

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(2) is not binding precedent of the Board.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. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte SUSAN M. ALLISON-RODGERS

Appeal No. 97-3008
Application 08/211,222¹

ON BRIEF

Before COHEN, MEISTER and NASE, **Administrative Patent Judges**.

MEISTER, **Administrative Patent Judge**.

DECISION ON APPEAL

Susan M. Allison-Rogers (the appellant) appeals from the final rejection of claims 1, 2 and 4-8, the only claims remaining in the application.

We REVERSE.

¹Application for patent filed March 25, 1994. This application is a National stage application under 35 U.S.C. § 371 of PCT/AU92/00515, filed September 25, 1992.

Appeal No. 97-3008
Application 08/211,222

The appellant's invention pertains to a garment that is utilized in conjunction with separate sanitary napkins or disposable pads that are particularly adapted for babies and incontinent adults. Of particular importance is the provision of an elasticized dart extending at least partially along each side of the garment for the purpose of forming upstanding wet guards, thus minimizing leakage of body fluids. Independent claim 1 is further illustrative of the appealed subject matter and a copy thereof may be found in the appendix to the appellant's brief.

The references relied on by the examiner are:

Toussant et al. (Toussant)	4,699,622	Oct. 13, 1987
Holliday et al. (Holliday)	4,978,345	Dec. 18, 1990
Merica (Great Britain)	790,062	Feb. 05, 1958
Gubik et al. ² (Gubik)	1,070,779	Dec. 10, 1959
(Germany)		

Claims 1, 2 and 4-6 stand rejected under 35 U.S.C. § 103 as being unpatentable over Merica in view of Gubik.

Claim 7 is rejected under 35 U.S.C. § 103 as being unpatentable over Merica in view of Gubik and Toussant.

Claim 8 stands rejected under 35 U.S.C. § 103 as being unpatentable over Merica in view of Gubik, Toussant and Holliday.

²Translation attached.

Appeal No. 97-3008
Application 08/211,222

The examiner's rejections are explained on page 2 of the final rejection (Paper No. 8) and page 3 of the first Office action (Paper No. 5).³ The arguments of the appellant and examiner in support of their respective positions may be found on pages 3-14 of the brief, pages 1-6 of the reply brief and pages 4-6 of the answer.

Although the examiner's position, taken as a whole, is less than clear, it appears that the examiner considers the position set forth in the first Office action (Paper No. 5), with respect to claim 3, to now be applicable to independent claim 1. This position states that:

Applicant claims elasticized darts which Merica does not clearly teach, see page 2, lines 117-127. However, Gubik et al teaches elasticizing pleats or darts, see 4b, 4c, 4d, 4e, 4f in Figures 1-3 thereof and col. 3, lines 58-60. To employ elasticized pleats or darts as taught by Gubik et al on the Merica device would be [sic, have been] obvious to one of ordinary skill in the art in view of the recognition that such a feature would better position the absorbent [sic] and better seal the garment to the wearer, i.e., less leakage and the desirability of such in Merica. [Page 5.]

It also appears from page 5 of the answer that the examiner

³ In setting forth the grounds of rejection on page 3 of the answer the examiner has incorporated by reference both Paper Nos. 5 and 8. Such a procedure by the examiner is totally improper and inappropriate. **Manual of Patent Examining Procedure** (MPEP) § 1208 (6th ed., Rev. 3, Jul. 1997) expressly provides that incorporation by reference may be made only to a **single** other action.

considers (1) the appellant's specification to provide a "deviant definition, one which is purposely different from the [accepted] definition" of the term "dart"⁴ and (2) the arrangement of Merica (wherein flat pleats B or B' are stitched along their lengths) to fall within the definition of a "dart" as used by the appellant.

The appellant argues that nowhere in the specification is there a deviant definition of "dart." According to the appellant

it is evident from the figures, particularly figures 1 and 2, that each dart 15 comprises an elongate fold of material tapering to a point at each end (similar to the specimen provided with the Amendment After Final). Such a disclosure is completely consistent with the definitions provided with the first Amendment. For example, each of the three illustrations under the section entitled "Darts" in the Reader's Digest reference include illustrations of aligned darts extending above and below the waistlines of dresses. Obviously, when the two pieces of fabric are sewn together, the aligned darts are then identical to those of the present invention depicted in figures 1 and 2 as would be well appreciated by those of ordinary skill in the art. This is clearly shown on the previously provided Ladbury references as well, where such darts are perhaps more properly referred to as "double pointed darts".⁵ [Brief, pages 9 and 10.]

Having carefully considered the respective positions of the appellant and the examiner we find ourselves in agreement with

⁴ Webster's Third New International Dictionary of the English Language, Unabridged, G. & C. Merriam Co., Springfield, MA, 1981, defines "dart" as -- 3c: a stitched tapered fold used esp. in fitting garments to the curves of the body --.

⁵ The references to "Reader's Digest" and "Ladbury" refer to text material attached to the amendment filed on February 21, 1995 (Paper No. 7).

the appellant. We have carefully reviewed the specification but nowhere therein find a "deviant" definition of a "dart" as the examiner alleges. As set forth in the specification (see the paragraph bridging pages 1 and 2; page 5, lines 13-15) and claim 1, lines 10-12, the elasticized dart extends at least partially along the sides of the garment in order to (1) minimize lateral movement of the absorbent product and (2) form "upstanding wet guards" to minimize leakage of body fluids. The elasticized dart is further described in the specification as being

formed by fixing a stretched length of elastic material in a fold of the liquid-resistant or liquid-impervious material along one of the sides of the garment and stitching together the sides of the fold to **enclose** the stretched elastic material and thereby form the dart.
[Page 2; emphasis ours.]

See also specification, page 4, and Figures 1-3 of the drawing.

Accordingly, one of ordinary skill in this art, consistent with the appellant's specification, would construe the elasticized dart 15 to comprise a stitched fold formed by (1) folding material along an elongate fold line and (2) stitching the sides of the folded material together so as to enclose a length of the folded material in such a manner that the stitching tapers to a point coincident with the fold line at each end, thus forming an upstanding wet guard. Clearly there is nothing in

Appeal No. 97-3008
Application 08/211,222

either Merica or Gubik which would either teach or suggest such a dart. In Merica the pleats B, B' are simply stitched along a line generally parallel to the fold line along the entire length thereof in such a manner that the pleats lie flat. In Gubik a length of material is pleated and folded along a generally longitudinal fold line and a narrow length of elastic material (e.g., 4c and 4d) is placed over the pleated and folded material and stitched thereto along the entire length of the fold line.

With respect to claims 7 and 8, we have carefully reviewed the teachings of Toussant and Holliday but find nothing therein which would overcome the deficiencies of Merica and Gubik which we have noted above.

The examiner's rejections of claims 1, 2 and 4-8 are reversed.

REVERSED

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
JAMES M. MEISTER)	APPEALS AND
Administrative Patent Judge)	INTERFERENCES

Appeal No. 97-3008
Application 08/211,222

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JEFFREY V. NASE)
Administrative Patent Judge)

Larson & Taylor
727 23rd Street, South
Arlington, VA 22202