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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte STEPHANIE PASKO

Appeal 2019-000652
Application 14/942,755
Technology Center 3700

Before LYNNE H. BROWNE, JILL D. HILL, and LISA M. GUIJT,
Administrative Patent Judges.

HILL, *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 to reject claims 1–20. *See* Final Act. 1. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Medline Industries, Inc. App. Br. 2.

BACKGROUND

Claims 1 and 17 are independent. Claim 1, reproduced below, illustrates the claimed invention, with certain limitations emphasized.

1. A gown, comprising:
 - a non-woven fabric layer defining *a head insertion aperture between a front portion and a rear portion*, wherein *the non-woven fabric layer defines an opening separated from the head insertion aperture by the rear portion* and configured to assist a user in donning the gown;
 - one or more *perforations extending across the rear portion at least partially between the opening and the head insertion aperture*, the one or more perforations tearing and splitting the rear portion when the front portion is pulled away from the user;
 - one or more sleeves extending distally away from an intersection of the front portion and the rear portion, each sleeve defining an arm insertion aperture and terminating at a thumb loop configured to engage a saddle of a thumb of the user; and
 - one or more tie members, attached to the non-woven fabric layer;
 - wherein the opening is closable when the one or more tie members are tied together about a torso of the user.

App. Br. 32 (Claims Appendix).

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Burton	US 2,449,584	Sept. 21, 1948
Matsushita	US 6,378,136 B2	Apr. 30, 2002
Lin	US 2009/0320177 A1	Dec. 31, 2009
Graneto	US D622,934 S	Sept. 07, 2010
Lair	US 2010/0300459 A1	Dec. 02, 2010
Sonderegger	EP 1362520 A2	Nov. 19, 2003

REJECTIONS

I. Claims 5 and 6 stand rejected under 35 U.S.C. § 101 and Section 33(a) of the America Invents Act as directed to, or encompassing, a human organism. Final Act. 5.

II. Claims 3–9 and 18–20 stand rejected under 35 U.S.C. § 112(b) as indefinite. Final Act. 5–6.²

III. Claims 17–19 stand rejected under 35 U.S.C. § 102(b) as anticipated by Graneto. Final Act. 6.

IV. Claims 1–8 and 10–13 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Graneto and Matsushita. Final Act. 10.

V. Claim 9 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Graneto, Matsushita, and Sonderegger. Final Act. 18.

VI. Claim 14 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Graneto, Matsushita, and Lair. Final Act. 19.

² Reference is made to a separate rejection of claims 8 and 9 under 35 U.S.C. § 112(b). The rejection of claims 8 and 9 is considered herein as part of Rejection II above. See Final Act. 5–6.

VII. Claim 15 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Graneto, Matsushita, and Lin. Final Act. 19.

VIII. Claim 16 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Graneto, Matsushita, and Burton. Final Act. 20.

IX. Claim 20 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Graneto. Final Act. 21.

ANALYSIS

Rejection I – Section 101

The Examiner finds that claims 5 and 6 recite a front and rear of a user's torso, "which are human body parts and therefore non-statutory subject matter." Final Act. 5.

Appellant argues that the claims merely recite "the function of the ties by what they do rather than what they are," and that if claim 5 instead "recited 'the first tie wrapping around a front of any torso-shaped object about which the tie might be tied,' there would be no question that there was no positive recitation of" a human body. Appeal Br. 15. According to Appellant, neither the front nor the rear of a torso is positively recited in the claims, and "these terms merely describes where the ties are when closing the opening of the gown and how they wrap when doing so."

The Examiner responds that claims 5 and 6, as amended by Appellant, "clearly require a torso of the user." Ans. 2. We understand the Examiner to be contending that claims 5 and 6, as amended during prosecution and contrary to Appellant's assertion, positively recite the user's torso.

Claim 5 recites a “first tie wrapping around a front of the torso of the user,” and claim 6 recites a “second tie wrapping around a rear of the torso of the user.”

We agree with the Examiner that each of claims 5 and 6, as written, positively recite³ the user’s torso, such that the claims encompass a human organism. *See Leahy-Smith America Invents Act (AIA), Public Law 112-29, sec. 33(a), 125 Stat. 284* (“Notwithstanding any other provision of law, no patent may issue on a claim directed to or encompassing a human organism.”). Claims 5 and 6 are therefore directed to non-statutory subject matter. *See MPEP § 2105(III)* (“If the broadest reasonable interpretation of the claimed invention as a whole encompasses a human organism, then a rejection under 35 U.S.C. 101 and AIA sec. 33(a) must be made indicating that the claimed invention is directed to a human organism and is therefore non-statutory subject matter.”). We sustain Rejection I.

Rejection II – Definiteness

The Examiner finds that the claims are indefinite because they “lack transitional words or phrases between the preamble and the body of the claim.” Final Act. 6. The Examiner finds that claim 3, which recites “[t]he gown of claim 1, the one or more tie members comprising a first tie and a second tie” should include a transition, for example, “wherein.” *Id.*

Appellant argues that “there is no rule, statute, case, or other authority stating that the term ‘wherein’ must be used in claim drafting,” and a lack thereof causes no ambiguity in claim 3. Appeal Br. 16–18.

