

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 28

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte RICHARD F. BAILEY, SR., RONALD A. FISHER  
and STEVEN M. HOFFBERG

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Appeal No. 2004-0251  
Application No. 09/853,097

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HEARD: January 6, 2004

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Before COHEN, FRANKFORT, and PATE, Administrative Patent Judges.  
FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 68 through 76, 79, 82, 83, 127 through 135, 137, 138 and 143, which are all of the claims remaining in the application. Claims 1 through 67, 77, 78, 80, 81, 84 through 126, 136 and 139 through 142 have been canceled.

As noted on page 1 of the specification, appellants' invention relates to the field of ergonomic systems, having

Appeal No. 2004-0251  
Application No. 09/853,097

intelligent adaptive surfaces and temperature control, for providing comfort and cryotherapy. More particularly, the claims before us on appeal are directed to an article of footwear (claim 68) and a dynamically controlled footwear system (claim 127). As disclosed, inflatable bladders are provided in the footwear upper or sole, or in both the upper and the sole, and associated with an active control system that can adjust the fit of the shoe as well as dynamic aspects thereof, like compliance and damping, by selective operation of the inflatable bladders. As noted on pages 28-29 of the specification, both hydraulic and pneumatic bladders may be utilized and, at least the pneumatic bladders in the shoe sole may be dynamically controlled, during use, to balance energy recovery and stability. Appellants' invention also addresses a cooling system for footwear and provides an active heat transport mechanism employing liquids or phase change media. As indicated on page 37 of the specification, where both control over the shoe and control over temperature are exerted, a common control system is preferably employed, and it is desired that further structures be shared, e.g., the working gaseous fluid may be a refrigerant, such that the refrigerant provides both cooling and compression, thereby permitting a single compressor to be used for both functions. An embodiment of this

Appeal No. 2004-0251  
Application No. 09/853,097

particular type of footwear system is described on pages 161-163 of the specification and shown schematically in Figure 42 of the drawings.

It is also indicated in the specification (e.g., pages 21-22) that the present invention is an improvement over the existing air bladder systems known for footwear, in that it includes an array of bladder segments, each separately controlled with an automated adaptive control system located within the shoe. Further details of the invention are set forth on pages 23-37 of the specification, wherein it is noted that the control system includes a microprocessor powered by an electrical source such as an electrical generator activated by locomotion/pedal power and that the microprocessor with an integral analog data acquisition system is located within the structure of the shoe sole. A user interface/input is also provided whereby the user may override an adaptive algorithm in the microprocessor and instruct the footwear control system to anticipate a particular set of conditions so that a changed set of operational parameters may be stored in memory. Greater details with regard to the adaptive footwear embodiments of appellants' invention are set

Appeal No. 2004-0251  
Application No. 09/853,097

forth on pages 158-163 of the specification and shown in Figures 34A-42 of the drawings.

Independent claims 68 and 127 are representative of the subject matter on appeal and a copy of those claims, as reproduced from Appendix A of appellants' brief, is attached to this decision.

The references of record relied upon by the examiner in rejecting the appealed claims are:

Sasaki et al. (Sasaki)	5,230,249	Jul. 27, 1993
Chen '788	5,367,788	Nov. 29, 1994
Kwok	5,460,012	Oct. 24, 1995
Chen '682	5,495,682	Mar. 5, 1996
Gross et al. (Gross)	5,586,067	Dec. 17, 1996
Demon	5,813,142	Sep. 29, 1998
		(filed Feb. 9, 1996)

Claims 68 through 76, 79, 82, 83, 127 through 135, 137, 138 and 143 stand rejected under 35 U.S.C. § 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventors, at the time the application was filed, had possession of the now claimed invention.

Appeal No. 2004-0251  
Application No. 09/853,097

Claims 68 through 76, 79, 82, 83, 127 through 135, 137, 138 and 143 additionally stand rejected under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim that which appellants regard as their invention.

Claims 68, 70, 72 through 75, 79, 127 through 130, 134, 135, 137, 138 and 143 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Gross.

Claims 68 through 70, 72 through 75, 127 through 131, 134, 135, 137, 138 and 143 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Demon.

Claim 71 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over either Demon or Gross in view of Sasaki.

Claims 76, 131 and 132 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over either Demon or Gross.

Claims 82 and 83 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over either Demon or Gross in view of Kwok.

Appeal No. 2004-0251  
Application No. 09/853,097

Claim 133 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over either Demon or Gross in view of Chen '682.

Claims 82, 83 and 133 additionally stand rejected under 35 U.S.C. § 103(a) as being unpatentable over either Demon or Gross in view of Chen '788.

Rather than reiterate the examiner's full commentary with respect to the above-noted rejections and the conflicting viewpoints advanced by the examiner and appellants regarding those rejections, we make reference to the examiner's answer (Paper No. 21, mailed May 9, 2003) for the examiner's reasoning in support of the rejections, and to appellants' brief (Paper No. 20, filed April 7, 2003) and reply brief (Paper No. 22, filed June 12, 2003) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellants' specification, drawings and claims<sup>1</sup>, to the applied prior art references, and to the

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<sup>1</sup> During our review of the present application, we have noted that the specification is replete with instances where the reference characters and the drawing figures identified as being associated therewith are clearly incorrect. See, for example, page 71 where it is clear that a cryotherapy device (16) is not shown in Figures 1C and 1D as indicated; page 95 where reference character (151) is clearly not shown in Figure 15 as indicated in the specification and reference character (157) shown in Fig. 15 does not indicate the fluid/gas interface as stated in the specification; page 107 where it is clear that Fig. 6 does not show the structure described; pages 108, 109, 110, 111, 112, 119 and 120 where similar inconsistencies between drawing figures and the subject matter described as being shown therein exist; and page 162 where reference characters (872) and (880) do not appear in Fig. 42, but the elements associated therewith appear to be identified by reference characters (812) and (886), respectively, and where reference character (878) is identified in the specification as designating a "dynamic response control chamber," while in drawing Figure 42 reference character (878) is shown as designating a "Dynamic Response Control." In addition, we note that appellants have utilized the same reference character in several different drawing figures to indicate what would at first glance appear to be different structures, e.g., in Fig. 32B reference character (669) is used to identify a "Dynamic Response Control Bladder," whereas in Fig. 33A the same reference character (669) is used to identify a "Reservoir." Similarly, in Fig. 34A reference character (700) is used to identify the sole of a shoe, while in Fig. 35A that same reference character has a lead line directed to the shoe upper. As another issue, Figures 35E and 35F show many elements of appellants' inventive footwear, but such elements (e.g., 752, 754, 722, 723, 724, 725, 729, 755) are not shown to be interconnected to other elements of the invention so that it is clear how the elements work together to

(continued...)

respective positions set forth by appellants and the examiner. As a consequence of our review, we have made the determinations which follow.

