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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 2011-012393
Application 12/305,309
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 6 through 8 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 one-stage injection-stretch-blow-molding. Appellants' method utilizes a randomly

formed copolymer of propylene and ethylene and having an ethylene content of less than 3.5 weight percent with respect to the weight of the random copolymer preferably prepared using a Ziegler-Natta catalyst. Spec. page 2, lines 13 through 17. The copolymer has a melt index (MI₂) of from 1 to 3 dg/min. *Id.* Appellants disclose various prior art publications that describe conventional one-stage and 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 processes do not possess “an ideal balance of properties.” Spec. page 1, lines 5 through 27. Appellants disclose that their injection-stretch-blow-molding process can be carried out either in a two-stage process using two separate machines or in a single-stage process using a single machine. Spec. page 4, lines 8 through 11. Appellants’ appealed claims are limited to a one-stage process.

Claim 6 is believed to be adequately representative of the appealed subject matter and is reproduced below for a more facile understanding of the claimed invention.

6. A method for preparing vials by one-stage injection-stretch-blow-moulding comprising:

providing a Ziegler-Natta formed random copolymer of propylene and from 0.1 to 3.5 wt.% ethylene exhibiting a melt index (MI₂) of from 1 to 3 dg/min.; and

one-stage injection-stretch-blow-moulding the random copolymer to form a vial, wherein the one-stage injection-stretch-blow-molding includes forming a perform [sic, preform] at a preform injection temperature of at least 210° C and a mould filling rate over gate diameter ratio 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:

Marczinke et al. (Marczinke)	US 6,733,717 B1	May 11, 2004
Batlaw et al. (Batlaw)	US 2005/0161866 A1	July 28, 2005
Sideris	US 2006/0290034 A1	Dec. 28, 2006 ¹
Hausmann et al. (Hausmann)	US 2010/0166991 A1	July 01, 2010
Novak	EP 0 309 138	Mar. 29, 1989
Sideris	WO 2005/084920 A1	Sep. 15, 2005

THE REJECTIONS

Claims 6 through 8 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 Novak, Sideris, and Batlaw.

Claims 6 through 8 stand provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 7 of Appellants' copending Application Number 12/305,252 considered with Sideris.

OPINION

After carefully considering 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, 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 stated rationale as set forth in the rejections to be persuasive and supported by the evidence on which he has

¹ The Examiner characterizes this reference to be an "equivalent of WO 200584920," *see* Ans. page 5, and relies on the U.S. patent for his citations in the record.

relied. 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 the passage cited by the Examiner from column 2 of Marczinke does teach that 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 10 and 11.

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 in their Brief. 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 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 (MI_2), 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. Indeed, at page 5, lines 6 through 16 of Appellants' Specification Appellants describe their "vials" as "bottles." Thus, we find no meaningful difference between the two terms as defined by Appellants' own disclosure.

To the Examiner's credit, he has provided the record with evidence which supports his position that the terms "melt flow index" (MI_2) 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 discloses the “melt flow rate” as being measured in accordance with ISO 1133. Appellants disclose the very same standard for measuring the “melt flow index (MI₂)” of the claimed copolymers at page 2, lines 21 and 22 of their Specification, including the same conditions for making the measurement, that is, a load of 2.16 kg 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.

Except for pronouncing at page 4 of their Brief that the secondary references “fail to supply the missing Ziegler-Natta formed random copolymer having the claimed features and the formation of vials from such”, Appellants have not otherwise discussed what the references disclose let alone distinguished what the “secondary” references to Novak, Sideris and Batlaw teach or suggest or even addressed what the proposed combination of references, considered together as a whole, would have suggested to the hypothetical person of ordinary skill in this art at the time Appellants made their invention. Thus, except for their discussion of Marczinke, Appellants have failed to address the rejection before us.

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

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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 as 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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