

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.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. 25

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte PAUL N. GEORGELOS  
and  
PAUL D. TATARKA

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

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ON BRIEF

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Before KIMLIN, WALTZ and MOORE, Administrative Patent Judges.

KIMLIN, Administrative Patent Judge.

REQUEST FOR REHEARING

Appellants request rehearing of our decision of March 31, 2003, wherein we affirmed the examiner's rejections of appealed claims 1-7, 9, 11 and 13-18 under 35 U.S.C. § 103 and over obviousness-type double patenting.

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We noted in our decision that the examiner's statement of the rejection in the Answer did not include claim 8. As a result, we considered the examiner's final rejection of claim 8 to have been withdrawn by the examiner (see footnote at page 2 of decision). However, as noted by appellants in their request, the examiner's allowance of claim 8 would be inconsistent with our decision sustaining the examiner's rejection of claim 11, which is narrower in scope than claim 8. Also, appellants note that they stated in their Brief that "[c]laims 8, 11 and 18 stand or fall together" (page 4 of Brief).

Due to this inconsistency we will not, as urged by appellants, reverse the examiner's rejection of claim 11. Rather, upon reconsideration of the Examiner's Answer, we find that the examiner's omission of claim 8 in the statement of the rejection was inadvertent error. In relevant part, the examiner states the following at page 2 of the Answer:

Claims 1-18, 20 and 21 were under a final rejection as set forth in the final Office Action dated March 23, 2001. Claim 19 was cancelled. Claims 10, 12, 20, 21 are allowed after further consideration of Appellant's [sic, Appellants'] appeal brief such that only claims 1-9, 11, 13-18 are now the subject of Appellant's [sic, Appellants'] appeal.

Clearly, it was the intent of the examiner to maintain the final rejection of claim 8 in the Answer. Also, since appellants'

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Brief was directed to the examiner's final rejection of claim 8, the examiner's omission of claim 8 in the statement of the rejection was harmless error. As a result, we hereby modify our decision to the extent that we affirm the examiner's final rejection of claims 1-9, 11 and 13-18 under 35 U.S.C. § 103 and under obviousness-type double patenting.

Regarding appellants' reliance on Samples 5-7 of the specification as evidence of nonobviousness, we remain of the opinion that appellants have not established on this record that the comparative data would have been truly unexpected by one of ordinary skill in the art in light of Wilhoit's teaching that films made from the claimed blends have improved heat sealing and puncture resistance properties. While appellants draw attention to specification Samples 5-7, comparative samples 6 and 7, which are directed to different patch materials, are not evidence of what one of ordinary skill in the art would have expected when performing the obvious step of fashioning a patch from the same blend as Wilhoit's film. As stated in our decision at page 5, inasmuch as appellants acknowledge in the specification that it was known in the art to match the shrink properties of the patch to the shrink properties of the bag, we agree with the examiner that it would have been obvious for one of ordinary skill in the

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art to provide the bag of Wilhoit with a patch from the same material used to form the bag.

Appellants also request that we address the discussion of Childress in appellants' Brief. First, as acknowledged by appellants, Childress does not form part of the examiner's rejection. Furthermore, Childress's disclosure of a patch that is either 100% homogeneous EAO or a blend of LLDPE and homogeneous EAO does not address the obviousness of utilizing a patch formed from the same material as the bag.

In conclusion, based on the foregoing, we have modified our decision to the extent that we affirm the examiner's final rejection of claims 1-9, 11, and 13-18 under 35 U.S.C. § 103 and obviousness-type double patenting. Appellants' request to reverse the examiner's rejection of the appealed claims is denied.

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

DENIED

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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