#### WRITTEN DESCRIPTION

We turn now to the first of the examiner's rejections on appeal, i.e., that of claims 68 through 76, 79, 82, 83, 127 through 135, 137, 138 and 143 under 35 U.S.C. § 112, first

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<sup>1</sup>(...continued)  
define an operative device. Moreover, there are numerous portions of the specification where appellants describe aspects of their invention by using reference characters, but do not indicate in which of the forty-nine drawing figures such reference characters appear. Perhaps most troubling, we note that appellants have used different terminology in the specification, claims and drawings to apparently refer to the same element or elements of their invention, e.g., the "dynamic response chamber" of claim 68 on appeal is mentioned in the specification (e.g., pages 158 and 159), but appears to be shown in various figures of the drawings as "Dynamic Response Control Bladder" (669) in Fig. 32B; "Reservoir" (669) in Fig. 33A; "Pressure Equalized Damping Space" (813) in Fig. 39; "Damping Space" (828) in Fig. 40; and "Dynamic Response Control" (878) in Fig. 42. In addition, various portions of the specification refer to elements such as the "reactive energy chambers" (page 28); "dynamic energy recovery system" (page 35); and "reservoir bladder" (page 154), which appear to be functionally the same as the dynamic response chamber. The above-noted problems have made review of the very lengthy specification of the present application and of the claims on appeal much more difficult than it needed to be. During any further prosecution of this application before the examiner, both the examiner and appellants should thoroughly review the rambling specification to correct the above-noted problems and any others which may be discovered.

Appeal No. 2004-0251  
Application No. 09/853,097

paragraph, wherein the examiner has urged that the specification, as originally filed, fails to provide written descriptive support for the invention as now claimed. In considering this rejection, we note that as stated in In re Bowen, 492 F.2d 859, 181 USPQ 48, 52 (CCPA 1974), the description requirement of 35 U.S.C. § 112, first paragraph, "is that the invention claimed be described in the specification as filed." It is not necessary that the claimed subject matter be described identically, i.e., in haec verba, but the disclosure originally filed must convey to those skilled in the art that the applicant had invented the subject matter later claimed. See In re Wilder, 736 F.2d 1516, 1520, 222 USPQ 369, 372 (Fed. Cir. 1984). In addition, we note that our Court of review has also informed us that the drawings included in the application may aid in the interpretation of claim limitations, in that "drawings alone may provide a 'written description' of an invention as required by § 112." Vas-Cath Inc. v. Mahurkar, 935 F.2d 1555, 1556, 19 USPQ2d 1111, 1117 (Fed. Cir. 1991). Thus, in those instances where a visual representation can flesh out words, as in the present application, drawings can and should be used like the written specification to provide evidence relevant to claim

Appeal No. 2004-0251  
Application No. 09/853,097

interpretation and used to interpret what the inventor(s) intended by the claim terms.

Applying these precepts to the present application, we find that when the various aspects of the claim language pointed to by the examiner on pages 5 and 6 of the answer are read in light of the present application disclosure as such would be interpreted by the hypothetical person possessing an ordinary level of skill in the art, such claim language finds reasonably clear support in either the specification, drawings, or originally filed claims, when such are considered as a whole. In the first place, since almost all of the terms selected for criticism by the examiner appear in the originally filed claims, it is apparent to us that the examiner has lost sight of the fact that the originally filed claims are part of the original disclosure and constitute their own written description. Moreover, like appellants, we are of the view that general principles and specific embodiments set forth in the present application may both be relied upon to establish written descriptive support for claim terminology and that, in this application, the principles of operation of the dynamic response control system, pressure sensors, etc., are clearly and directly analogous for both seating surfaces like

that seen in Figures 32B, 33A and 33B, and the adaptive footwear embodiments of the invention seen in Figures 34A-42.

Thus, it is reasonably clear to us that one of ordinary skill in the art would have understood that the footwear embodiments schematically diagramed, for example, in Figures 39<sup>2</sup>, 40 and 42 would be implemented in footwear in essentially the same manner as shown in the seating surface embodiment of Figures 32B, 33A and 33B. In that regard, we note that the "Actuator Expansion Space" (814) in Fig. 39 would correspond to the Surface Contour Control Bladder (663) of Fig. 32B and be located adjacent a wearer's foot, while the "Pressure Equalized Damping Space" (813) would correspond to the Dynamic Response Control Bladder (669) of Fig. 32B and be located in the shoe sole as set forth in claim 70 on appeal. Further, "Micro Value [sic, Micro Valve]" (810) of Fig. 39 would correspond to valve (666) of Fig. 32B and control flow of a pressurized fluid between the above-noted bladder spaces (813, 814) depending on the level of damping

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<sup>2</sup> We note that appellants' use of the terminology "hydraulic compressor" in both the specification and drawings of the present application is inapt and should in each instance where it appears in either the specification or drawings be replaced with the term --- hydraulic pump ---.

Appeal No. 2004-0251  
Application No. 09/853,097

desired in the footwear. Similar correspondence would be understood for Fig. 40, with Bladder (824) corresponding to the Surface Contour Control Bladder (663) of Fig. 32B, Damping Space (828) corresponding to the Dynamic Response Control Bladder (669) of Fig. 32B, and Micro Valve (820) corresponding to valve (666) of Fig. 32B. As a further point, we again note, as we did in footnote 1, that reference character (878) seen in Figure 42 of the application is described in the specification (page 162) as being a "dynamic response control chamber" (emphasis added).

As for the examiner's concern for the recitation in claim 71 that the footwear comprises an upper having an "inelastic portion," we point to original claim 71 noting that this language appears therein and also to Figure 35B, noting that the footwear upper shown therein includes bladder structures, and that the specification, e.g., at page 22, describes the bladder structures of the invention as being formed of "a high tensile flexible strength polymer film" (e.g., MYLAR®) having a modulus per ASTM D882 of about 550 kpsi, making them stiff and relatively non-compliant, i.e., essentially inelastic. We also point to pages 23-24 of the specification, wherein it is noted that the footwear upper itself is typically formed of "a thin, relatively non-

Appeal No. 2004-0251  
Application No. 09/853,097

compliant shell, which form fits the foot" and which is typically leather, nylon or canvas, each of which we consider one of ordinary skill in the footwear art would view as being essentially inelastic.

With regard to a pressure sensor for sensing a pressure within a bladder of a shoe, we point to original claim 73 which depends from original claim 68 directed to an article of footwear, and again note that the original claims provide their own written description. Moreover, we point to Figures 33A and 42 wherein a sensor (682 or 886) clearly senses a pressure within a bladder, and in the footwear embodiment of Fig. 42 then sends a signal to a control (e.g., 881) which operates valve (877) in accordance with the sensed pressure signal using an adaptive control algorithm.

