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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* DAVID PATRICK MCCRANE<sup>1</sup>

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Appeal 2014-007846  
Application 12/842,362  
Technology Center 3700

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Before LEE L. STEPINA, AMANDA F. WIEKER, and  
ARTHUR M. PESLAK, *Administrative Patent Judges*.

WIEKER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

David Patrick McCrane (“Appellant”) appeals under 35 U.S.C. § 134(a) from the Examiner’s non-final rejection (dated September 12, 2013) of claims 1–22 and 24–29.<sup>2</sup> We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We REVERSE.

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<sup>1</sup> According to Appellant, the Real Party in Interest is McCrane, Inc., dba Harbinger. Appeal Br. 1.

<sup>2</sup> Claim 23 has been cancelled. *Id.*

### CLAIMED SUBJECT MATTER

The invention concerns “a glove for use by a person engaging in an activity such as weightlifting and other activities in which a person grips an object.” Spec. 1:3–5. Claims 1 and 22 are illustrative of the subject matter on appeal, and recite:

1. A glove for gripping an object, comprising a palm section, finger stalls extending from the palm section, and pads on the palm section and the finger stalls of *malleable, substantially incompressible material that conforms to the contours of the object and a hand wearing the glove and retains its shape without hardening* to provide a firm, solid grip between the hand and the object.

22. A glove for gripping an object, comprising a palm section, finger stalls extending from the palm section for receiving lower and middle sections of the fingers of a hand wearing the glove, and pads on the finger stalls, *the pads having rolled upper edges and being positioned to overlie upper parts of the lower and middle finger sections when the hand wearing the glove is grasping an object.*

Appeal Br. 18, 21 (Claims App. A) (emphasis added). Independent claims 13, 18, 28, and 29 contain similar language to that emphasized above in claim 1. *Id.* at 19–21 (Claims App. A).

### REJECTIONS

The claims stand rejected as follows:

- I. Claims 22 and 24–27 under 35 U.S.C. § 102(b) as anticipated by Winkler (US 745,088, iss. Nov. 24, 1903).
- II. Claims 1–6, 10, 12–15, 17–21, 28, and 29 under 35 U.S.C. § 103(a) as unpatentable over Rawlings (US 325,968, iss. Sept.

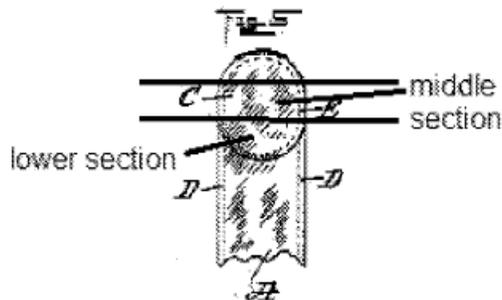
8, 1885) and Gabriel (US 2007/0105977 A1, pub. May 10, 2007).

- III. Claims 7–9 under 35 U.S.C. § 103(a) as unpatentable over Rawlings and Johnson (US 2005/0210562 A1, pub. Sept. 29, 2005).
- IV. Claims 1, 10, 11, 13, and 16 under 35 U.S.C. § 103(a) as unpatentable over Bower (US 6,832,391 B1, iss. Dec. 21, 2004) and Gabriel.

### ANALYSIS

#### Rejection I – Anticipation by Winkler

With respect to independent claim 22, the Examiner finds that Winkler discloses a glove comprising, *inter alia*, “pads (C) . . . positioned to overlie upper parts of the lower and middle finger sections,” as shown in the Examiner’s annotated figure, which is reproduced below:



Non-Final Act. 3–4. The annotated figure purports to show “the pad as it would correspond to the fingers.” *Id.* The Examiner also states that “the limitation of the pads positioned to overlie areas of the user’s hands is considered an intended use recitation.” *Id.* at 3; *see also* Ans. 5.

