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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte LORELEI FAY

Appeal 2018-002532
Application 14/746,622
Technology Center 3700

Before BIBHU R. MOHANTY, KENNETH G. SCHOPFER, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.

SILVERMAN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision rejecting claims 1–18. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. The Appeal Brief does not identify a real party in interest, per 37 C.F.R. § 41.37(c)(1)(i). The Specification identifies Lowen & Sons, LLC, DBA Miss Concealed as the “Applicant.” Spec. 1.

ILLUSTRATIVE CLAIM

1. A garment having a support pocket, said garment comprising:

a clothing garment;

two lengths of rigid boning affixed to said garment wherein said two lengths of boning comprise a first length of boning and a second length of boning, wherein said first length of boning and said second length of boning are affixed to said garment and comprise a width between said first length of boning and said second length of boning;

a length of material attached to said garment proximate to said first length of boning and extending between said first and said second boning and attached to said garment proximate to said second length of boning, wherein said length of material defines a pocket between said material and said garment.

REFERENCES

Name	Reference	Date
Yewer, Jr. ("Yewer")	US 5,591,122	Jan.7, 1997
Bass	US 6,585,673 B1	July 1, 2003
Anquetil	US 2009/0292230 A1	Nov. 26, 2009
Leyva	US 2012/0255098 A1	Oct. 11, 2012

REJECTIONS

- I. Claims 1–6, 8–10, and 16 are rejected under 35 U.S.C. § 102(a)(1) as anticipated by Yewer.
- II. Claims 7, 13, and 14 are rejected under 35 U.S.C. § 103 as unpatentable over Yewer and Leyva.
- III. Claims 11, 12, and 15 are rejected under 35 U.S.C. § 103 as unpatentable over Yewer and Anquetil.
- IV. Claims 17 and 18 are rejected under 35 U.S.C. § 103 as unpatentable over Yewer and Bass.

FINDINGS OF FACT

The findings of fact relied upon, which are supported by a preponderance of the evidence, appear in the following Analysis.

ANALYSIS

The Appellant argues that the Examiner erred in rejecting independent claim 1, because Yewer does not teach the claimed “lengths of rigid boning.” *See* Appeal Br. 5–6.²

For the disclosure of the claimed “lengths of rigid boning,” the Examiner relies upon Yewer’s “strips of batting 32” that “provide vertical stiffness in the body 16” of an abdominal support belt. *See* Final Action 4 (citing Yewer, col. 3, ll. 17–22, Figs. 2–3).

According to the Appellant, “boning” and “batting” are familiar terms in the art of garment design and manufacture, having distinct and different meanings:

In Yewer, what the examiner sets forth as being “rigid boning” is in fact batting and not boning. Applicant’s claims specifically include the term, “rigid boning.” According to the Merriam-Webster online dictionary, batting is “layers or sheets of raw cotton or wool or of synthetic fibrous material used for lining quilts or for stuffing, or packaging; *also*: a blanket of thermal insulation (as fiberglass)”; whereas boning is defined as “a strip of material (as whalebone or steel) used to stiffen a garment (as a corset).” This difference is fundamental to the function of the garment, as batting is not rigid as required by the term “rigid boning”.

Id. at 5. The Appellant further argues that a person of ordinary skill in the art would not equate “rigid boning” with “batting,” because these two terms

² We regard the page bearing the title “Appeal Brief” as the first page thereof, with the following pages numbered consecutively thereafter.

“*have different meaning[s].*” *Id.* at 6. More particularly, “[r]igid boning is stiff, . . . while batting is not stiff.” *Id.*

In response, the Examiner states:

Appellant's *disclosure* may suggest a different structure or material for the strips of boning; however, Appellant has not defined the structure of the rigid boning *in the claims* over that of Yewer's, such that one of ordinary skill in the art would not include both traditional whalebone or steel boning and the stiffening strips taught by Yewer within the scope of the claims as currently presented. The claims do not restrict the scope of the rigid boning to merely encompass traditional whalebone or steel strips.

Ans. 5. The Examiner further states:

[A]s the disclosures and claims are written in English, and part of the beauty of the English language is that there are many different ways to describe the same thing. Furthermore, it is not the Office's position that the batting strips are *absolutely and exactly identical* to the boning as disclosed by Appellant, but rather that the Yewer's batting strips, explicitly disclosed to act as stiffening members and provide vertical stiffness to the garment, are considered to be rigid boning, *inasmuch as claimed by Appellant*. See at least pages 2-4 of the Final Rejection mailed 2/9/17.

Id. at 6.

