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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte HENNING KANZOW, MARKO SCHLEICHER, REINHARD TEVES, and CLAUS-LÜDER MAHNKEN

Appeal 2014-009204
Application 12/659,281
Technology Center 3600

Before ANNETTE R. REIMERS, LISA M. GUIJT, and ERIC C. JESCHKE, *Administrative Patent Judges*.

JESCHKE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Henning Kanzow et al. ("Appellants") seek review under 35 U.S.C. § 134(a) of the Examiner's decision, as set forth in the Non-Final Office Action dated November 6, 2013 ("Non-Final Act."), rejecting claims 1–8, 12–16, 18–38, 42–46, and 48–61.[1] We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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[1] Appellants identify ContiTech Antriebssysteme GmbH as the real party in interest. Appeal Br. 2. Appellants state to also "remain a party of interest because of the German law (Gesetz über Arbeitnehmererfindungen) covering employed inventors." *Id.*

BACKGROUND

The disclosed subject matter "relates to a flexurally elastic drive belt (power transmission belt) . . . having a textile overlay on the working side thereof that is susceptible to wear." Spec. 1, ll. 11–14. Claims 1, 31, and 61 are independent. Claim 1 is reproduced below:

> l. A flexurally elastic drive belt comprising:
>
> a belt body defining a longitudinal direction and having a work side subject to wear during operational use of said drive belt;
>
> a textile overlay disposed on said work side of said drive belt;
>
> in a state in advance of fabrication and in advance of vulcanization, said textile overlay having an elongation at tear in said longitudinal direction of at least 30% and an elongation at tear in a transverse direction of at least 100%;
>
> said textile overlay being made of a textile material which includes staple fibers in a proportion in terms of quantity of at least 30% by weight;
>
> said textile overlay comprises a sheet-like structure in the form of a woven fabric; and,
>
> wherein said staple fibers comprise cotton, cellulose, or cotton and cellulose.

REJECTIONS

1. Claims 1–8, 24–26, 28, 31–38, 54–56, 58, and 61 stand rejected under 35 U.S.C. § 102(b) as anticipated by Wetzel (US 4,169,393, issued Oct. 2, 1979).[2]

2. Claims 13, 14, 23, 29, 43, 44, 53, and 59 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Wetzel and Beckh (US 5,429,555, issued July 4, 1995).

3. Claims 15, 16, 19, 45, 46, and 49 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Wetzel, Beckh, and Lofgren ’264 (US 6,461,264 B1, issued Oct. 8, 2002).

4. Claims 12, 18, 42, and 48 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Wetzel, Beckh, and Patterson (US 5,112,282, issued May 12, 1992).

5. Claims 20–22 and 50–52 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Wetzel, Beckh, and Knutson (US 6,572,505 B1, issued June 3, 2003).

6. Claims 27 and 57 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Wetzel, Beckh, and Billups (US 6,409,621 B1, issued June 25, 2002).

7. Claims 30 and 60 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Wetzel, Beckh, and Lofgren ’004 (US 6,770,004 B1, issued Aug. 3, 2004).

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[2] The Examiner rejected claims 1–8, 24–26, 28, 31–38, 54–56, 58, and 61, in the alternative, under 35 U.S.C. § 103(a) as unpatentable over Wetzel and Beckh (US 5,429,555, issued July 4, 1995). Non-Final Act. 3–11. In the Answer, the Examiner withdraws this alternative rejection. Ans. 2.

DISCUSSION

Rejection 1

Appellants argue the patentability of the three independent claims—claims 1, 31, and 61—based on the same arguments and do not provide separate arguments for any dependent claims. Appeal Br. 16–21. We select claim 1 as representative, with the remaining claims standing or falling with claim 1. *See* 37 C.F.R. § 41.37 (c)(1)(iv) (2013).

Claim 1 recites, *inter alia*, "said textile overlay comprises a sheet-like structure in the form of a *woven fabric*." Appeal Br. 25 (Claims App.) (emphasis added). In the rejection, the Examiner found that Wetzel "teaches said textile overlay (33) comprises a sheet-like structure in the form of a woven fabric (Col. 7 lines 28–35)." Non-Final Act. 3.

