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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte LAURENT DURANEL and EMMANUEL HUMBEECK

Appeal 2011-012392
Application 12/305252
Technology Center 1700

Before ANDREW H. METZ, CATHERINE Q. TIMM, and
GEORGE C. BEST, *Administrative Patent Judges*.

METZ, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 7 through 10, which are all the claims remaining in the application. We have jurisdiction under 35 U.S.C. § 6.

We AFFIRM.

THE INVENTION

Appellants disclose a method for preparing vials by two-stage injection-stretch-blow-molding. Appellants' method utilizes a randomly

formed copolymer of propylene and from 2 to 3.5 weight percent ethylene prepared using a Ziegler-Natta catalyst. The copolymer exhibits a melt index (MI₂) of from 1 to 3 dg/min. Spec. page 2, lines 13 through 25. Appellants disclose various prior art publications that describe conventional two-stage processes for preparing “articles” from ethylene/propylene copolymers by injection-stretch-blow-molding techniques but allege that the resins used in the cited prior art processes do not possess “an ideal balance of properties.” Spec. page 1, lines 4 through 24.

Claim 7 is believed to be adequately representative of the appealed subject matter and is reproduced below for a more facile understanding of the claimed invention.

7. A method for preparing vials comprising:

providing a Ziegler-Natta formed random copolymer of propylene and from 2 to 3.5 wt.% ethylene exhibiting a melt index (MI₂) of from 1 to 3 dg/min.; and

two-stage injection-stretch-blow-moulding the random copolymer to form a vial, wherein the two-stage injection-stretch-blow-molding includes forming a perform [sic, preform] at a preform injection temperature of at least 280° C and a mould filling rate over gate diameter ratio is less than or equal to 10 cc/s/mm.

The references of record which are being relied on by the Examiner as evidence of obviousness are:

| | | |
|------------------------------|--------------------|---------------|
| Dairanieh et al. (Dairanieh) | US 2004/0026827 A1 | Feb. 12, 2004 |
| Marczinke et al. (Marczinke) | US 6,733,717 B1 | May 11, 2004 |
| Batlaw et al. (Batlaw) | US 2005/0161866 A1 | Jul. 28, 2005 |
| Sideris | US 2006/0290034 A1 | Dec. 28, 2006 |
| Hausmann et al. (Hausmann) | US 2010/0166991 A1 | July 01, 2010 |
| Chen et al. (Chen) | WO 96/35571 | Nov. 14, 1996 |

THE REJECTIONS

Claims 7 through 10 stand rejected as being unpatentable under 35 U.S.C. § 103(a) as the claimed subject matter would have been obvious at the time Appellants made their invention from the disclosure of Marczinke when considered with Batlaw.

Claim 9 stands rejected as being unpatentable under 35 U.S.C. § 103(a) as the claimed subject matter would have been obvious at the time Appellants made their invention from the disclosure of Marczinke when considered with Batlaw and further in view of Chen.

Claim 10 stands rejected as being unpatentable under 35 U.S.C. § 103(a) as the claimed subject matter would have been obvious at the time Appellants made their invention from the disclosure of Marczinke when considered with Batlaw and further in view of Dairanieh.

Claims 7 through 9 stand provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 6 of Appellants' copending Application Number 12/305,309 considered with Sideris.

Claim 10 stands provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 6 of Appellants' copending Application Number 12/305,309 considered with Sideris in further view of Dairanieh.

OPINION

We have carefully considered the entire record before us, including all of the evidence and the arguments made by the Appellants and the Examiner in support of their respective positions. For reasons that follow, we find that

the Examiner has established a prima facie case of obviousness with respect to the claimed subject matter. We find the Examiner's position to be persuasive and supported by the evidence on which he has relied to reject the appealed claims. We do not find Appellants' arguments to be persuasive. We add the following remarks for emphasis.

Appellants argue that the Examiner erred by relying on Marczinke to reject the claims under 35 U.S.C. § 103(a) because Marczinke does not teach or suggest a process for injection-stretch-blow-molding using a Ziegler-Natta formed random copolymer. Specifically, while conceding that the passage cited by the Examiner from column 2 does teach polyolefins may be formed with Ziegler-Natta catalysts or metallocene catalysts, Appellants urge that "the entirety of *Marczinke* clearly teaches that the polymers utilized for ISBM are metallocene catalyst formed." Brief at page 3, lines 9 and 10.

