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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ELIZABETH KERSCH BYE, KAREN LOUISE LABAT, LINSEY ANN GORDON, and THERESA ELIZABETH LASTOVICH

Appeal 2018-002737[1]
Application 14/266,130[2]
Technology Center 3700

Before HUBERT C. LORIN, NINA L. MEDLOCK, and BRADLEY B. BAYAT, *Administrative Patent Judges*.

BAYAT, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's decision rejecting claims 1–5 and 8–20.[3] We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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[1] Our Decision references Appellants' Appeal Brief ("App. Br.," filed September 11, 2017) and Reply Brief ("Reply Br.," filed January 17, 2018), the Examiner's Answer ("Ans.," mailed November 17, 2017), and Non-Final Office Action ("Non-Final Act.," mailed March 9, 2017).

[2] Appellants identify Regents of the University of Minnesota as the real party in interest. (App. Br. 2).

[3] Claims 6 and 7 are canceled. (Non-Final Act. 2).

THE INVENTION

Claim 1, reproduced below with added emphasis, is illustrative of the claims on appeal.

1. A protective garment comprising:

a body comprising a front portion, a rear portion, and a neck opening, wherein the front portion comprises a left front portion and a right front portion, wherein the rear portion comprises a left rear portion and a right rear portion;

a left sleeve attached to the body at a left sleeve opening and a right sleeve attached to the body at a right sleeve opening;

a left leg and a right leg extending from the body;

a left shoulder region located between the left sleeve opening and the neck opening;

a right shoulder region located between the right sleeve opening and the neck opening;

a crotch region comprising a crotch point where the left and right legs meet the body;

a waist region positioned between a waist axis and the crotch point, wherein the waist axis is transverse to a longitudinal axis of the garment and intersects the longitudinal axis between the left and right sleeve openings and the crotch point;

an elastic lumbar panel positioned on the rear portion of the body and attached to the rear portion of the body in the waist region;

a left shoulder elastic strap comprising a first end attached to the left front portion of the body and a second end attached to the left rear portion proximate the elastic lumbar panel such that the left shoulder elastic strap extends from the front portion over the left shoulder region to a location proximate the elastic lumbar panel;

a right shoulder elastic strap comprising a first end attached to the right front portion of the body and a second end

> attached to the right rear portion proximate the elastic lumbar panel such that the right shoulder elastic strap extends from the front portion over the right shoulder region to a location proximate the elastic lumbar panel;
>
> a left side elastic waist strap attached to the front portion of the body and extending around a left side of the garment where the left side elastic waist strap is attached to the rear portion of the body, ***wherein the left side elastic waist strap comprises a first end proximate the crotch point and a second end proximate the elastic lumbar panel***; and
>
> a right side elastic waist strap attached to the front portion of the body and extending around a right side of the garment where the right side elastic waist strap is attached to the rear portion of the body, ***wherein the right side elastic waist strap comprises a first end proximate the crotch point and a second end proximate the elastic lumbar panel***.

(App. Br. 16–17 (Claims Appendix)).

THE REJECTIONS

The following rejections are before us for review:

I. Claims 1–4, 8–10, 12, 13, 16, 17, and 20 are rejected under 35 U.S.C. § 103(a) as unpatentable over Kostrzewski (US 8,533,864 B1, iss. Sept 17, 2013) and Dicker et al. (US 5,819,322, iss. Oct. 13, 1998) ("Dicker").

II. Claims 5 and 11 are rejected under 35 U.S.C. § 103(a) as unpatentable over Kostrzewski, Dicker, and Gatto et al. (US 2008/0250553 A1, pub. Oct. 16, 2008) ("Gatto").

III. Claims 14, 15, 18, and 19 are rejected under 35 U.S.C. § 103(a) as unpatentable over Kostrzewski, Dicker, and Dainese (WO 01/10254 A1, pub. Feb. 15, 2001).

ANALYSIS

Rejection I

Appellants argue that Kostrzewski does not disclose the claim 1 limitations "wherein the left side elastic waist strap comprises a first end proximate the crotch point and a second end proximate the elastic lumbar panel" and "wherein the right side elastic waist strap comprises a first end proximate the crotch point and a second end proximate the elastic lumbar panel." (App. Br. 8–12). According to Appellants, the meanings of the limitations "proximate the elastic lumbar panel" and "proximate the crotch point" are governed by the definitions set forth in the Specification at pages 6 and 8, respectively. [4,5] (*Id.*; Reply Br. 3–9).

The Examiner agrees that the cited definitions apply to the disputed claim language. However, the Examiner maintains that Kostrzewski discloses the above limitations under the definitions in the Specification. (Non-Final Act. 4–8) (citing the definition at page 8, lines 14–16 of the Specification). The Examiner explains

> the interpretation that the respective second ends of the left and right waist straps being "proximate the elastic lumbar panel" is in agreement with Appellants' argued definition (Defn. [5] above) is proper, since the waist straps' second ends are located closer to the elastic lumbar panel (at intersection point #304a in Kostrzewski Fig. 2) than the neck opening (i.e. closer than "another element or feature shown in the Figures," wherein the

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[4] *See* Spec. 8, ll. 14–16 ("As used herein, the term 'proximate the crotch point' means that the element or feature is closest to or nearest the crotch point as compared to another element or feature shown in the Figures").
[5] *See* Spec. 6, ll. 22–24 ("As used herein, the term 'proximate the elastic lumbar panel' means that an element or feature is closest to or nearest the elastic lumbar panel as compared to another element or feature shown in the Figures.").

