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Philip H. Burrus, IV Burrus Intellectual Property Law Group LLC 222 12th Street NE Suite 1803 Atlanta, GA 30309			JACKSON, BRANDON LEE	
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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* ANDREW J. GILES and FRANCIS A. CZAJKA

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Appeal 2015-003007<sup>1</sup>  
Application 13/585,435<sup>2</sup>  
Technology Center 3700

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Before MICHAEL C. ASTORINO, JAMES A. WORTH, and  
KENNETH G. SCHOPFER, *Administrative Patent Judges*.

ASTORINO, *Administrative Patent Judge*.

DECISION ON APPEAL

The Appellants appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1–5 and 7–20. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We REVERSE.

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<sup>1</sup> According to the Appellants, “[t]he real party in interest is Medline Industries, Inc.” Appeal Br. 2.

<sup>2</sup> The Appellants note that a Notice of Appeal was filed in a related case (Application 13/116,749) and that Kuznetz (US 4,569,874, iss. Feb. 11, 1986) is applied as prior art for rejections for both the present and related application. *See* Appeal Br. 2.

STATEMENT OF THE CASE

*Claimed Subject Matter*

Claims 1, 15, and 19 are the independent claims on appeal. Claim 1, reproduced below, is illustrative of the subject matter on appeal.

1. A gown, comprising:
  - a body-covering portion; and
  - an outer layer coupled to the body-covering portion, thereby defining a pocket, wherein the outer layer comprises a film layer having a thermally reflective side disposed facing the body-covering portion;
  - the pocket disposed along a chest covering portion of the body-covering portion;
  - a base of the pocket extending about the body-covering portion and at least partially covers a kidney-covering portion of the body-covering portion.

*Rejections*

Claims 1–5, 7–15, and 19 are rejected under 35 U.S.C. § 103(a) as unpatentable over Kuznetz (US 4,569,874, iss. Feb. 11, 1986), Barry (US 5,038,779, iss. Aug. 13, 1991), and Music (US 2006/0253954 A1, pub. Nov. 16, 2006).

Claims 16 and 20 are rejected under 35 U.S.C. § 103(a) as unpatentable over Kuznetz, Barry, Music, and Flannery (US 2010/0263104 A1, pub. Oct. 21, 2010).

Claims 17 and 18 are rejected under 35 U.S.C. § 103(a) as unpatentable over Kuznetz, Barry, Music, Flannery, and Hass (US 6,770,848 B2, iss. Aug. 3, 2004).

## ANALYSIS

*Independent claims 1 and 19, and dependent claims 2–5 and 7–14*

Independent claim 1 is directed to a gown having a body-covering portion and an outer layer which coupled together define a pocket, where “the pocket [is] disposed along a chest covering portion of the body-covering portion” and “a base of the pocket extend[s] about the body-covering portion and at least partially covers a kidney-covering portion of the body-covering portion.” Appeal Br., Claims App. Independent claim 19 includes similar requirements as claim 1. *See id.*

The Examiner finds that Kuznetz fails to disclose a pocket and relies on Barry and Music to teach the claimed pocket. Final Act. 3. The Examiner finds that Barry includes pockets (18, 20A, 20B) and that the base of pocket (18) extends about a body-covering portion (16). Ans. 6. The Examiner explains that “*Barry* is not cited for a teaching of placing the pocket over the chest and partially over the kidney covering region of the garment. *Barry* is merely cited for a teaching of a pocket on a garment that holds a therapeutic device.” Ans. 7; *see also* Appeal Br. 12–13 (citing Barry, Abstract, col. 2, ll. 59–66).

The Examiner also finds that “*Music* teaches a thermal garment (10) comprising pockets (fig. 4) that cover the chest portion and the kidneys of the user (figs. 1 & 2).” Ans. 6. The Examiner explains that “*Music* is cited for a teaching of the placement of the pocket over the chest and kidney covering portions in order to warm those portions of the body using therapeutic heat packs.” Ans. 7.

We agree with the Examiner that Music includes a pocket — actually multiple pockets — that are “disposed along a chest covering portion of the

body-covering portion.” *See, e.g.*, Music, Fig. 1. Music also includes a different pocket — actually multiple pockets — that include a base that extends about the body-covering portion and at least partially covers a kidney-covering portion of the body-covering portion. *See, e.g.*, Music, Fig. 2. However, the Examiner fails to explain how Music includes a single pocket disposed as required by claims 1 and 19. *See* Appeal Br. 13–14.

In sum, we fail to understand how the Examiner combined teachings of Kuznetz, Barry, and Music to result in a single pocket disposed as required by claims 1 and 19. Thus, we do not sustain the Examiner’s rejection of independent claims 1 and 19, and dependent claims 2–5 and 7–14, as unpatentable over Kuznetz, Barry, and Music.

The remaining rejection based on Kuznetz, Barry, and Music in combination with Flannery does not include findings or reasoning that cures the deficiency in the Examiner’s rejection of independent claim 19. As such, we do not sustain the rejection of claim 20 as unpatentable over Kuznetz, Barry, Music, and Flannery.

*Independent claim 15 and dependent claims 16–18*

Independent claim 15 is directed to “[a] patient warming system” that includes a “gown defining a rear opening comprising a slit running along a portion of a rear of the gown.” Appeal Br., Claims App. The Examiner states that “*Kuznetz* in view of *Barry* and *Music* do not fairly teach or suggest a rear opening comprising a slit running along a portion of a rear portion of the gown.” Ans. 7. Despite this statement, the Examiner does not explicitly withdraw the rejection of independent claim 15. As such, we proceed with the understanding that the Examiner maintains the rejection of

claim 15 under 35 U.S.C. § 103(a) as unpatentable over Kuznetz, Barry, and Music.

The Appellants contend that the combination of teachings of Kuznetz, Barry, and Music fail to disclose a “gown defining a rear opening comprising a slit running along a portion of a rear of the gown,” as recited in independent claim 15. *See* Appeal Br. 14–15. In light of the Examiner’s apparent agreement with this contention and the lack of reasoning as to how the disputed claim recitation would have been obvious, we determine that the Appellants’ contention is persuasive. Thus, we do not sustain the Examiner’s rejection of independent claim 15 and dependent claim 19 as unpatentable over Kuznetz, Barry, and Music.

The remaining rejections based on Kuznetz, Barry, and Music in combination with Flannery or Flannery and Hass do not include findings or reasoning that cures the deficiency in the Examiner’s rejection of independent claim 15. As such, we do not sustain the rejections under 35 U.S.C. § 103(a) of: claim 16 as unpatentable over Kuznetz, Barry, Music, and Flannery; and claims 17 and 18 as unpatentable over Kuznetz, Barry, Music, Flannery, and Hass.

#### DECISION

We REVERSE the Examiner’s decision rejecting claims 1–5 and 7–20.

REVERSED