As for the "gait operated compressor," we point to original claim 79 and original claims 124, 125. We also point to the specification at page 25, lines 8-10, page 26, lines 18-22, page 28, lines 3-5 and page 162, lines 21-22. For a phase change fluid being used as the working fluid in a footwear embodiment as in claim 131 on appeal, we point to Figures 40 and 42 of the

Appeal No. 2004-0251  
Application No. 09/853,097

drawings and the description thereof on pages 161-162 of the specification. Figures 35F, 36 and 39 exemplify embodiments where at least a portion of the control "comprises a hydraulic fluid" as in claim 132 on appeal. Attention is also directed to pages 28-29 of the specification for a discussion of the use of hydraulic bladders in the footwear.

The last of the examiner's contentions with respect to the written description rejection relates to the "means for determining an activity type" set forth in claim 143 on appeal. According to the examiner (answer, page 6), there is no disclosure of any such structure. On pages 18-20 of the brief appellants point to structures in the application which are said to correspond to the "means" of claim 143. We point to original claims 68, 73-75, 78, 79 and original claims 87-92 and 99, noting that the adaptive "control" set forth in such claims and the gait operated compressor associated therewith constitute "means for determining an activity type." Appellants' specification, at pages 21-22, also describes an "automated control system within the shoe" which may operate in an open loop manner or include a sensing system to provide feedback. Pages 27 and 28 further describe the control as being "an adaptive control system"

Appeal No. 2004-0251  
Application No. 09/853,097

providing an intelligent and adaptive fit function making it possible to correct poor static or dynamic fit during use of the footwear. The control system includes a microprocessor with an integral analog data acquisition system, both volatile and nonvolatile memory, and an interface for controlling the various actuators. Note also the disclosure at page 30, lines 1-7, reference to the adaptive algorithm mentioned at page 160, line 5, and the disclosure at the bottom of page 162 of control (881) providing "active damping" which is clearly responsive to different types or levels of user activity.

In the present case, for the reasons expressed above, we are in agreement with appellants' position that the disclosure as originally filed would have reasonably conveyed to those skilled in the art that appellants had invented the subject matter presently claimed. Accordingly, the examiner's rejection of claims 68 through 76, 79, 82, 83, 127 through 135, 137, 138 and 143 under 35 U.S.C. § 112, first paragraph, for failing to comply with the written description requirement will not be sustained.

ENABLEMENT

We next consider the examiner's comments in the above-noted written description rejection where the examiner has inappropriately introduced enablement issues into the written description rejection. It is by now well settled that the test for compliance with the enablement requirement in the first paragraph of 35 U.S.C. § 112 is whether the disclosure, as filed, is sufficiently complete to enable one of ordinary skill in the art to make and use the claimed invention without undue experimentation. In re Moore, 439 F.2d 1232, 1235, 169 USPQ 236, 238 (CCPA 1971). See also In re Scarborough, 500 F.2d 560, 566, 182 USPQ 298, 302-03 (CCPA 1974). Moreover, in rejecting a claim for lack of enablement, it is also well settled that the examiner has the initial burden of advancing acceptable reasoning inconsistent with enablement in order to substantiate the rejection. See In re Strahilevitz, 668 F.2d 1229, 1232, 212 USPQ 561, 563 (CCPA 1982); In re Marzocchi, 439 F.2d 220, 223, 169 USPQ 367, 369 (CCPA 1971). Once this is done, the burden shifts to appellant to rebut this conclusion by presenting evidence to prove that the disclosure in the specification is enabling. See In re Doyle, 482 F.2d 1385, 1392, 179 USPQ 227,

Appeal No. 2004-0251  
Application No. 09/853,097

232 (CCPA 1973); In re Eynde, 480 F.2d 1364, 1370, 178 USPQ 470, 474 (CCPA 1973).

In the case before us, while we understand the examiner's frustration with the lengthy and confusing specification and paucity of clear details in the drawings of the present application, after reviewing the disclosure as set forth in the specification and claims, and the invention as seen in the drawings of the application, as a whole, we are of the opinion that the examiner has not met her burden of advancing acceptable reasoning inconsistent with enablement. Again, we note that both the general principles and specific embodiments set forth in the application may be relied upon to establish an understanding of, and support for, the claimed subject matter and, in this application, that the principles of operation of the dynamic response control system, pressure sensors, etc., are clearly and directly analogous for both the seating surfaces like that seen in Figures 32B, 33A, and the adaptive footwear embodiments of the present invention seen in Figures 34A-42.

We are troubled that the examiner has made no meaningful attempt to explain why one of ordinary skill in the art would

Appeal No. 2004-0251  
Application No. 09/853,097

have been unable to understand the claimed subject matter when the disclosure of the present application is considered as a whole. In that regard, we see no discussion by the examiner as to exactly why the footwear embodiments of the invention claimed would be beyond the capability of one of ordinary skill in the art (i.e., would require undue experimentation) given a full consideration of appellants' disclosure. It appears from the record that the examiner's position is based on the mistaken belief that the examiner need not consider the entirety of the specification when determining whether every feature of the claims on appeal is adequately described so as to enable one skilled in the art to make and use the invention.

After a careful consideration of appellants' disclosure, the prior art of record, and the arguments on both sides, it is our opinion that the level of skill in this art is sufficiently high that the ordinarily skilled artisan would have been able to make and use appellants' claimed invention as set forth in the claims on appeal, based on appellants' disclosure, without the exercise of undue experimentation.

Appeal No. 2004-0251  
Application No. 09/853,097

INDEFINITENESS

With respect to the examiner's rejection of claims 68 through 76, 79, 82, 83, 127 through 135, 137, 138 and 143 under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim that which appellants regard as their invention, we note that the purpose of the requirement stated in the second paragraph of 35 U.S.C. § 112 is to provide those who would endeavor, in future enterprise, to approach the area circumscribed by the claims of a patent, with the adequate notice demanded by due process of law, so that they may more readily and accurately determine the boundaries of protection involved and evaluate the possibility of infringement and dominance. In re Hammack, 427 F.2d 1378, 1382, 166 USPQ 204, 208 (CCPA 1970). In the present case, we are of the opinion that appellants have complied with the statutory mandates and defined the claimed subject matter with a reasonable degree of precision and particularity.