We find Appellants' argument concerning the disclosure at column 2, lines 46 through 59 in Marczinke of ethylene/propylene copolymers prepared using Ziegler-Natta catalysts to be based on an unduly narrow and unreasonable reading of what Marczinke discloses. We find said disclosure to mean either type of catalyst may be used to prepare useful random copolymers for use in the injection-stretch-blow-molding method disclosed by Marczinke, as conceded by Appellants. Further, the basis for Appellants' determination from page 3 of their Brief that "the entirety of *Marczinke* teaches that the polymers utilized for ISBM are metallocene catalyst formed" is not clear from the record nor have Appellants directed us to what forms the basis for their opinion. Nevertheless, assuming, *arguendo*, all the examples in Marczinke were prepared using metallocene catalysts it would

not mandate a change to our finding of obviousness because exemplification is not required to support a conclusion of obviousness. Rather, we find that the hypothetical person of ordinary skill in the art would have understood from reading the entire Marczinke reference and particularly the cited and relied upon passage to mean that random propylene copolymers prepared using either Ziegler-Natta catalysts or metallocene catalysts would have been expected to be useful in the two-stage injection-stretch-blow-molding process of Marczinke.

Appellants also argue that because Marczinke teaches the preparation of bottles, and not vials, that it would not have suggested the claimed process to a person of ordinary skill in the art at the time Appellants made their invention. Additionally, Appellants argue that Marczinke describes melt flow rates not the claimed melt flow index (MI₂) and therefore could not have rendered the claimed subject matter obvious. Neither of these arguments is persuasive.

Appellants' Specification does not describe or define what constitutes a vial for purposes of their invention in terms of its dimensions or capacities. We agree with the Examiner's observation that because Marczinke discloses that containers or bottles prepared by their process are useful as packaging for the "medical sector," Marczinke's disclosure would have been understood to include vials—which are, by the broadest reasonable definition of that term, small bottles. More significantly, because Appellants use the terms "vials" (claim 7) and "bottles" (claim 10) interchangeably in their claims we find any difference in the two terms to be a difference without meaningful distinction.

To the Examiner's credit, he has provided the record with evidence which supports his position that the terms "melt flow index" (MI₂) and melt flow rate are synonymous in this art. *See, for example*, Hausmann discussed at page 12 of the Answer. Other than their bare argument, Appellants have offered no evidence in support of their position but rely merely on the fact that the terms are different. At column 10, lines 26 through 30, Marczinke describes the measurement of the "melt flow rate" in accordance with ISO 1133. Appellants describe the very same standard for measuring the "melt flow index" of the claimed copolymers at page 2, lines 21 and 22 of their Specification, including the same conditions for making the measurement, i.e., a 2.16 kg load at a temperature of 230° C. Accordingly, we find that the terms "melt flow rate" and "melt flow index" are the same based on the evidence before us, and we find Appellants' argument to the contrary to be unpersuasive.

Appellants' piecemeal consideration of what Batlaw, Chen, and Dairanieh teach or suggest individually rather than what they teach or suggest when considered in combination with the disclosure of Marczinke evidences a misunderstanding of the inquiry under 35 U.S.C. § 103(a). The question to be answered is not whether the references could be physically combined but rather the question is whether the subject claimed by Appellants would have been obvious to the hypothetical person of ordinary skill in the art at the time Appellants made their invention considering the teachings of the prior art as a whole. In answering this question and in reading the prior art, we must presume the hypothetical person is skilled in the relevant art. In this case, we are satisfied the prior art on which the Examiner has relied establishes at the time Appellants made their invention

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that the two-stage injection-stretch-blow-molding process as claimed in claim 7 would have been obvious for reasons expressed above.

In the Final Rejection of Appellants' claims, the Examiner set forth two provisional obviousness-type double-patenting rejections of all Appellants' claims. Appellants have not presented the issues of the two provisional obviousness-type double-patenting rejections for our review because Appellants did not identify those grounds of rejections as ones for which review was sought in their Brief. *See* 37 C.F.R. § 41.37 (c)(1)(vii). Accordingly, Appellants have waived any arguments concerning the correctness of the provisional obviousness-type double-patenting rejections as stated in the Final Rejection and repeated in the Examiner's Answer. *Hyatt v. Dudas*, 551 F.3d 1307, 1313-14 (Fed. Cir. 2008) (discussing predecessor to 37 C.F.R. § 41.37 (c)(1)(vii) (2010)). Accordingly, we shall summarily affirm each of the provisional obviousness double patenting rejections.

The Examiner's decision is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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