> neck opening is "another element" compared to the waist strap regarding proximity to the elastic lumbar panel.

(Ans. 5) (citing the definition at page 6, lines 22–24 of the Specification).

Thus, the parties agree that the disputed claim language is defined in the Specification, but disagree as to the meaning of those definitions. In particular, the parties differ as to the import of the definitional phrase "as compared to another element or feature." The Examiner interprets the term "another" broadly to mean "at least one other." According to the Examiner:

> Giving importance to the phrase "another element or feature," as long as the first ends of the straps are closest to the crotch point ***as compared to at least one other element or feature*** (i.e. such as a neck opening or shoulder region), then the straps' front/first ends are "proximate the crotch point."

(Non-Final Act. 20) (emphasis added). The Examiner also asserts that the Specification contains an alternative definition for each limitation. (Ans. 3–5) (citing Spec. 6, ll. 27–28;[6] *Id.* at 8, ll. 16–17[7]).

Appellants disagree and argue that "one of skill in the art would understand that the phrase 'proximate the crotch point' means that the first ends of the recited left and right side elastic waist straps are closer to the crotch point ***than to any other element or feature*** shown in the Figures." (Reply Br. 4) (emphasis added). Similarly, Appellants contend that "one of skill in the art would understand that the phrase 'proximate the elastic

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[6] "Alternatively, the term 'proximate the elastic lumbar panel' means that the element or feature is located within 6 inches (i.e., 15.24 cm) of the elastic lumbar panel."

[7] "Alternatively, the term 'proximate the crotch point' means that an element or feature is located within 6 inches (i.e., 15.24 cm) of the crotch point."

lumbar panel' means that the second ends of the recited left and right elastic waist straps are located closer to the elastic lumbar panel ***than to any other element or feature*** shown in the Figures." (*Id.*) (emphasis added).

During examination, claims are to be given their broadest reasonable interpretation consistent with the specification, and the 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) (citations omitted). In interpreting claim language, we apply the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the Specification. This means that the words of the claim must be given their plain meaning unless the plain meaning is inconsistent with the specification. *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989). And "[w]hen the applicant states the meaning that the claim terms are intended to have, the claims are examined with that meaning, in order to achieve a complete exploration of the applicant's invention and its relation to the prior art." *Id. See also, Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996).

> Although words in a claim are generally given their ordinary and customary meaning, a patentee may choose to be his own lexicographer and use terms in a manner other than their ordinary meaning, as long as the special definition of the term is clearly stated in the patent specification or file history.

Here, Appellants have clearly set forth special definitions in the Specification for the argued claim language. To the extent that the definitions contain some ambiguity, Appellants have resolved that

ambiguity. *See* Reply Br. 4. Notwithstanding that the Specification contains alternative language set off with quotation marks, which would normally introduce a special definition,[8] Appellants have stated on the record that this language is intended to introduce an alternative embodiment rather than an alternative definition. (*Id.* at 3.) Accordingly, we interpret the claims with the meaning that the Appellants intend the claim terms to have, as stated on the record by Appellants. To be clear, we interpret the phrase "proximate the crotch point" to mean "that the first ends of the recited left and right side elastic waist straps are closer to the crotch point than to ***any*** other element or feature shown in the Figures." And we interpret the phrase "proximate the elastic lumbar panel" to mean that "the second ends of the recited left and right elastic waist straps are located closer to the elastic lumbar panel than to ***any*** other element or feature shown in the Figures."

As Appellants point out (App. Br. 11–12), Kostrzewski's left and right side elastic waist straps 302 have "ends" that are located closer to fourth shirt strip 304 than to first point 304a (i.e., "the elastic lumbar panel"). *See* Kostrzewski Figure 2. Therefore, Kostrzewski's waist strap ends are not "proximate the elastic lumbar panel" as required by claim 1.

In view of the forgoing, we do not sustain the rejection of independent claim 1, and independent claim 12, which recites substantially similar claim

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[8] The choice of the words "phrase" and "means," combined with the use of quotation marks to set the phrase off from the rest of the sentence, unmistakably notify a reader of the patent that the patentee exercised the option to define the entire phrase without respect to its ordinary meaning as understood by one of ordinary skill in the art at the time of the invention. *Merck & Co. v. Teva Pharm. USA, Inc.*, 395 F.3d 1364, 1379 (Fed. Cir. 2005).

limitations. For the same reasons, we also do not sustain the rejection of dependent claims 2–4, 8–10, 13, 16, 17, and 20. *Cf. In re Fritch*, 972 F.2d 1260, 1266 (Fed. Cir. 1992) ("dependent claims are nonobvious if the independent claims from which they depend are nonobvious").

Rejections II and III

Dependent claims 5, 11, 14, 15, 18, and 19

Claims 5, 11, 14, 15, 18, and 19 depend from independent claims 1 and 12, and the Examiner's reliance on Gatto and Dainese (Non-Final Act. 16–18) does not cure the above-discussed deficiency as to claims 1 and 12. Therefore, we do not sustain the rejections of claims 5, 11, 14, 15, 18, and 19 under 35 U.S.C. § 103(a).

DECISION

The Examiner's decision to reject claims 1–5 and 8–20 under 35 U.S.C. § 103(a) is reversed.

REVERSED