Appellant contends, *inter alia*, that Winkler discloses “reinforcing flaps [C] that extend along the upper portions of the front and back pieces of the finger sections [A] and across the tops of the finger sections . . . [which are not] positioned to overlie upper parts of the lower and middle finger sections.” Appeal Br. 15. Appellant also argues that the positioning of the pads is not “intended use, but rather a definite structural limitation regarding the positioning of the pads.” Reply Br. 13.

We are persuaded by Appellant’s argument. Winkler discloses a glove having front and back finger pieces (A) with integral extension flaps (C). Winkler, 1:34–40, Fig. 2. The front and back pieces (A) are fastened together, via interposed fourchettes (B), and the extension flaps (C) are folded back upon their respective finger pieces (A). *Id.* at 1:40–46, Figs. 4, 6. In this manner, the extension flaps provide reinforcement to the terminal fingertip portions of the glove. *Id.* at 1:9–10, 1:37–40, Fig. 1. Therefore, a preponderance of the evidence does not support the Examiner’s finding that Winkler’s flaps (C) are positioned to overlie upper parts of the lower and middle finger sections of a hand wearing the glove. Final Act. 3–4. To the contrary, flaps (C) are positioned to overlie the terminal, distal, *fingertip* parts of a hand wearing the glove. *See id.* at 1:9–10, 1:37–40, Fig. 1.

Further, we do not agree with the Examiner’s finding that the relevant claim language merely recites an intended use. Non-Final Act. 3. Claim 22 defines the relative positioning of the pads with respect to finger sections of a hand wearing the glove, and recites such positioning in a manner that dictates the structure of the claimed glove. Appeal Br. 21 (Claims App. A). This relative positioning is identified clearly in the Specification, which

explains that the “lower” and “middle” sections of the fingers of a hand wearing the glove are the first two finger sections proximal the palm (14, 16), and not the distal fingertip sections (17). Spec. 1:17–22, 4:27–32, Fig. 2, Fig. 3 (pads 49, 51 positioned to overlie the lower and middle sections). Contrary to the Examiner’s finding, the relevant language does not describe only how the glove is intended to be used.

Accordingly, we reverse the Examiner’s rejection of independent claim 22, and claims 24–27, which depend therefrom.

Rejection II – Obviousness over Rawlings and Gabriel

Claims 1–6, 10, 12–15, 17, 28, and 29

With respect to independent claims 1, 13, 28, and 29, the Examiner finds that Rawlings discloses a glove substantially as claimed, which includes pads of India rubber. Non-Final Act. 5 (claims 1, 13); *see also id.* at 8–10 (claims 28, 29). The Examiner finds that Rawlings does not disclose expressly that the rubber is malleable, incompressible, conformable, and shape retaining without hardening. *Id.* at 5. The Examiner relies on Gabriel as disclosing “a therapy agent for a user’s hands . . . comprising a putty-like material.” *Id.* The Examiner finds this material may be “PLACTICINE,” and relies on Appellant’s disclosure to show that PLACTICINE is a “malleable, substantially incompressible material that conforms to the contours of the object and a hand wearing the glove and retains its shape without hardening.” *Id.* (citing Spec. 4). The Examiner concludes it would have been obvious to a person of ordinary skill in the art “to have substituted the padding material of Rawlings (rubber) with the padding material of Gabriel (plastic), since it is within the general skill of a worker in the art to

select a known material on the basis of its suitability for the intended use as a matter of obvious design choice.” *Id.* at 5–6 (citing *In re Leshin*, 125 USPQ 416 (CCPA 1960)).

Appellant contends, *inter alia*, that Rawlings and Gabriel are non-analogous art because “Rawlings pertains to a glove for catching baseballs, and [Gabriel] is concerned with a putty into which skin conditioning agents, moisturizers, moisture barriers, and thermal therapy agents are incorporated, with the putty acting as a delivery system for delivering the incorporated agents to the surface of the skin.” Appeal Br. 6, 12–13; Reply Br. 1–2.