Appellants argue that "[a] woven fabric is a textile formed by weaving a warp thread and a weft thread, which are perpendicular to each other and preferably run in the transverse and the longitudinal direction of the belt, respectively." Appeal Br. 16 (citing Spec. 2, ll. 20–29). According to Appellants, although Wetzel "suggest[s] an endless power transmission belt that is covered with triaxial fabric" and "suggest[s] that three sets of yarns are interwoven, the resulting triaxial fabric is not a woven fabric as known to the skilled artisan, having a warp thread and a weft thread running in perpendicular directions." *Id.* at 16, 17; *see also* Reply Br. 4 ("[T]he skilled artisan can readily ascertain that the triaxial fabrics of [Wetzel] are not woven fabrics.").

The Examiner responds that claim 1 of Wetzel "states that the yarns are 'interwoven' which reasonably corresponds to the claim term 'woven.'" Ans. 7.

In reply, Appellants argue that the Specification "teaches that the claimed textile material may be provided in the form of a knitted or woven fabric." Reply Br. 3 (citing Spec. 5, ll. 2–4). According to Appellants, "[k]nitted and woven fabrics are terms of art and the recitation of a woven fabric readily allows the skilled artisan to ascertain the scope of the independent claims." *Id.* Appellants contend that Wetzel is "aware of the meaning of the terms knitted fabric and woven fabric" in that Wetzel "use[s] the term knitted fabric at col. 1, lines 22 to 23, to describe a fabric of the prior art" and, "[t]o distinguish the structurally distinct triaxial fabrics of [Wetzel], the term interwoven is used." *Id.* Appellants argue that "interwoven does not reasonably correspond to the claim recitation woven" because Wetzel "use[s] interwoven to describe the angled arrangement of three sets of parallel courses of yarn" whereas "[a] woven fabric, by contrast, comprises two sets of threads being arranged as a warp thread and a weft thread, which are perpendicular to each other." *Id.*

During examination, claims are given their broadest reasonable interpretation consistent with the specification, reading the claim language in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Sneed*, 710 F.2d 1544, 1548 (Fed. Cir. 1983). Appellants do not identify any language in claim 1 that limits the broadest reasonable construction of "woven fabric" to the configuration identified—i.e., two sets of threads perpendicular to each other—rather than the three-thread-set (i.e., "triaxial") configurations disclosed in Wetzel (*see, e.g.*, Wetzel, Figs. 2, 8).

Further, as to the citation to page 2, lines 20 to 29 of the Specification (*see* Appeal Br. 16), Appellants have not shown that, with that passage, the Specification limits "woven fabric" as asserted. Although the identified

passage uses the term "woven fabric," Appellants have not, for example, shown that the passage (1) provides a "special definition" of "woven fabric" or (2) intentionally disavows or disclaims certain scope (such as, e.g., triaxial configurations). *See, e.g.*, *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc) (discussing the use of specifications in claim construction).

As to the assertions that one of ordinary skill in the art would not consider "woven fabric" to include a triaxial configuration (*see, e.g.*, Appeal Br. 16, 17; Reply Br. 4), Appellants do not provide evidence—but rather only attorney argument—for these assertions. *See In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974) ("Attorney's argument in a brief cannot take the place of evidence."). Further, Appellants have not shown a distinction, supported by evidence, between "interwoven"—used to describe the yarns in claim 1 of Wetzel (*see* Ans. 7)—and "woven" as recited in Appellants' claim 1.

As to the alleged distinction between "knitted" and "woven" fabrics (Reply Br. 3–4), Appellants have not shown that distinction (even if assumed to exist) supports excluding the triaxial configurations of Wetzel from the "woven fabric" claimed. For example, Appellants have not shown that one of ordinary skill in the art would consider a triaxial configuration to be a "knitted" fabric rather than a "woven" fabric. Instead, Appellants assert, again without evidence, that "woven fabric" distinguishes "not only over knitted fabrics but also over the triaxial fabrics of Wetzel." *Id.* at 4.

Claim 1 also recites, *inter alia*, "said textile overlay having an elongation at tear in said longitudinal direction of at least 30% and an elongation at tear in a transverse direction of at least 100%." Appeal Br. 25

(Claims App.). In the rejection, the Examiner stated: "When the structure recited in the reference is substantially identical to that of the claims, claimed properties are presumed to be inherent (MPEP 2112.01). In this case, [Wetzel] teaches all the claimed structural limitations and thus the elongation at tear properties are considered inherent." Non-Final Act. 3–4.

