

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JODY D. SUPRISE, GEORGIA L. ZEHNER
and PAULETTE M. ROSCH

Appeal No. 96-3313
Application 08/148,101¹

ON BRIEF

Before CALVERT, McQUADE and NASE, Administrative Patent Judges.

CALVERT, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1 to 5, 9 to 20 and 24 to 33. Claims 7, 8, 22 and 23, the other claims remaining in the application, were also finally

¹ Application for patent filed November 2, 1993.

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rejected, but the examiner states in the Advisory Action (Paper No. 15, October 11, 1995) that this rejection is overcome by the proposed amendment (Amendment After Final Action filed September 15, 1995).

The subject matter involved in this appeal defined by claim 1 thus:

1. A disposable absorbent article, said article defining a front portion, a rear portion and a crotch portion connecting the front and rear portions and having opposed longitudinal side edges, said article comprising:

an outer cover;

a liquid-pervious body-side liner;

an absorbent material located between said outer cover and said body-side liner;

a pair of opposed ears located on said front portion, said ears being adapted, in use, to overlap with said rear portion of said article to form overlapped portions;

attachment means for attaching said overlapped portions of said ears to said rear portion to form attachment points, said attachment points being located on a side of said article behind a transverse center plane of said article and within about 2.5 inches (6.4 centimeters) of said transverse center plane;

a waist elastic member attached to at least one of said front portion or said rear portion; and

leg elastic members attached to said crotch portion adjacent said opposed longitudinal side edges.

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The references applied by the examiner in the final rejection are:

Enloe 1990	4,895,568	Jan. 23,
Mesek 1990	4,938,754	Jul. 3,
Nomura et al. (Nomura) 1991	5,055,103	Oct. 8,
Roessler et al. (Roessler) 1993	5,176,671	Jan. 5,

The claims on appeal stand finally rejected as follows:

(1) Claims 1 to 5, 9, 11, 16 to 20, 24, 26 to 28 and 33, unpatentable over Roessler under 35 U.S.C. 102(e) (anticipation) or 103 (obviousness);

(2) Claims 10, 12, 13, 25, 29 and 30, unpatentable over Roessler in view of Nomura, under 35 U.S.C. 103;

(3) Claims 14 and 31, unpatentable over Roessler in view of Enloe, under 35 U.S.C. 103;

(4) Claims 15 and 32, unpatentable over Roessler in view of Mesek, under 35 U.S.C. 103.

Considering first the rejection of independent claims 1, 16 and 27 as anticipated by Roessler under 35 U.S.C. 102(e), we note that claims 1 and 27 require that the pair of opposed ears be located on the front portion, whereas in Roessler ears

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27 are located on the rear portion 16. This difference, although not raised by appellants, would seem to mitigate against anticipation of claims 1 and 27, since it is well settled that anticipation is only established when a single prior art reference discloses, expressly or under principles of inherency, each and every element of a claimed invention. RCA Corp. v. Applied Digital Data Systems, Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir.), cert. dismissed, 468 U.S. 1228 (1984).

Independent claims 1 and 16 recite that the attachment points are "located on a side of said article behind a transverse center plane of said article and within about 2.5 inches (6.4 centimeters) of said transverse center plane," while independent claim 27 recites that all the attachment points are "located behind a transverse center plane of said article and within about 2.5 inches (6.4 centimeters) of said transverse center plane." The examiner takes the position, in effect, that these limitations are inherently met by Roessler, because (answer, page 4):

When the article is worn by a "fat" baby the attachment points will be located closer to the transverse axis of the article, than when the

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article is worn by a "thin" baby (where the attachment points will be located farther away from the transverse axis of the article (see figures 4B and 6 [sic: 5?])).

Appellants, on the other hand, contend (brief, page 4):

the wide range of wearer size assumed by the Examiner is not accurate. If a given diaper is designed so that fastening occurs on the front of the diaper, fastening will occur on the front of the diaper across the range of wearer sizes for which that specific diaper is designed. It is not a "one size fits all" situation. Specific diapers are intended to be used on specifically sized wearers.

We do not agree with the examiner that the above-quoted limitations are anticipated by Roessler. In the Roessler diaper, the attachment means consist of hook portions 28 on the tabs 27 at the rear of the diaper, and a patch 21 of loop material across the front of the diaper; the attachment points will be where the hooks of portions 28 engage the loops of patch 21. Since patch 21 is at the front of the diaper, the attachment points will therefore be at that location also, i.e., ahead of the transverse center plane of the diaper. Clearly, the location of the attachment point will vary somewhat depending on whether the wearer (baby) has a larger or smaller waist than average. The only possible scenario in which the attachment points would be behind the transverse

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center plane of the Roessler diaper would be if the baby's waist were so large (the baby was so "fat") that the hook portions 28 of the tabs 27 could not reach past the transverse plane T. However, it would appear that in that case, given the location of loop patch 21, the hook portions 28 would not be able to reach the patch 21 and there would be no attachment points at all.

With regard to the question of obviousness, we find no teaching in Roessler which would have suggested to one of ordinary skill in the art that the disclosed Roessler diaper be modified in such a manner as to meet the above-discussed limitations. While we do note that at column 5, lines 22 to 29, Roessler states that "the garment may be constructed for encircling the waist in the reverse order," this language is not cited or discussed by either appellants or the examiner, and its meaning is somewhat obscure. We therefore conclude that claims 1, 16 and 27 would not have been obvious over Roessler.

Accordingly, the rejection under 35 U.S.C. 102(e) or 103 of claims 1, 16 and 27, and likewise of dependent claims 2 to 5, 9, 11, 17 to 20, 24, 26, 28 and 33, will not be sustained.

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As for rejections (2), (3) and (4), the Nomura, Enloe and Mesek secondary references applied therein do not overcome the deficiencies of Roessler noted above. The rejections of claims 10, 12 to 15, 25 and 29 to 32 will therefore not be sustained.

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Conclusion

The examiner's decision to reject claims 1 to 5, 9 to 20
and 24 to 33 is reversed.

REVERSED

IAN A. CALVERT)	
Administrative Patent Judge))	
)	
)	
JOHN P. McQUADE)	BOARD OF PATENT
Administrative Patent Judge))	APPEALS AND
)	INTERFERENCES
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)	
JEFFREY V. NASE)	
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