The Examiner counters that Rawlings and Gabriel are indeed analogous because Rawlings discloses “an exercise glove” and Gabriel discloses “an exercise putty that is wearable on the hands.” Ans. 2 (citing Rawlings, 1:20–23; Gabriel ¶ 94). According to the Examiner, “both references are used on body parts, and incorporating an exercise putty into an exercise glove would have the obvious and desirable benefit of simultaneously providing skin benefits to the wearer.” *Id.*

We are persuaded by Appellant’s argument. “In order to rely on a reference as a basis for rejection of the applicant’s invention, the reference must either be in the field of the applicant’s endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned.” *In re Oetiker*, 977 F.2d 1443, 1447 (Fed. Cir. 1992). Rawlings discloses a padded glove used by, e.g., baseball players, and is within Appellant’s field of endeavor. *See, e.g.*, Spec. 1:3–5 (describing the field as “pertain[ing] generally to gloves”); Rawlings, 1:20–23; Ans. 2. However, the Examiner has not established that Gabriel is in the same field or is

reasonably pertinent to the problem with which Appellant was concerned. Specifically, Gabriel discloses a “kneadable putty-like material” used to deliver treatment agents to the skin, e.g., skin conditioners, medicines, or antimicrobials, in a manner that does not leave the administrator’s hands feeling slippery or oily. Gabriel, Abstract, ¶¶ 6, 39. Although Gabriel uses the phrase “exercise putty (*id.* ¶ 94),” Gabriel does not suggest use of the putty with a glove (e.g., Appellant’s field) and does not suggest use of the putty to provide a continuous gripping surface (e.g., the problem with which Appellant was concerned). Accordingly, Gabriel’s disclosure of a putty used to deliver skin treatment materials is not analogous to Appellant’s invention.

The Examiner’s reasoning that incorporating Gabriel’s putty into Rawlings’ glove “would have the obvious and desirable benefit of simultaneously providing skin benefits to the wearer,” (Ans. 2) is unpersuasive because this does not address whether Gabriel is analogous art. This reasoning is flawed additionally because, if Gabriel’s material is substituted for Rawlings’s India rubber, as the Examiner proposes (Non-Final Act. 5–6), Gabriel’s material would not be in contact with the wearer’s skin, but would instead be placed between Rawlings’ layers of felt. *See* Rawlings, 1:40–43, Fig. 4. As such, the Examiner has not established that any skin benefit would be imparted to the wearer, through the layers of felt.

Accordingly, we reverse the Examiner’s rejection of independent claims 1, 13, 28, and 29, and claims 2–6, 10, 12, 14, 15, and 17, which depend therefrom.

Claims 18–21

With respect to independent claim 18, which requires “a cohesive, incompressible, non-oozing material that does not require a liquid-tight bladder for containment and is sufficiently malleable to conform to the contours of the object and a hand wearing the glove,” (Appeal Br. 20 (Claims App. A)), the Examiner finds that “Rawlings discloses the invention as claimed, as shown in the rejection of claims 1 and 13 above, and further including the pads are India rubber, which is considered to be a cohesive, non-oozing material that does not require a liquid-tight bladder for containment.” Non-Final Act. 7 (citing Rawlings, 1:42). The Examiner also finds that Appellant has not defined specially the claim language “sufficiently malleable,” and “[t]he India rubber disclosed by Rawlings will conform to the contours of the object and the hand to at least some degree, which is enough to read on the broad claim.” Ans. 4.

Appellant contends that Rawlings’s India rubber is not malleable, incompressible, and conforming, as claimed, but rather is disclosed as being rigid. Appeal Br. 11. Appellant also contends that India rubber compresses and stretches and is not sufficiently malleable to conform to the contours of an object or a hand. *Id.* at 11–12.

It is unclear whether the Examiner relies on Rawlings alone, or the combination of Rawlings and Gabriel, in concluding that claim 18 is unpatentable. In either case, however, we do not affirm the Examiner’s rejection of claim 18.