In that regard, we note that it is a well settled maxim of our Patent law that, in proceedings before the U.S. Patent and Trademark Office, claims must be given their broadest reasonable interpretation consistent with the specification, and that the

Appeal No. 2004-0251  
Application No. 09/853,097

claim language cannot be read in a vacuum, but instead must be read in light of the specification as it would be interpreted by one of ordinary skill in the pertinent art. See In re Sneed, 710 F.2d 1544, 1548, 218 USPQ 385, 388 (Fed. Cir. 1983). When we look to the disclosure of the present application, it is readily apparent to us that the terminology "dynamic response chamber" in claim 68 on appeal would have been understood by one of ordinary skill in the art as defining a chamber like that seen at (669) in Figure 32B and at (878) of Figure 42, and that such chambers would operate in the manner set forth on pages 154-158 and 161-163, respectively, of appellants' specification. Moreover, although not labeled as such, we also agree with appellants that one of ordinary skill would have understood from a full reading of appellants' specification and consideration of the drawing figures, that the "Pressure Equalized Damping Space" (813) of Figure 39 and "Damping Space" (828) of Figure 40 also constitute dynamic response chambers, although not expressly labeled as such, an oversight worthy of correction.

As for the recitation in claim 71 of "an upper having an inelastic portion," we have fully addressed this issue in our

Appeal No. 2004-0251  
Application No. 09/853,097

treatment of the examiner's rejection under 35 U.S.C. § 112, first paragraph, and see no need to repeat that discussion here.

With respect to the examiner's concerns about the language of appellants' claim 127, we again point to Figure 42 of the present application, as an example, and note that bladder segment (874) defined by walls (883) and (884) comprises "an enclosed space having a wall" with at least a portion of said wall (884) being located adjacent a portion of a wearer's foot so that the wall communicates forces with the wearer's foot. For a general understanding of "an enclosed space having a wall," we also note the bladders (663) and (669) of Figure 32B. Moreover, we understand that the Actuator Expansion Space (814) and Pressure Equalized Damping Space (813) of Figure 39 and the Bladder (824) and Damping Space (828) of Figure 40 would likewise be understood by one of ordinary skill in the art as each comprising an enclosed space having a wall, wherein a portion of the wall of the Actuator Expansion Space (814) and the Bladder (824) would be located in a shoe sole or shoe upper adjacent some portion of a wearer's foot so that the wall communicates forces with the wearer's foot.

Appeal No. 2004-0251  
Application No. 09/853,097

As for "a control system for separately controlling a static and dynamic characteristic of said enclosed space," we observe that such is broadly shown in both Figures 39 and 40 of the present application. Looking to Figure 40, for example, we note that this embodiment of appellants' invention includes Control (821) and Micro Valve (820) which operate as a "control system" for setting a base pressure in Bladder (824) and Damping Space (828) via Compressor (822), and then allowing closing of the valve to set such static characteristic. However, the control system also subsequently allows movement of the valve to another position so that Bladder (824) and Damping Space (828) can communicate with one another via the valve, with the valve then serving to selectively and proportionally provide a restricted flow path between the Bladder and Damping space dependent upon a desired level of damping of transient forces. A similar control system is shown in Figure 33A of the application drawings. Although the control system of Figure 33A is associated with a seating surface (650), we again point out that one skilled in the art would recognize that this same control system would work equally well in footwear, where the surface (650) would be that of the insole of a shoe and the Bladder (663) would be located in the sole of the shoe and subjected to transient forces based on a

Appeal No. 2004-0251  
Application No. 09/853,097

wearer's activity. Reservoir (669) of Figure 32A would operate as a dynamic response control bladder or Damping Space like that seen at (828) in Figure 40.

With respect to the recitation of "a sensor, for sensing a wearer activity" in claim 128 on appeal, we direct attention to the Pressure Sensor (886) of Figure 42 and the Pressure Sensor (682) of Figure 32A, noting that such sensors sense pressure variations in Bladder (874) and Bladder (663), respectively, resulting from user/wearer activity and, thus, each broadly senses differing levels of such user/wearer activity. As for the language of claims 129 and 135, we see nothing confusing, vague or indefinite about reciting the type of forces which will be encountered by the enclosed space wall of the footwear system of claim 127 under static loading (i.e., a tension level in the enclosed space wall) and under dynamic loading, wherein an effective damping of forces takes place in the low mechanical compliance wall of the enclosed space and the control system also acts to control the perceived compliance of the enclosed space by selectively controlling the fluid pressure therein.<sup>3</sup>

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<sup>3</sup> As to claim 136 mentioned on page 7 of the examiner's  
(continued...)

Appeal No. 2004-0251  
Application No. 09/853,097

Concerning the examiner's position that claims 72 and 74 in their entirety are functional, incomplete and indefinite, and the position that the phrase "adaptive to conditions of operation" in claim 75, and the language "a static fit of the footwear . . ." in claim 134 render those claims functional, incomplete and indefinite, we point the examiner to § 2173.05(g) of the MPEP wherein it is noted that there is nothing inherently wrong with defining some part of an invention in functional terms, and that functional language does not, in and of itself, render a claim improper. During examination, the examiner is charged with the responsibility of evaluating and considering functional limitations in the same manner as any other limitation of the claim, and should keep in mind that, as in the present case, a functional limitation is often associated with an element of the claimed subject matter to define a particular capability or purpose that is served by that element. In that vein, we note that claim 72 merely sets forth a capability of the bladder recited in parent claim 68, while claims 74 and 75 set forth capabilities of the control also set forth in parent claim 68.

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<sup>3</sup>(...continued)  
answer, we note that this claim was canceled in Paper No. 17, filed January 2, 2003.

Appeal No. 2004-0251  
Application No. 09/853,097

Claim 134 sets forth a functional limitation defining the manner in which the control system of parent claim 127 operates to control a static characteristic of the footwear defined therein in the event of increased wearer activity and, thus, provides a limitation concerning the capability/operation of the control system of claim 127. Note pages 24 and 25 of the specification for a description of such an intelligent adaptive conformation system for footwear.

Claim 130 depends from claim 127 and sets forth that "the control [sic, control system] adjusts a pressure of a working fluid."<sup>4</sup> In the context of the embodiments of appellants' invention directed to a dynamically controlled footwear system as broadly defined in parent claim 127, we do not see that the broad recitation of a capability of the control system of claim 127 and reference to "a working fluid" in claim 130 in any way renders this claim confusing, vague or indefinite. It merely places a limitation on the control system and mandates that a working

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<sup>4</sup> In claims 132, 133, 135 and 138 it should be noted that "said control" will be understood to be "said control system" as in parent claim 127, and these claims have been so construed for purposes of this appeal. Correction of this oversight should be made during any further prosecution of the application before the examiner.

Appeal No. 2004-0251  
Application No. 09/853,097

fluid be part of that system. As for the recitations of claim 131 of concern to the examiner, we again point the examiner to Figure 42 of the application drawings and the description thereof on page 162, as well as the disclosure at page 30, lines 18-24, and page 36, line 14 through page 37, line 8.