Taking issue with the Examiner's position, the Appellant responds: “*words have meaning.*” Reply Br. 2. “If all language in the English language was capable of being substituted,” the Appellant contends, “then words would be rendered either meaningless or their specific meaning would be diluted”; “[i]ndeed, the beauty of the English language *is that words do in fact have meaning.*” *Id.*

A dispute, such as the present one, involves matters of claim construction. “During examination, ‘claims . . . are to be given their

broadest reasonable interpretation consistent with the specification, and . . . claim language should be read in light of the specification as it would be interpreted by one of ordinary skill in the art.” *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004) (quoting *In re Bond*, 910 F.2d 831, 833 (Fed. Cir. 1990)). As the Federal Circuit has explained:

The correct inquiry in giving a claim term its broadest reasonable interpretation in light of the specification is not whether the specification proscribes or precludes some broad reading of the claim term adopted by the examiner. And it is not simply an interpretation that is not inconsistent with the specification. It is an interpretation that corresponds with what and how the inventor describes his invention in the specification, *i.e.*, an interpretation that is “consistent with the specification.” *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997) (citation and internal quotation marks omitted); *see also In re Suitco Surface*, 603 F.3d 1255, 1259–60 (Fed. Cir. 2010).

In re Smith Int’l, Inc., 871 F.3d 1375, 1382–83 (Fed. Cir. 2017). Sources for claim construction may include intrinsic sources (such as the claims themselves and the Specification), as well as extrinsic sources (such as technical treatises and dictionaries). *See Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582–84 & n.6 (Fed. Cir. 1996). Yet, “there is no magic formula or catechism for conducting claim construction,” nor is there any requirement to “consider[] any particular sources” or to “analyze sources in any specific sequence, as long as those sources are not used to contradict claim meaning that is unambiguous in light of the intrinsic evidence.”

Phillips v. AWH Corp., 415 F.3d 1303, 1324 (Fed. Cir. 2005) (en banc).

Because “[t]he specification contains a written description of the invention which must be clear and complete enough to enable those of ordinary skill in the art to make and use it,” “the specification is always highly relevant to the

claim construction analysis.” *Vitronics*, 90 F.3d at 1352. “Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.” *Id.*

The Appellant’s interpretation of the term “boning” is reinforced by the intrinsic materials of claim construction. The Specification, for example, states:

The stiffener used in this disclosure is also known to those within the fabric industry as ‘boning’. . . . The bones can be made of materials such as Plastic, German Plastic, Hoop Steel, Spring Steel, Spiral Steel, Galvanized wire, Nylon, Polyester, Polyester Webbing or other preferably non corrosive, thin, flexible but ridged [sic, “rigid”] material. In specific detail, in a preferred embodiment the bones structure used in a current product for this disclosure is made of nylon.

Spec. ¶ 16.

Prior art references considered by the Examiner also constitute intrinsic evidence that is available to aid in the construction of claim terms. *See V-Formation, Inc. v. Benetton Grp. SpA*, 401 F.3d 1307, 1311–12 (Fed. Cir. 2005) (construing claim language, in view of a prior art reference that was of record in the prosecution of the patent-in-suit). In this regard, the Levya and Anquetil references employ the term “boning” in the same manner as the Specification. Levya describes a “boning segment” as being “a plastic, nylon, polyester (e.g., polyester rods, such as Rigilene™) or steel (e.g., steel spiral), or other flexibly rigid length.” Levya ¶ 27. Anquetil describes “posterior boning element[s]” in a “lumbar support belt,” having “two parallel bones” that “are flat elements made of an elastic material of the spring steel type or composite material and are fitted into casings which, in the example depicted, are stitched to the strip of elastic textile.” Anquetil ¶ 34.

Although “boning” may employ a variety of materials, in addition to bone, from which the term originates,³ all of the materials identified as “boning” in the intrinsic evidence discussed above, as well as the dictionary definition cited by the Appellant (*see* Appeal Br. 5) relate to rigid elongate elements possessing a slight amount of elasticity. By contrast, “batting” — as indicated by the dictionary definition cited (*see id.*) is characterized by its softness, loft, and compressibility.

Further, even though Yewer employs “batting” to “provide vertical stiffness” (Yewer col. 3, ll. 19–21), this implementation does not persuade us that Yewer teaches the claimed “rigid boning” — particularly as the nature of Yewer’s “vertical stiffness” is not described in a manner that can be compared with the behavior of the materials identified as “boning.”

In view of the foregoing, we do not sustain the rejection of independent claim 1, or any of claims 2–6, 8–10, and 16, depending therefrom, under 35 U.S.C. § 102(a)(1). Likewise, we do not sustain the rejection of dependent claims 7, 11–15, 17, and 18 under 35 U.S.C. § 103.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–6, 8–10, 16	102(a)(1)	Yewer		1–6, 8–10, 16
7, 13, 14	103	Yewer, Levya		7, 13, 14

³ “In the sixteenth century, bodices were sometimes made more rigid by inserting whalebones along the front and sides.” Kara W. Swanson, *Getting a Grip on the Corset: Gender, Sexuality, and Patent Law*, 23 Yale J.L. & Feminism 57, 73 (2011).

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Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
11, 12, 15	103	Yewer, Anquetil		11, 12, 15
17, 18	103	Yewer, Bass		17, 18
Overall Outcome				1-18

REVERSED