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Cheryle.Telesco@solvay.com

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* CARMELO LOFARO and MATT ALDRIDGE

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Appeal 2015-007070  
Application 11/043,676  
Technology Center 1700

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Before CATHERINE Q. TIMM, KAREN M. HASTINGS, and  
BRIAN D. RANGE, *Administrative Patent Judges*.

HASTINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134 from a final rejection of claims 1–6 under 35 U.S.C. § 102(b) as anticipated by Carter (WO 02/16481A1, pub. Feb. 28, 2002). We have jurisdiction under 35 U.S.C. § 6.

We AFFIRM.

Appellants' invention is best illustrated by independent claim 1, reproduced below (emphasis added to highlight contested limitation(s)):

1. A stabilized preform for composites, said preform comprising:  
a preform precursor comprising at least one layer of a structural fabric comprised of reinforcing fibers, said at least one layer of structural fabric having integrated therein at least one stabilizing fiber that is dissolvable at a dissolution temperature in a resin for infusing into said structural fabric, *said preform precursor having been subjected to a stabilizing temperature of from about 60°C to about 250°C for a time period from about 1 minute to about 200 minutes, that stabilizes said preform precursor to form a stabilized preform.*

Appellants present arguments only for independent claim 1. *See* Appeal Brief, *generally*. Accordingly, we select independent claim 1 as representative of the claimed subject matter before us on appeal and dependent claims 2–6 stand or fall with claim 1.

#### OPINION

We have reviewed each of Appellants' arguments for patentability. However, Appellants have not persuaded us that the Examiner reversibly erred in rejecting claim. Accordingly, we sustain the Examiner's prior art rejection for the reasons explained in the Answer, and we add the following primarily for emphasis.

We refer to the Examiner's Answer for a statement of the rejection, which the Examiner denominated as a new ground (Ans. 2–4).

Appellants principally argue Carter does not teach the heat treatment claimed (App. Br. 3–4; Reply Br. 2). Appellants also contend that the Specification refers to more than “fixing a preform in a desired shape” for the definition of stabilized (Reply Br. 3).

We are unpersuaded by these arguments for the reasons presented by the Examiner. *Ans. generally.* We agree with the Examiner that the Specification does not contain a clear or a limiting definition of “stabilized” (Ans. 3, 6; Spec. ¶ 28).

According to the Specification,

For purposes of the present invention, *the term stabilized is used to mean both* 1) the stabilization of a single sheet, layer or ply or multiple sheets, layers or plies of structural or reinforcing fabric so that it can be moved, cut, transported, resin infused, or handled in a typical manner without fraying, unravelling, pulling apart, bending, wrinkling or otherwise distorting the integrity of the structural or reinforcing fabric, 2) the stabilization and binding together of multiple layers of reinforcing or structural fabrics for cutting, molding or shaping, by placing in a mold or otherwise so that the resulting preform will not be distorted by being moved, transported or manipulated in any way and so that the fibers that make up the reinforcing or structural fabrics remain intact during resin infusion, and 3) fixing a preform in a desired shape.

Spec. ¶ 28 (emphasis added).

Appellants’ Spec. ¶ 28 in stating that “stabilized is used to mean both” (1), (2) and (3), when (1) and (2) appear to be alternatives, is mis-descriptive at best.

In any event, representative claim 1 is drafted in a product-by-process format. The patentability of this type of claim does not depend on the

process steps, except to the extent that the process steps are shown to result in properties not possessed by prior art products. It has long been held that “[i]f the product in a product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process.” *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1317 (Fed. Cir. 2006)(quoting *In re Thorpe*, 777 F.2d 695, 697 (Fed. Cir. 1985)). For product-by-process claims, the Examiner “bears a lesser burden of proof in making out a case of prima facie obviousness for product-by-process claims because of their peculiar nature than would be the case when a product is claimed in the more conventional fashion.” *In re Fessmann*, 489 F.2d 742, 744 (CCPA 1974). Thus, “when the prior art discloses a product which reasonably appears to be either identical with or only slightly different than a product claimed in a product-by-process claim, a rejection based alternatively on either section 102 or section 103 of the statute is eminently fair and acceptable.” *Id.* (quote and citation omitted). Once the examiner establishes a prima facie case of anticipation or obviousness, the burden “to prove that the prior art products do not necessarily or inherently possess the characteristics of his claimed product” shifts to the Appellants. *Thorpe*, 777 F.2d at 698 (citation omitted).

In this case, there is no dispute that Carter discloses a preform made of the same materials as disclosed in Appellants’ Specification (e.g., Ans. 3). That is, Appellants’ claimed preform reasonably appears to be substantially the same as the preform of Carter. Accordingly, the burden shifted to Appellants to demonstrate that the claimed preform differs from the preform of the prior art. *Thorpe*, 777 F.2d at 698 (citing *Best*, 562 F.2d 1252, 1255

(CCPA 1977)). However, Appellants have not proffered adequate evidence showing any structural difference between their preform as claimed and the one of the prior art. Appellants have not directed us to any evidence of the properties of the stabilized preform of Carter without a heat treatment. While Appellants point to the Examples in their Specification, none of these examples show heat treatment less than a minimum of 160°C for 10 minutes, whereas the claim encompasses as little as 1 minute at 60°C.

Therefore, we affirm the Examiner's prior art rejection of claims 1–6 under 35 U.S.C. § 102(b) for the reasons presented by the Examiner and given above.

#### DECISION

The Examiner's prior art rejection of claims 1–6 under 35 U.S.C. § 102(b) is affirmed.

#### TIME PERIOD

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).

AFFIRMED