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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KENNETH DAVID PHILIPS

Appeal 2010-009994
Application 10/483,281
Technology Center 3700

Before STEFAN STAICOVICI, BRADFORD E. KILE, and
SCOTT A. DANIELS, *Administrative Patent Judges*.

STAICOVICI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Kenneth David Phillips (Appellant) appeals under 35 U.S.C. § 134 from the Examiner's decision finally rejecting claims 1-10, 15, 22-30, 32-37, 40, 43-51, and 53-61. Claims 31 and 52 have been canceled.¹ We have jurisdiction over this appeal under 35 U.S.C. § 6.

THE INVENTION

Appellant's invention relates to a protective headgear 20 that mimics characteristics of the human head including an outer layer 28 (mimics scalp 18), a shell 26 (mimics skull 16), and an inner layer 24 (mimics cerebrospinal fluid 14). Spec. 1:5-6 and 17-19; 11:15 and 19-21; 13:20; and 14:5; and fig. 4.

Claim 1 is representative of the claimed invention and reads as follows:

1. Protective headgear comprising:
 - a shell having an inwardly facing surface which in use faces the head of a user of the headgear and an outwardly facing surface which in use faces away from the head of a user;
 - an outer layer which overlies at least a portion of the outwardly facing surface of the shell; and
 - rupturing means for fixedly attaching the outer layer to a remainder of the headgear at one or more locations, wherein:
 - the rupturing means is configured so as to fail when a force greater than a selected threshold is received on an outer surface of the headgear which acts in an at

¹ Claims 11-14, 16-21, 38, 39, 41, and 42 are objected to by the Examiner as being dependent upon a rejected base claim and otherwise indicated as being allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claim. Claims 11-14, 16-21, 38, 39, 41, and 42 are not part of the instant appeal.

least part tangential direction to rotate the headgear and the head of the user, and

upon failure of the rupturing means at the one or more locations, the received force causes at least part of the outer layer receiving the force to move relative to the shell in a manner which is similar to the protective movement of the human scalp relative to the skull.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Keltner	US 3,999,220	Dec. 28, 1976
Lovell	US 4,307,471	Dec. 29, 1981
Zahn	US 4,987,609	Jan. 29, 1991
Park	US 5,890,232	Apr. 6, 1999
Popovich	US 5,956,777	Sep. 28, 1999
von Holst	WO 01/45526 A1	Jun. 28, 2001

The following rejections are before us for review:

The Examiner rejected claims 1-4, 7, 10, 15, 22, 23, 25-28, 33, 36, 37, 40, 43, 44, 46-49, and 54-61 under 35 U.S.C. § 102(b) as anticipated by von Holst.

The Examiner rejected claims 5, 6, 34, and 35 under 35 U.S.C. § 103(a) as unpatentable over von Holst and Keltner.

The Examiner rejected claims 8 and 9 under 35 U.S.C. § 103(a) as unpatentable over von Holst and Zahn.

The Examiner rejected claims 24 and 25 under 35 U.S.C. § 103(a) as unpatentable over von Holst and Popovich.

The Examiner rejected claims 29 and 50 under 35 U.S.C. § 103(a) as unpatentable over von Holst and Lovell.

The Examiner rejected claims 30, 32, 51, and 53 under 35 U.S.C. § 103(a) as unpatentable over von Holst and Park.

SUMMARY OF DECISION

We REVERSE.

ANALYSIS

Each of independent claims 1, 56, 58, and 60 requires, *inter alia*, a “rupturing means” that is “configured so as to fail when a force greater than a selected threshold is received.” Similarly, each of independent claims 33, 57, 59, and 61 requires, *inter alia*, an “outer layer” that is “configured so as to fail when a force greater than a selected threshold is received.” App. Br., Claims App’x.

Regarding independent claims 1, 56, 58, and 60, the Examiner found that connecting members 5 of von Holst constitutes the claimed “rupturing means.” Ans. 3; *see also* von Holst, Abstract. According to the Examiner, the deformation of connecting members 5 of von Holst “failed” because when deforming “they went from one physical condition to another.” Ans. 7; *see also* von Holst, figs. 1 and 2. With respect to independent claims 33, 57, 59, and 61, the Examiner found that “shell 3, outer layer 2, attaching means 5 [of von Holst] and the shifting of the outer layer relative to the shell [is] equivalent to failure of the outer layer as claimed.” Ans. 4; *see also* von Holst, Abstract. The Examiner further noted that both elastic and plastic deformation “involve material failure.” Ans. 8.

Appellant argues that the Examiner’s interpretation of the “term ‘fail’ is overly broad and improper.” App. Br. 12. Appellant “defines the term ‘rupture’ as ‘a breaking apart or the state of being broken apart’” and the

term “[d]eformation’ . . . as an ‘alteration of form or shape.’” App. Br. 13. Appellant further defines “the term ‘failure’ as a ‘fracturing or giving way under stress.’” App. Br. 14.

Claims are to be given their broadest reasonable interpretation consistent with the specification, reading claim language in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). Here, like Appellant, we find that an ordinary and customary meaning of the term “fail” is “to stop functioning normally” and of the term “failure” is “a fracturing or giving way² under stress.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th Ed. 1997); *see also* App. Br. 33. Appellant’s Specification states when,

. . . the shear stress induced in the outer layer 28 exceeds the sheer strength of the adhesive band 30 [“rupturing means”] or the yield and/or tear strength of the material of outer layer 28, then failure of the band 30 or yielding or tearing of the outer layer 28 (or possibly all three) will occur . . . [such that] outer layer 28 is free to move relative to the hard shell 2[6].

Spec. 16:34-17:5.

In this case, because connecting members 5 of von Holst merely deform, but do not fracture or collapse from the application of a force or stress, such that they stop functioning normally, connecting members 5 of von Holst do not constitute the claimed “rupturing means,” as recited in

² An ordinary and customary meaning of the phrase “give way” is “to collapse from the application of force or pressure.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th Ed. 1997).

each of independent claims 1, 56, 58, and 60. Similarly, merely because outer shell 2 of von Holst can be displaced (free to move) relative to inner shell 3, does not mean that outer shell 2 is configured to “fail,” that is, configured to fracture or give way under stress so as to stop functioning normally, as called for by each of independent claims 33, 57, 59, and 61.

Thus, for the foregoing reasons, we do not sustain the rejection of claims 1-4, 7, 10, 15, 22, 23, 25-28, 33, 36, 37, 40, 43, 44, 46-49, and 54-61 under 35 U.S.C. § 102(b) as anticipated by von Holst.

The addition of Keltner, Zahn, Popovich, Lovell, or Park does not remedy the deficiencies of von Holst as described above. Accordingly, the rejections under 35 U.S.C. § 103(a) of claims 5, 6, 34, and 35 as unpatentable over von Holst and Keltner; of claims 8 and 9 as unpatentable over von Holst and Zahn; of claims 24 and 25 as unpatentable over von Holst and Popovich; of claims 29 and 50 as unpatentable over von Holst and Lovell; and of claims 30, 32, 51, and 53 as unpatentable over von Holst and Park likewise cannot be sustained.

SUMMARY

The decision of the Examiner to reject claims 1-10, 15, 22-30, 32-37, 40, 43-51, and 53-61 is reversed.

REVERSED

Klh