Referring to the arguments set forth above, Appellants contend that Wetzel does not "suggest a woven fabric" and, thus, "given the structural differences between the claimed subject matter and the applied references, the triaxial fabrics of [Wetzel] cannot reasonably be presumed to inherently possess the claimed properties." Appeal Br. 18.[3]

When an examiner shows a sound basis for finding that the claimed and prior art products are structurally identical or substantially identical, the burden shifts to an appellant to show that the "prior art products do not necessarily or inherently possess the characteristics of [the] claimed product." *In re Best*, 562 F.2d 1252, 1255 (CCPA 1977). Here, the Examiner's explanation supports a prima facie case regarding the claimed properties. *See* Non-Final Act. 3–4. Appellants do not dispute the inherency aspect of the Examiner's position, but rather, dispute the primary finding regarding structural identity (i.e., that Wetzel satisfies the structural limitations recited in claim 1). *See id.*; Ans. 7 ("The structural claim limitations, including the woven fabric, are taught by [Wetzel] as set forth in the rejection above, thus claimed properties can be considered inherent

[3] Although Appellants also provide arguments regarding Beckh (*see* Appeal Br. 18–20), as noted above (*see supra* note 2), the Examiner withdrew the alternative reliance on Beckh to address claim 1.

(MPEP 2112.01).”). Because Appellants have not shown error in this primary finding, we are not apprised of error based on this argument.

Claim 1 also recites, *inter alia*, “said staple fibers comprise cotton, cellulose, or cotton and cellulose.” Appeal Br. 25 (Claims App.). To address this limitation in the rejection, the Examiner relied on column 7, lines 2–27 in Wetzel and stated “[t]he fabric can contain only cotton fibers.” *See* Non-Final Act. 3.

Appellants discuss certain teachings in Wetzel regarding the selection of materials for the three sets of yarns (X, Y, and Z) and then state, “[a]s an alternative, [Wetzel] suggest[s], at col. 7, line 7, that cotton may be used as one material for the triaxial fabric.” Appeal Br. 21 (discussing Wetzel, col. 6, ll. 52–62). Appellants argue that Wetzel, however, “do[es] not provide any guidance as to which of the yarns ‘X,’ ‘Y’ or ‘Z’ should be selected from cotton” and “[a]s a result, and as discussed above, a skilled artisan is not directed by the applied citations to select one or more of the yarns of the triaxial fabric of [Wetzel] and provide a fabric” with the claimed “elongation” properties. *Id.*

The Examiner responds that Wetzel “teaches that cotton may be used in the yarns (Col. 7 lines 2–27)” and that “[t]his meets the claim requirement that ‘staple fibers comprise cotton, cellulose, or cotton and cellulose.’” Ans. 7–8.

The passage relied on by the Examiner provides, in part: “In addition to the constructions previously described, *the triaxial fabric* used to make one or more portions of various belts of this invention *may be made of yarns comprised of any suitable material such as filaments or fibers of cotton*, or the like.” Wetzel, col. 7, ll. 3–7 (emphasis added). This passage and the rest

of the discussion relied on by the Examiner support the finding that Wetzel teaches an embodiment in which *all three sets* of yarns (X, Y, and Z) are cotton, and that this configuration satisfies the limitation at issue. *See* Non-Final Act. 3; Ans. 7–8. Appellants have not shown error in these findings and have not shown that the claim excludes such a configuration. To the extent Appellants argue that the relied-upon teachings relate to a nonpreferred embodiment, and are thus insufficient to address the limitation at issue, we note that "[a]ll the disclosures in a reference must be evaluated, including nonpreferred embodiments." *In re Mills*, 470 F.2d 649, 651 (CCPA 1972). Further, Appellants have not shown that an embodiment in which all three sets of yarns are cotton would not satisfy the "elongation" properties discussed above.

For these reasons, we sustain the rejection of independent claim 1. Claims 2–8, 24–26, 28, 31–38, 54–56, 58, and 61 fall with claim 1.

Rejections 2 through 7

Appellants do not separately argue Rejections 2 through 7, but rather, argue that certain additional references relied on by the Examiner do not cure the alleged deficiencies in Wetzel discussed above. *See* Appeal Br. 21–23. Because we are not apprised of error based on the arguments regarding Wetzel (*see supra* Rejection 1), we sustain the rejection of claims 12–16, 18–23, 27, 29, 30, 42–46, 48–53, 57, 59, and 60.

DECISION

We AFFIRM the decision to reject claims 1–8, 12–16, 18–38, 42–46, and 48–61.

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