On page 8 of the answer, the examiner has asserted that claims 132 and 133 are "confusing, vague and indefinite," however, the examiner has not provided any explanation of how or why these claims fail to particularly point out and distinctly claim that which appellants regard as their invention. Accordingly, the examiner has not met her burden of establishing a *prima facie* case of indefiniteness. Moreover, we point to appellants' specification at pages 21-37 wherein the use of hydraulic fluid as part of the overall control system for footwear is broadly described and the control system is further indicated to be an active or automated control system within the shoe which may include a "compressor based on foot activity" (page 25, line 10), or include a microprocessor powered by an electrical generator activated by sole dorsi flexion, asymmetrically on flexion (page 26, lines 10-16). Note also the disclosure at page 27, line 25 through page 30, line 17; page 33,

Appeal No. 2004-0251  
Application No. 09/853,097

line 11 through page 34, line 15; and page 158, line 7 through page 163.

With respect to the "means for determining an activity type" in claim 143, we have discussed this aspect of appellants' invention in our treatment of the examiner's rejection of claim 143 under 35 U.S.C. § 112, first paragraph, above, and based on that discussion, find no reason to conclude that claim 143 is either vague or indefinite.

As for the examiner's further contention on page 8 of the answer that "[t]he above noted defects are merely representative, and are in no way to be construed to be a complete listing thereof," we find such an omnibus assertion of indefiniteness to be contrary to both law and Office policy. The examiner has the initial burden of presenting by a preponderance of the evidence why a person skilled in the art would be unable to understand appellants' claimed subject matter, i.e., why appellants have failed to meet the requirements of 35 U.S.C. § 112, second paragraph, that the claims presented particularly point out and distinctly claim that which they regard as their invention. A

Appeal No. 2004-0251  
Application No. 09/853,097

general assertion of indefiniteness as made by the examiner here is thus inappropriate.

Based on the foregoing, we are of the view that appellants have complied with the requirements of 35 U.S.C. § 112, second paragraph, and therefore we will not sustain the examiner's rejection of claims 68 through 76, 79, 82, 83, 127 through 135, 137, 138 and 143 on that basis.

#### ANTICIPATION

We next look to the examiner's rejection of claims 68, 70, 72 through 75, 79, 127 through 130, 134, 135, 137, 138 and 143 under 35 U.S.C. § 102(b) as being anticipated by Gross. In this instance, the examiner contends (answer, page 9) that Gross

shows a shoe sole (figure 2) having bladders/enclosed spaces (20a-20d), a "dynamic response chamber" (40 inasmuch as the Examiner understands the term), and a control means/system (16) as claimed inasmuch as the claims are understood.

The patent to Gross is clearly directed to an article of footwear (Fig. 2) including bladders (20a-20d) having a pressurized fluid therein, pressure detectors in operative engagement with the fluid in the bladders for monitoring changes

Appeal No. 2004-0251  
Application No. 09/853,097

in the pressure of the fluid, due, for example, to varying loads caused by physical activity of the wearer, and form control componentry disposed on the footwear and operatively connected to the measurement componentry thereof for automatically subjecting a shoe support surface adjacent the bladders, in response to the determined load distribution, to forces tending to modify a contour of the support surface. However, we find nothing in the Gross patent concerning a "dynamic response chamber," nor a control for controlling a dynamic flow of pressurized fluid "between said bladder and said dynamic response chamber caused by transient forces, wherein said flow of pressurized fluid is dependent on a state of said dynamic response chamber," as in appellants' claim 68 on appeal. The examiner's position that pressure source (40) in Gross corresponds to such a "dynamic response chamber" and that the control componentry of Gross controls a dynamic flow of fluid in the manner set forth in appellants' claim 68, appears to us to be entirely based on speculation and conjecture without even a modicum of support in the disclosure of the Gross patent.

At column 7, lines 35-44, it is noted that the form control componentry (18) of Gross includes a pressure control circuit

(38) connected at an output of pressure value selector subcircuit (36) and at an input of "pressure source or pressurization element 40 such as a pump" (emphasis added), and that the pressure source/pump (40) is connected to the pressure chamber (20) via a valve (42) which is responsive to pressure control (38). This portion of the specification in the Gross patent goes on to indicate that the valve (42) "is controlled to release pressure fluid from chamber 20 or to admit more fluid into that chamber from pressure source 40, in accordance with control signals from pressure control 38."

In our opinion, given the above-noted disclosure in Gross, it would be illogical for one of ordinary skill in the art to assume (as the examiner apparently has) that the control system of Gross and valve (42) would be operative to vent a dynamic flow of pressure fluid from the bladders or pressure chamber (20) back to the pressure source/pump (40), so that the pressure source/pump (40) would somehow act as a "dynamic response chamber" like that set forth in appellants' claim 68. It appears to us, based on the disclosure of Gross, that the release of pressure fluid from chamber (20) in response to increased loading caused by wearer activity would be by way of venting to some

other location (not shown) and that the pressure source/pump (40) would then be operated to provide a flow of pressurized fluid to chamber (20) to cause an increase in pressure in that chamber in response to a control command that such increased pressure is required. Note from Figures 32B and 33A, and Figures 39, 40 and 42 of the present application, that appellants' system includes both a pressure source (e.g., 680 in Figs. 32B, 33A; 829 in Fig. 39; 822 in Fig. 40; and 870 in Fig. 42) and a dynamic response control bladder/chamber (669 of Figs. 32B, 33A; 813 of Fig. 39; 828 of Fig. 40; and 878 of Fig. 42) operatively associated with the surface contour control bladder (663 of Figs. 32B, 33A; 814 of Fig. 39; 824 of Fig. 40; and 874 of Fig. 42) via the valve (666 of Figs. 32B, 33A; 810 of Fig. 39; 820 of Fig. 40; and 877 of Fig. 42), thereby facilitating the type of control described in appellants' specification (e.g., at page 154, line 21 - page 155, line 9 and at page 162, line 8, et seq.) and set forth in claim 68 on appeal.

It follows from the foregoing that we will not sustain the examiner's rejection of appellants' independent claim 68 under

Appeal No. 2004-0251  
Application No. 09/853,097

35 U.S.C. § 102(b) based on Gross. For the same reasons, we also will not sustain the examiner's rejection of claims 70, 72 through 75 and 79, which depend from claim 68.