The Examiner states that “Rawlings discloses the invention as claimed, as shown in the rejection of claims 1 and 13 above,” and relies on

Rawlings's India rubber to satisfy claim 18. Non-Final Act 7. To the extent the Examiner relies solely on Rawlings, without Gabriel, a preponderance of the evidence does not support the Examiner's implicit findings that Rawlings's India rubber is "incompressible" and "sufficiently malleable to conform to the contours of the object and a hand." Indeed, in rejecting claims 1 and 13, the Examiner found the opposite, stating that "Rawlings does not expressly disclose the India rubber possesses the properties of malleability, incompressibility, [and] conformability." *Id.* at 5. Although the Examiner finds, in the Answer, that India rubber is "sufficiently malleable," the Examiner provides no persuasive evidence or reasoning to support this finding. Rawlings, which discloses that India rubber possesses "a certain amount of rigidity" that is lacking in felt and is "to a degree inflexible," does not support the Examiner's findings. Rawlings, 1:40–43, 2:64–66.

Alternatively, to the extent the Examiner's incorporation of the rejection of claims 1 and 13 indicates the Examiner's reliance on Rawlings and Gabriel together to render claim 18 obvious, we do not sustain the rejection on that basis. With respect to claims 1 and 13, the Examiner *substituted* a PLACTICINE material as taught by Gabriel for the India rubber disclosed by Rawlings. Non-Final Act 5–6 (concluding it would have been obvious "to have substituted the padding material of Rawlings (rubber) with the padding material of Gabriel (plastic)"). Accordingly, the Examiner's reliance on the India rubber disclosed by Rawlings is misplaced because, in the combination proposed by the Examiner, that material has been replaced with PLACTICINE. *Id.*

Accordingly, we reverse the Examiner's rejection of independent claim 18, and claims 19–21, which depend therefrom.

Rejection III – Obviousness over Rawlings and Johnson

The Examiner rejects claims 7–9, which depend from claim 1, as unpatentable over Rawlings and Johnson. Non-Final Act. 10–11. The Examiner relies on Johnson's disclosure of a glove having a partially closed pocket with a curled upper edge. *Id.* at 10. The Examiner's reliance on Johnson does not cure the defects in the rejection of independent claim 1, as discussed above, because Johnson does not disclose a material that is malleable, incompressible, conformable, and shape retaining without hardening.

Accordingly, we reverse the Examiner's rejection of dependent claims 7–9 for the same reasons discussed above with respect to independent claim 1, from which claims 7–9 depend.

Rejection IV – Obviousness over Bower and Gabriel

With respect to independent claims 1 and 13, the Examiner finds that Bower discloses a glove substantially as claimed, which includes pads of closed cell foam. Non-Final Act. 11. The Examiner finds that Bower does not disclose expressly that the foam is malleable, incompressible, conformable, and shape retaining without hardening. *Id.* at 12. The Examiner relies on Gabriel, for the same teaching discussed above with respect to Rejection II. *Id.* The Examiner concludes it would have been obvious to a person of ordinary skill in the art “to have substituted the padding material of Bower (foam) with the padding material of Gabriel (plastic), since it is within the general skill of a worker in the art to select a

known material on the basis of its suitability for the intended use as a matter of obvious design choice.” *Id.* (citing *In re Leshin*, 125 USPQ 416 (CCPA 1960)).

Appellant presents similar arguments as discussed above with respect to Rejection II. Appeal Br. 13.

For the same reasons discussed above with respect to Rejection II, we reverse the Examiner’s rejection of independent claims 1 and 13 because the Examiner has not established that Gabriel is analogous art. We also reverse the rejections of claims 10 and 11, which depend from claim 1, and claim 16, which depends from claim 13.

#### DECISION

The Examiner’s rejections of claims 1–22 and 24–29 are REVERSED.

REVERSED