

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.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. 30

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROGERIO COSTA

Appeal No. 2004-1174
Application No. 09/470,793

ON BRIEF

Before KIMLIN, WARREN and KRATZ, Administrative Patent Judges.
KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1, 2, 5-11 and 14-17. Claim 1 is illustrative:

1. A disposable sanitary napkin comprising a top layer, a coating layer and an absorbing core intermediate the top layer and the coating layer, the sanitary napkin adapted to be worn in a user's panties and having a longitudinal dimension and a transverse dimension, wherein the absorbing core further comprises three or more longitudinally extending substantially independent absorbing panels, each absorbing panel being separated in the transverse dimension by channels, and wherein the top layer is sealed to the coating layer in the channels between adjacent absorbing panels, along a longitudinal line to form a joining means that allows the panels to pivot in relation to each other; and wherein there are either 3 or 5 absorbing panels.

Appeal No. 2004-1174
Application No. 09/470,793

In the rejection of the appealed claims, the examiner relies upon the following references:

Pierce et al. (Pierce)	4,490,147	Dec. 25, 1984
Abuto et al. (Abuto)	5,964,743	Oct. 12, 1999

Appellant's claimed invention is directed to a disposable sanitary napkin comprising an absorbing core intermediate top and coating layers. The absorbing core comprises three or more longitudinally extending absorbing panels that are substantially independent from each other, being separated by channels. The top layer is sealed to the coating layer in the channels between the absorbing panels. According to appellant,

[A] sanitary napkin having an odd number of panels, in this case either 3 or 5 absorbing panels allows a center panel to maintain good fit to a wearer's body in use, while allowing the adjacent panels to pivot and conform to the space between the wearer's legs in use" [page 2 of Brief, last sentence].

Appealed claim 1 stands rejected under 35 U.S.C. § 102(e) as being anticipated by Abuto. Claims 2, 5-11 and 14-17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Abuto in view of Pierce.

Appellant submits at page 3 of the Brief that the appealed claims, as separately rejected, stand or fall together. With respect to the § 103 rejection, appellant simply states at page 6 of the Brief that appellant respectfully disagrees with this

Appeal No. 2004-1174
Application No. 09/470,793

position, and that "[c]laims 2-11 and 13-17 are dependent from an allowable base claim and thus are considered to be patentable for the above reasons of record."¹ Accordingly, since appellant has not presented a substantive argument against the § 103 rejection, all the appealed claims stand or fall together with claim 1. Hence, we will limit our consideration to the examiner's § 102 rejection of claim 1.

We have thoroughly reviewed each of appellant's arguments for patentability. However, we are in complete agreement with the examiner that the claimed subject matter is unpatentable over the cited prior art. Accordingly, we will sustain the examiner's rejections for the reasons set forth in the Answer, and we add the following for emphasis only.

Appellant does not dispute the examiner's factual determination that Abuto discloses the claimed structure comprising an absorbing core intermediate top and coating layers wherein the core comprises three or more longitudinally extending substantially independent absorbing panels that are separated in the transverse dimension by channels, and further wherein the top and coating layers are sealed together in the channels between

¹ Only claims 1, 2, 5-11 and 14-17 are currently pending and on appeal.

Appeal No. 2004-1174
Application No. 09/470,793

the absorbing panels. Appellant also does not dispute that Abuto discloses and claims that the absorbent material is incorporated into personal care products, such as feminine hygiene products (see columns 8 and 9). It is appellant's contention that whereas appellant claims a disposable sanitary napkin, a specific article of manufacture, "the absorbent material disclosed in Abuto is not an absorbent article, it may be used to form an absorbent article" (page 4 of Brief, second paragraph). Appellant maintains that "the Figures 1-4 in Abuto are not products, but in fact are components that may be incorporated into a final absorbent article" (id.).

We are not persuaded by appellant's argument because we concur with the examiner that Abuto fairly describes a disposable sanitary napkin within the meaning of § 102. We are satisfied that claims 8 and 9 of Abuto, which define a feminine hygiene product as an article of manufacture, would be interpreted by one of ordinary skill in the art as describing a disposable sanitary napkin having the claimed structure. In our view, when the reference is considered as a whole, it is not necessary for a finding of description under § 102 that Abuto does not use the terminology recited by appellant, i.e., disposable sanitary napkin. As for appellant's argument that "there is no

Appeal No. 2004-1174
Application No. 09/470,793

recognition within the Abuto reference of the criticality of using either three or five absorbing panels in the final absorbing product" (page 5 of Brief, second paragraph), the examiner correctly points out that criticality is not relevant in view of Abuto's description of the claimed structure (see Figure 2 of Abuto).

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)	
)	
)	
)	
CHARLES F. WARREN)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
)	
)	
PETER F. KRATZ)	
Administrative Patent Judge)	

ECK:clm

Appeal No. 2004-1174
Application No. 09/470,793

Audley A. Ciamporcerro Jr.
One Johnson & Johnson Plaza
New Brunswick, NJ 08933-7003