However, we reach a different conclusion with regard to the examiner's rejection of claims 127 through 130, 134, 137, 138 and 143 under 35 U.S.C. § 102(b) as being anticipated by Gross. Claim 127 does not set forth a "dynamic response chamber" or the particular type of control associated therewith as required in independent claim 68. Instead, claim 127 is much more broadly directed to a dynamically controlled footwear system comprising "an enclosed space having a wall, said wall communicating forces with a wearer's foot; and a control system for separately controlling a static and dynamic characteristic of said enclosed space." From our review of the Gross patent, it is clear to us that Gross includes both an enclosed space having a wall (i.e., one of the chambers 20a-20d) communicating forces with a wearer's foot and a control system (16, 18) for separately controlling a static and dynamic characteristic of the enclosed space. In that regard, we note that the pressure source/pump (40) of Gross can be initially used to set a base pressure in each of the chambers or enclosed spaces (20a-20d) of the shoe and that, absent user

Appeal No. 2004-0251  
Application No. 09/853,097

activity, such base pressure or static characteristic will remain at the set level. However, in the event of wearer activity of a given level and time interval, the control system of Gross will dynamically alter the pressure levels in the chambers (20a-20d) in response to varying loads caused by such physical activity, by venting pressure fluid from a given chamber or chambers while adding pressurized fluid to others of the chambers, thus separately controlling a dynamic characteristic of the chambers or enclosed spaces (see, e.g., col. 8, lines 4-24, of Gross).

For the reasons set forth above, appellants' general argument (brief, pages 24-25) that Gross only executes a single control over a single parameter of the enclosed space, is simply not persuasive of any error on the examiner's part. Thus, we will sustain the examiner's rejection of independent claim 127 under 35 U.S.C. § 102(b) as being anticipated by Gross.

Finding no arguments from appellants regarding the separate patentability of dependent claims 128, 130, 134, 137, 138 and 143, we conclude that such claims will fall with claim 127, and thus we will also sustain the examiner's rejection of those claims under 35 U.S.C. § 102(b) as being anticipated by Gross.

Appeal No. 2004-0251  
Application No. 09/853,097

On page 29 of the brief, appellants have presented separate arguments as to dependent claims 129 and 135. More specifically, appellants contend that the examiner has completely ignored the limitations of claim 129, particularly the damping aspect thereof, and that none of the references applied by the examiner teaches that a low mechanical compliance wall like that set forth in claim 135 is a material factor. For the reasons already set forth above in our discussion of independent claim 127, we find appellants' argument regarding dependent claim 129 unpersuasive. One of ordinary skill in the art would have immediately recognized that initially setting the base pressure in a chamber/enclosed space (20a-20d) of Gross' footwear would provide a corresponding tension in the enclosed space wall, while dynamically controlling the pressure in one or more of the chambers/enclosed spaces in accordance with varying loads caused by some form of physical activity by the wearer would correspond to an effective damping of forces in the wall of the one or more enclosed spaces. As for claim 135, we must agree with appellants' that there is no disclosure in Gross that the walls of the chambers/enclosed spaces therein have "low mechanical compliance." Accordingly, the examiner's rejection of claim 129

Appeal No. 2004-0251  
Application No. 09/853,097

under 35 U.S.C. § 102(b) as being anticipated by Gross is sustained, while that of claim 135 is not.

The next of the examiner's rejections for our consideration is that of claims 68 through 70, 72 through 75, 127 through 131, 134, 135, 137, 138 and 143 under 35 U.S.C. § 102(e) as being anticipated by Demon. In this instance, the examiner contends (answer, page 9) that Demon shows a shoe (1) comprising bladders/enclosed spaces (Z1-Z5), a "dynamic response chamber" (col. 6., lines 27-32), and a control means/system (300).

Like the examiner, we make particular note of the footwear embodiment described in Demon at column 6, lines 27-32, but unshown in the drawings of the Demon patent, which embodiment uses water as the pressurizing fluid and wherein each of the fluid bladders (Z1-Z5, 205 seen in Fig. 1) would have its own separate reservoir connected to the vent line (206) associated therewith and a separate valve (210) for each bladder whose opening is selectively and proportionally controlled based on a calculated threshold pressure for that bladder to allow a portion of the water within the bladder to escape to the reservoir when such threshold pressure is exceeded, and thus reduce the impact of the

wearer's foot with the traveling surface during physical activity. Demon also recognizes that when the wearer's foot leaves the traveling surface and no pressure is applied by the wearer's foot on the bladders, the fluid bladders reconfigure themselves and draw fluid back into the bladders (see, e.g., col. 2, lines 17-37 and col. 4, line 60 through col. 5, line 64). A cushion adjustment control allows the wearer to adjust or scale the amount of cushioning provided by the footwear (col. 4, lines 41-52). As further noted in column 6, lines 11-14, depending on the parameters of fluid valves (210), fluid bladders (205), and the cushioning desired, it may be acceptable to leave fluid valves (210) in a partially opened state permanently, thereby forming a restricted flow path between a bladder and its associated reservoir, although it appears from the disclosure of Demon as a whole that an active control system is preferred.

Given the disclosure in the paragraph bridging columns 4 and 5 of Demon, it appears to us that appellants' assumption of equalized pressure between the bladders and their associated reservoirs, and assumption that the pressure of the reservoirs must remain constant, are incorrect, and that the system in Demon would, in fact, allow a selected level of static fit or initial

Appeal No. 2004-0251  
Application No. 09/853,097

pressurization of the bladders above that of the reservoirs, as well as subsequent (i.e., post initialization) active and dynamic control over the amount of cushioning provided by the footwear during physical activity. In the embodiment of Demon where water is the desired pressurizing medium, we perceive the reservoir connected to its associated bladder via a partially open valve (210) to constitute a "dynamic response chamber," and the control system therein to allow a dynamic flow of pressurized fluid between the bladder and the dynamic response chamber/reservoir caused by transient forces and dependent on a state of the dynamic response chamber/reservoir, e.g., the pressure exerted by the water in the reservoir (col. 5, lines 48-49).

As for appellants' assertion of the "Doctrine of Accidental Anticipation" (brief, pages 26-27), we find such to be inapposite in this case. The doctrine of "accidental anticipation" does not apply to an article or system as in Demon where the footwear and control system therefor were envisioned and consciously disclosed by the patentee and where the inventor/patentee must have understood and appreciated that such a footwear system was capable of producing the results sought to be accomplished therein, even though that inventor may not have recognized or

Appeal No. 2004-0251  
Application No. 09/853,097

appreciated all of the benefits or effects of such a footwear system. As was stated by the Supreme Court of the United States in General Elec. Co. v. Jewel Incandescent Lamp Co., 326 U.S. 242 (1945), it is not invention to perceive that the product which others had discovered had qualities they failed to detect. The "Doctrine of Accidental Anticipation" which precludes a finding of anticipation based on an invention which produces accidental or unintended results whose character and function are not recognized or appreciated until a later time, requires true fortuitousness, such as the situation where a chemical is accidentally and unwittingly produced as a side effect to no one's knowledge, as in Tilghman v. Proctor, 102 U.S. 707 (1881). In the present case, the mere fact that Demon may not have understood or appreciated the entirety of the qualities or effects of the water reservoir version of his footwear system will not permit issuance of another patent to someone who apparently later recognized those qualities/effects.

