinkable film that has an inner heat sealable layer comprising the same blend of first, second and third polymers presently claimed. We note appellants' acknowledgment that "[a]ppellants admit that the teachings of the Wilhoit, et al. '740 patent discloses the heat shrinkable bag component of the presently claimed invention" (page 6 of Brief, last sentence). As appreciated by the examiner, Wilhoit "fails to teach a heat-shrinkable patch adhered to the exterior surface of the bag" (page 4 of Answer, last paragraph). However, Walton, who also discloses a heat-shrinkable film for packaging meat, evidences that it was well known in the art to provide an extra layer of film, or patch, on the portions of the bag that are at risk for puncturing. In view of the collective teachings of Wilhoit and Walton, the examiner offers the following rationale:

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Since it is well known in the art to use patches on bags for use with meat cuts to prevent rupturing as taught by Walton et al., it would have been obvious to one of ordinary skill in the art to have provided additional material, or a patch, to the bag of Wilhoit et al., to give additional reinforcement. Furthermore, it would have been obvious to one having ordinary skill in the art to have used the bag material taught by Wilhoit et al. for making the patch. Using the identical material would have provided the same shrinkage properties of the bag as well as providing a thickened film in the critical areas where sharp bones are likely to puncture the bag [page 5 of Answer, second paragraph].

We find no error in the examiner's reasoning, particularly in light of the acknowledgment in appellants' specification that "[a] common solution to the problem is to improve the puncture and abrasion resistance of the bag film by adhering a patch to the outer surface of the heat-shrinkable bag" (page 1, last paragraph), and "[t]he shrink properties of the patch in each case are matched to the shrink properties of the bag to reduce the likelihood of delamination of the patch from the bag during heat shrinking" (page 2, first paragraph). Accordingly, appellants' admitted prior art provides factual support for the examiner's conclusion that it would have been obvious for one of ordinary skill in the art to use the identical material for both the bag and the patch. We are not persuaded by appellants' argument that the materials disclosed by Walton to serve as the patch are not the claimed blend of copolymers.

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We are also not persuaded that the specification data cited by appellants establishes unexpected results as evidence of nonobviousness which outweighs the evidence of obviousness represented by the prior art. Although the specification data demonstrates improved puncture resistance for patch materials within the scope of the appealed claims compared to other materials, we concur with the examiner that it is not evident that the specification results would be considered truly unexpected by one of ordinary skill in the art. In re Merck & Co., 800 F.2d 1091, 1099, 231 USPQ 375, 381 (Fed. Cir. 1986). As explained by the examiner, Wilhoit "does teach that the films made from the blends have improved heat sealing as well as puncture resistance properties, and that they are used in packaging meat and poultry," and, therefore, "[o]ne of ordinary skill in the art would thus not only think of using the blends of Wilhoit et al. in a heat seal layer but also in a layer which specifically functions as a puncture resistant layer" (page 6 of Answer, third paragraph). Just as unexpected results are evidence of nonobviousness, expected results are evidence of obviousness. In re Skoner, 517 F.2d 947, 950, 186 USPQ 80, 82 (CCPA 1975).

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In conclusion, based on the foregoing and the reasons well-stated by the examiner, the examiner's decision rejecting the appealed 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

EDWARD C. KIMLIN)	
Administrative Patent Judge)	
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THOMAS A. WALTZ)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
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JAMES T. MOORE)	
Administrative Patent Judge)	

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