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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SALLY CARTER and RICHARD STEVENSON¹

Appeal 2018-004373
Application 14/984,047
Technology Center 3700

Before MICHELLE R. OSINSKI, JEREMY M. PLENZLER, and
ALYSSA A. FINAMORE, *Administrative Patent Judges*.

OSINSKI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's decision rejecting claims 1–11 and 13–16² under 35 U.S.C. § 103(a) as unpatentable over Bauman (US 7,547,312 B2, iss. June 16, 2009) and Grant (US 2002/0165559 A1, pub. Nov. 7, 2002). We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

¹ Covidien LP (“Appellant”) is the Applicant as provided in 37 C.F.R. § 1.46 and is identified as the real party in interest. Appeal Br. 1.

² Claim 12 is cancelled. Appeal Br. 16 (Claims Appendix).

THE CLAIMED SUBJECT MATTER

Claims 1 and 8 are independent. Claim 1 is reproduced below.³

1. An apparatus for joining two hollow organ sections with an annular array of surgical staples, the apparatus comprising:

a staple cartridge component including a plurality of surgical staples arranged in an annular array;

an anvil component movable relative to the staple cartridge component between spaced apart and approximated positions to adjustably clamp the organ sections between the staple cartridge and anvil components;

a buttress component configured and dimensioned to be positioned on a distal surface of the staple cartridge component, the buttress component including a buttress member and a plurality of circumferentially arranged tabs extending proximally from the buttress member;

a plurality of attaching members, each tab of the plurality of circumferentially arranged tabs of the buttress component including an attaching member of the plurality of attaching members; and

a plurality of fastening members disposed on an outer wall of the staple cartridge component, the plurality of fastening members corresponding to, and configured and dimensioned to engage, the plurality of attaching members disposed on the plurality of circumferentially arranged tabs of the buttress component to securely position the buttress component on the staple cartridge component.

OPINION

The Examiner finds that Bauman teaches all of the limitations of independent claims 1 and 8, except that Bauman “lacks the explicit

³ We understand the Examiner to have entered, for purposes of appeal, the Amendment Under 37 C.F.R. § 1.116 (June 9, 2017), which was filed along with a Certification and Request for Consideration Under the After Final Consideration Pilot Program 2.0 (78 Fed. Reg. 29117 (2013)). Adv. Act. 3 (June 23, 2017).

disclosure of the staple cartridge component including fastening members corresponding to and cooperating with the attaching members of the buttress tabs.” Final Act. 3. Instead, Bauman discloses only that each tab 80 of buttress 12 “includ[es] an . . . attaching member 88 comprising an adhesive tape, wherein the attaching member 88 could be any suitable attaching means, if desired.” *Id.* (citing Bauman 11:50–65). More particularly, Bauman contemplates buttress 12 with protrusions 80 covered with an adhesive substance 88 over which a removable cover 82 has been placed. Bauman 11:36–43, Fig. 8A. Each removable cover 82 can be removed so as to enable attachment of protrusions 80 of buttress 12 to the outer surface of circular stapler body 22 when buttress 12 is properly positioned. *Id.* at 11:45–49, Fig. 8B. Bauman also describes that “the protrusions may be provided without adhesive should it be desired to secure the buttress 12 to the circular stapler through other means, such as, for example with a suture, adhesive tape, or adhesives applied to the protrusions at the time of use.” *Id.* at 11:54–58 (boldface omitted). There is, however, no disclosure in Bauman of circular stapler body 22 having corresponding fastening members on its outer wall that would engage with adhesive 88 (or other means) when buttress 12 is positioned to conform to the contours of the outer surface of circular stapler body 22.

The Examiner finds that Grant teaches “a similar stapler comprising a buttress 107 comprising a plurality of tabs 108 including attaching members 109 cooperating with corresponding fastening members 106 of anvil surface 89 and ring 105 affixed thereto.” Final Act. 3 (citing Grant ¶ 55, Fig. 11). The Examiner concludes that, in view of Grant’s teachings, it would have been obvious “to provide the exterior surface of the cartridge component

with separate fastening members cooperating with the attaching members of the buttress in order to more effectively secure the buttress to the cartridge.” *Id.* at 3–4. More particularly, the Examiner acknowledges that Grant does not specifically disclose fastening members on an outer wall of the cartridge component, but explains that Grant is relied on for the more general idea of “an annular component (105) of a surgical stapler with an outer surface having a plurality of fastening members (106) corresponding to, and cooperating with[,] attaching members (109) of tabs (108) of a buttress member (107).” Ans. 3. The Examiner determines that it would have been obvious “to provide the cartridge component outer surface of Bauman, which is adjacent to the tabs of the buttress, with ‘fastening members’ cooperating with the attaching members (88) [of the buttress] in order to more securely attach the buttress to the cartridge component.” *Id.*