For the above reasons, we will sustain the examiner's rejection of independent claims 68 and 127 under 35 U.S.C. § 102(e) as being anticipated by Demon. Finding no arguments from appellants regarding the separate patentability of dependent

Appeal No. 2004-0251  
Application No. 09/853,097

claims 69, 72 through 75, 128, 130, 134, 137, 138 and 143, we conclude that such claims will fall with their respective parent claims 68 and 127, and thus we will also sustain the rejection of those claims under 35 U.S.C. § 102(e) as being anticipated by Demon.

On pages 28 and 29 of the brief, appellants have provided separate arguments addressing dependent claims 70, 129, 131 and 135. With regard to the examiner's rejection of those claims under 35 U.S.C. § 102(e) as being anticipated by Demon, we will sustain the examiner's rejection as to claim 129, but not with regard to claims 70, 131 and 135. Our reasons follow. As for claim 129, we again make reference to columns 4 and 5 of Demon's specification, wherein it is clear that the control system will initially permit each of the fluid bladders (Z1-Z5) to be set at a desired base pressure and thereby establish a static characteristic corresponding to a tension of the bladder/enclosed space wall and that, absent user activity, such base pressure or static characteristic will remain at the set level. However, in the event of wearer activity of a given level and time interval, the control system of Demon will also dynamically alter the pressure levels in the fluid bladder (Z1-Z5) in response to

Appeal No. 2004-0251  
Application No. 09/853,097

varying loads caused by such physical activity, by venting pressure fluid from a given bladder or bladders to their associated water reservoirs, thus separately controlling a dynamic characteristic corresponding to an effective damping of forces in the walls of the bladders (see, e.g., col. 5, lines 22-51).

Concerning appellants' contentions with respect to claims 70, 131 and 135, we find nothing in the examiner's answer which we can characterize as a response to these arguments. Moreover, our review of the Demon patent reveals no teaching of a reservoir/dynamic response chamber associated with a fluid bladder therein and where the reservoir/dynamic response chamber is "embedded within the sole," as set forth in claim 70 on appeal. It appears from Demon's disclosure at column 6, lines 27-32, that the water reservoirs for each of the bladders therein would be located on the side of the shoe, not embedded in the sole. As for the recitations in appellants' claims 131 and 135, we find nothing in Demon concerning a working fluid which "changes phases within a range of normal operating conditions" (claim 131), or with regard to the walls of the fluid

Appeal No. 2004-0251  
Application No. 09/853,097

bladders/enclosed spaces therein being of "low mechanical compliance" (claim 135).

#### OBVIOUSNESS

Claim 71 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over either Demon or Gross in view of Sasaki. In this instance, the examiner finds (answer, page 9) that Demon and Gross fail to disclose a bladder having pressurized fluid located in an upper of a shoe, but concludes that such an arrangement would have been obvious as taught by Sasaki to provide controlled support and fit to the top and sides of the foot as well as beneath the foot. Although we agree with the examiner that it would have been obvious to one of ordinary skill in the art at the time of appellants' invention to provide the footwear of either Gross or Demon with fluid pressure chambers like those in Sasaki, we must nonetheless agree with appellants (brief, page 28) that such a modification of the two primary references would not result in the particular structure and article of footwear set forth in claim 71 on appeal. Accordingly, the examiner's rejection of claim 71 will not be sustained. Claim 71 depends from claim 68, and for the same reasons as we refused to sustain the examiner's rejection of claim 68 based on Gross, we also

Appeal No. 2004-0251  
Application No. 09/853,097

refuse to sustain the rejection of dependent claim 71. In that regard, we note, contrary to the examiner's findings, that Gross does disclose a bladder having pressurized fluid located in an upper of a shoe (e.g., col. 2, lines 45-49 and col. 8, lines 61-64), but, as we noted in our evaluation of Gross, *supra*, this patent does not provide any disclosure or teaching of footwear as specifically set forth in appellants' claim 68, i.e., no dynamic response chamber and no control that functions in the manner required in claim 68, and the addition of the air bladders of Sasaki to the upper of Gross would not alter that finding.

As for the rejection of claim 71 based on the collective teachings of Demon and Sasaki, we do not see that adding the air bladders of Sasaki to the upper of Demon's footwear as set forth in column 6, lines 27-32 (i.e., the water reservoir embodiment of Demon) would result in footwear as specified in claim 71 on appeal, since it would appear that the systems of Demon and Sasaki, even if located in the same footwear, would nonetheless be separate systems (air and water). Accordingly, there would be no interaction of the type necessitated by appellants' claim 71 between the bladders located in the upper of the footwear of Demon as modified by the examiner and the dynamic response

Appeal No. 2004-0251  
Application No. 09/853,097

chambers or water reservoirs associated with the bladders located in the sole of Demon's footwear.

Concerning the examiner's rejection of claims 76, 131 and 132 under 35 U.S.C. § 103(a) as being unpatentable over either Demon or Gross, we will sustain the rejection as to claim 132 based on Demon, but not as to any of the other claims based on either Demon or Gross. Simply stated, the examiner has absolutely no basis whatsoever for the assertions set forth in the paragraph bridging pages 9 and 10 of the answer. The detailed requirements of claims 76, 131 and 132 on appeal involve much more than the mere selection of materials, and the examiner's reliance on In re Leshin, is wholly misplaced. However, since Demon discloses an embodiment where water is the working fluid, it follows that Demon actually teaches an arrangement where a hydraulic fluid, as required in claim 132 on appeal, is part of the control system. Thus, we sustain the examiner's rejection of claim 132 under 35 U.S.C. § 103(a) based on Demon, noting that anticipation or lack of novelty is the ultimate or epitome of obviousness. See, in this regard, In re Fracalossi, 681 F.2d 792, 794, 215 USPQ 569, 571 (CCPA 1982); In re Pearson, 494 F.2d 1399, 1402, 181 USPQ 641, 644 (CCPA 1974).

Appeal No. 2004-0251  
Application No. 09/853,097

Claims 82 and 83 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over either Demon or Gross in view of Kwok. In this rejection, the examiner has determined that it would have been obvious to one of ordinary skill in the art at the time of appellants' invention to provide the footwear of either Demon or Gross with a heat exchanger/cooler as taught by Kwok for the purpose of cooling the wearer's feet as suggested by Kwok (e.g., Figs. 6a-6c). Although we agree with the examiner that it would have been obvious to one of ordinary skill in the art to incorporate the heat exchanger/cooler as taught by Kwok in the footwear of either Gross or Demon so as to obtain the benefits taught in Kwok, we do not see that such a modification of Gross would result in the footwear defined in appellants' claims 82 and 83. Those claims depend from claim 68, and for the same reasons as we refused to sustain the examiner's rejection of claim 68 based on Gross, we also refuse to sustain the rejection of dependent claims 82 and 83 based on Gross in view of Kwok.