Appellant argues that the Examiner’s proposed modification of Bauman “appears to be based on impermissible hindsight” because the Examiner has not adequately shown why a person of ordinary skill in the art “would have sought to include fastening members and attaching members in the claimed configuration . . . and why one would have understood said configuration to more effectively secure a buttress to a cartridge.” Appeal Br. 9. More particularly, Appellant argues that:

a person of ordinary skill in the art would not have understood secure attachment to be an issue that remained to be improved upon with respect to the buttress of Bauman, and/or the Examiner has not offered reasoning to explain how a person of ordinary skill in the art would have understood fastening members disposed on an outer wall of the circular stapler body of Bauman to have resulted in more secure attachment of the buttress thereto.

Reply Br. 3.

As an initial matter, we note that the Examiner has not adequately explained what the proposed “separate fastening members cooperating with the attaching members of the buttress” (Final Act. 4) would be. Assuming that the proposed separate fastening members provided on an exterior of the cartridge component would be a second adhesive, we agree with Appellant that Grant uses a two-part connector “because the tab hooks 106 and the tab openings 109 are *both* necessary for attaching the buttress ring 107 to the circular anvil 89” (Reply Br. 2–3) (emphasis added), but a two-part connector is not necessary for adhesive, nor is it clear that a two-part connector would provide any improvement in secure attachment with respect to an adhesive (*id.* at 3).

The Examiner also finds that Grant teaches that it “is well known to provide both surfaces of a buttress 60 and cartridge surface 45 with an adhesive 66 for securing the buttress 60 to the cartridge 45.” Final Act. 3 (citing Grant Fig. 3). In the Answer, the Examiner clarifies that “Grant is not relied upon to teach a process of ‘applying’ adhesive to both surfaces of a buttress and cartridge component, which is more specific than claimed, but rather to disclose that the adhesive is ‘disposed’ on both surfaces of the buttress and cartridge component.” Ans. 3. The Examiner takes the position that adhesive being disposed on both the buttress surface and the cartridge component surface “would be inherent after the buttress (60) . . . is pressed into position onto cartridge component (46), regardless of whether the adhesive remained molten, or had solidified.” *Id.*

Whether or not adhesive would be disposed on both the buttress surface and the outer surface of the circular stapler body after the buttress is pressed into position relative to the circular stapler body and attached with

Bauman's adhesive does not explain what would have led one of ordinary skill in the art "to provide the exterior surface of the cartridge component with *separate* fastening members cooperating with the attaching members of the buttress" (Final Act. 3–4 (emphasis added)) in accordance with the Examiner's articulated rejection.

Thus, the Examiner has failed to articulate reasoning having a rational underpinning to explain what would have led one of ordinary skill in the art to provide separate fastening members on the exterior surface of Bauman's staple cartridge assembly for cooperating with the adhesive on the protrusions of Bauman's buttress.

To the extent that the separate fastening members provided on the exterior surface of the cartridge component proposed by the Examiner (Final Act. 3–4) would be based on the tab hooks and tab openings of Grant (with some corresponding modification to the adhesive on the protrusions of Bauman's buttress), we note that Grant is concerned with "removably attach[ing] the perforated buttress ring 107 to the tab hooks 106 of attachment ring 105" by rotary motion. Reply Br. 2 (citing Grant ¶ 56) (explaining that either counterclockwise or clockwise rotation can remove an attached buttress ring). The intended removable nature of the attachment of Grant's two-part connector undermines the Examiner's position that that a two-part connector would more effectively secure the buttress to the staple cartridge assembly in Bauman.

In sum, the Examiner fails to adequately explain what—absent impermissible hindsight reconstruction—would have led an ordinary artisan to provide the exterior surface of the cartridge component with separate fastening members cooperating with the attaching members of the buttress.

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For the foregoing reasons, we find that the Examiner did not articulate adequate reasoning to support a conclusion that the subject matter of independent claims 1 and 8 is rendered obvious by Bauman and Grant. We do not sustain the rejection of claims 1 and 8, or claims 2–7, 9–11, and 13–16 depending therefrom, under 35 U.S.C. § 103(a) as unpatentable over Bauman and Grant.

DECISION

The Examiner's decision to reject claims 1–11 and 13–16 under 35 U.S.C. § 103(a) as unpatentable over Bauman and Grant is reversed.

REVERSED