However, we reach a different conclusion with regard to the rejection of claims 82 and 83 based on Demon in view of Kwok. Contrary to appellants' assertion (brief, page 29), we find ample teachings in the collective disclosures of Demon and Kwok for the

Appeal No. 2004-0251  
Application No. 09/853,097

combination proposed by the examiner and see no reason why one of ordinary skill in the art would have any serious difficulty including a heat exchanger/cooling system like that in Kwok in the footwear of Demon. Appellants' general assertion that the art is "not enabling for the proposed combination of references," is unavailing, since appellants have provided no reasoned basis to support such a conclusion. Accordingly, the examiner's rejection of claims 82 and 83 under 35 U.S.C. § 103(a) as being unpatentable over Demon in view of Kwok is sustained.

With regard to the examiner's rejection of claim 133 under 35 U.S.C. § 103(a) as being unpatentable over either Demon or Gross in view of Chen '682, we will sustain this rejection. In the rejection, the examiner has concluded that it would have been obvious to one of ordinary skill in the art at the time of appellants' invention to provide the footwear of either Demon or Gross with a pedal energy means as taught by Chen '682 for the purpose of powering the various electrical devices in the footwear of either Demon or Gross. We agree. Again, appellants' general assertion that the art is "not enabling for the proposed combination of references," is unavailing, since appellants have provided no reasoned basis to support such a conclusion. With

Appeal No. 2004-0251  
Application No. 09/853,097

respect to this rejection, we also note that we have presumed skill on the part of the artisan practicing the art here involved, rather than the converse. See In re Sovish, 769 F.2d 738, 743, 226 USPQ 771, 774 (Fed. Cir. 1985).

The last of the examiner's rejections for our review is that of claims 82, 83 and 133 under 35 U.S.C. § 103(a) as being unpatentable over either Demon or Gross in view of Chen '788. Chen '788 teaches use of both a heat exchanger/cooling apparatus (30) and a pedal power means (20) in a shoe sole. The examiner has concluded that it would have been obvious to one of ordinary skill in the art at the time of appellants' invention to provide the footwear of either Demon or Gross with a cooling apparatus and pedal energy means as taught by Chen '788 for the purpose of cooling the wearer's feet and powering the various electrical devices in the footwear of either Demon or Gross. As we noted above, claims 82 and 83 depend from claim 68, and for the same reasons as we refused to sustain the examiner's rejection of claim 68 based on Gross, we also refuse to sustain the rejection of dependent claims 82 and 83 based on Gross in view of Chen '788. However, for essentially the same reasons as advanced above for sustaining the other § 103 rejections of claims 82 and

Appeal No. 2004-0251  
Application No. 09/853,097

83 where Demon is the primary reference and of claim 133 where either Demon or Gross is the primary reference, we will sustain the rejection of those claims here. Again, appellants' unsupported assertion that the art is "not enabling for the proposed combination of references," is unavailing, since appellants have provided no reasoned basis to support such a conclusion.

To summarize our decision, a) the examiner's rejection of claims 68 through 76, 79, 82, 83, 127 through 135, 137, 138 and 143 under 35 U.S.C. § 112, first paragraph, has not been sustained; b) the examiner's rejection of claims 68 through 76, 79, 82, 83, 127 through 135, 137, 138 and 143 under 35 U.S.C. § 112, second paragraph, has likewise not been sustained; c) the examiner's rejection of claims 68, 70, 72 through 75, 79, 127 through 130, 134, 135, 137, 138 and 143 under 35 U.S.C. § 102(b) as being anticipated by Gross, has been sustained as to claims 127 through 130, 134, 137, 138 and 143, but not with regard to claims 68, 70, 72 through 75, 79 and 135; d) the rejection of claims 68 through 70, 72 through 75, 127 through 131, 134, 135, 137, 138 and 143 under 35 U.S.C. § 102(e) as being anticipated by Demon, has been sustained with respect to claims 68, 69, 72

Appeal No. 2004-0251  
Application No. 09/853,097

through 75, 127 through 130, 134, 137, 138 and 143, but not with regard to claims 70, 131 and 135; e) the examiner's rejection of claim 71 under 35 U.S.C. § 103(a) based on Demon or Gross in view of Sasaki has not been sustained; f) the rejection of claims 76, 131 and 132 under 35 U.S.C. § 103(a) as being unpatentable over Demon or Gross has been sustained only with regard to claim 132 based on Demon and has otherwise not been sustained; g) the examiner's rejection of claims 82 and 83 under 35 U.S.C. § 103(a) based on Demon or Gross in view of Kwok has been sustained on the basis of Demon in view of Kwok, but not where the examiner has relied upon Gross as the primary reference; h) the examiner's rejection of claim 133 under 35 U.S.C. § 103(a) based on Demon or Gross in view of Chen '682 has been sustained on the basis of both combinations; and i) the rejection of claims 82, 83 and 133 under 35 U.S.C. § 103(a) based on Demon or Gross in view of Chen '788 has been sustained as to all claims on the basis of the combination of Demon and Chen '788, but only with regard to claim 133 relying on the combination of Gross in view of Chen '788.

In light of the foregoing, the decision of the examiner is affirmed-in part.

Appeal No. 2004-0251  
Application No. 09/853,097

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

AFFIRMED-IN-PART

IRWIN CHARLES COHEN	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
	)	BOARD OF PATENT
CHARLES E. FRANKFORT	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
	)	
	)	
	)	
WILLIAM F. PATE, III	)	
Administrative Patent Judge	)	

CEF/lbg

CLAIMS

68. An article of footwear, comprising a bladder having a pressurized fluid therein, a dynamic response chamber, and a control for controlling a dynamic flow of pressurized fluid between said bladder and said dynamic response chamber caused by transient forces, wherein said flow of pressurized fluid is dependent on a state of said dynamic response chamber.

127. A dynamically controlled footwear system, comprising:

(a) an enclosed space having a wall, said wall communicating forces with a wearer's foot; and

(b) a control system for separately controlling a static and dynamic characteristic of said enclosed space.

Appeal No. 2004-0251  
Application No. 09/853,097

MILDE, HOFFBERG & MACKLIN, LLP  
COUNSELORS IN INTELLECTUAL PROPERTY LAW  
10 BANK STREET, SUITE 460  
WHITE PLAINS, NY 10606