³ A positive recitation limits the claim. Thus, claims 5 and 6, as written require a user’s torso. *See, e.g., MPEP §2115.*

The determination of definiteness is whether a skilled artisan would understand what is claimed when a claim is read in light of the specification as a whole. *See Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343, 1350 (Fed. Cir. 2010). The Examiner does not contend that the missing “wherein” transition in claim 3 would prevent a skilled artisan from understanding what is claimed. For this reason, we do not sustain the indefiniteness rejection of claim 3, or claims 4–7 depending therefrom. The Examiner sets for no explicit reason why claims 18–20 are indefinite. Thus, we likewise do not sustain the rejection of claims 18–20.

The Examiner contends that claim 8, which recites “the second tie a mirror image of the first tie” is indefinite because a verb, for example “is” appears to be missing. *Id.* Similarly, the Examiner contends that claim 9, which recites “a front portion length of the front portion greater than a rear portion length of the rear portion” is indefinite because a verb, for example “is” appears to be missing. *Id.*

Appellant argues that they are free to “define in the claims what they regard as their invention essentially in whatever terms they choose,” as long as there is no ambiguity in the claims. Appeal Br. 19–20. According to Appellant, the recitation of claim 8 “simply means that the first tie and second tie are mirror images. There is no other meaning possible, and thus no ambiguity. The same is true with claim 9.” *Id.* at 29.

The Examiner responds that the current language of claim 8 is unclear because, for example, it is unknown whether the limitation should “be interpreted as ‘the second tie *can be attached as* a mirror image of the first tie,’ which would be consistent with the specification, or [as] ‘the second tie

is a mirror image of the first tie,’ as Appellant argues. It is assumed that the Examiner considered the same argument to hold true for claim 9. Ans. 3–4.

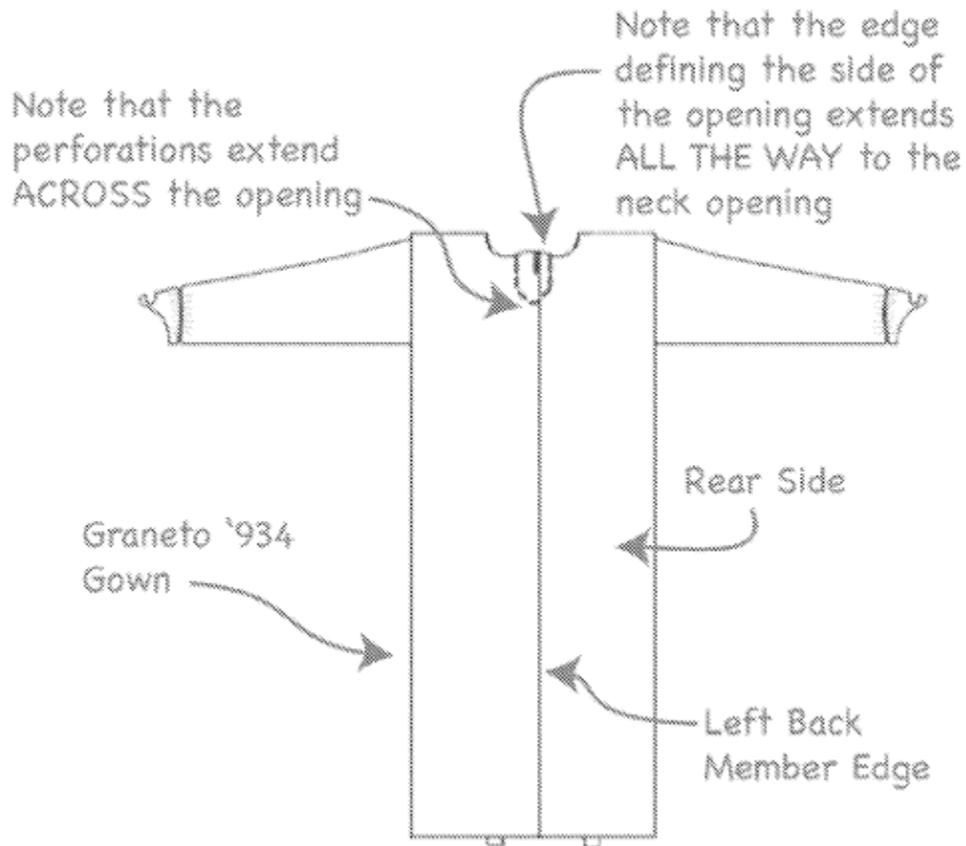
Regarding claims 8 and 9, because it is unclear whether the missing word is intended to be “is,” for example, or “can be,” a skilled artisan is prevented from completely understanding what is claimed. For this reason, we sustain the indefiniteness rejection of claims 8 and 9.

Rejections III–IX

A single issue is determinative of the prior art rejections set forth in Rejections III–IX: whether Graneto discloses a “rear portion” that “separates the opening and the head insertion aperture” and includes a perforation extending between the opening and the head insertion aperture. *See, e.g.*, Appeal Br. 23–26.

The Examiner finds that Graneto discloses, *inter alia*, a gown with a rear portion “separating the opening and the head insertion aperture (figs 2, 4, and 5 show the head insertion aperture at the top side of the rear portion and the opening at the bottom side of the rear portion),” and “one or more perforations extending across the rear portion at least partially between the opening and the head insertion aperture (fig 7).” Final Act. 7.

Appellant argues that Graneto does not disclose such a rear portion, instead disclosing “a rear opening that extends all the way to its neck opening, as shown in FIG. 4.” Appellant provides the following annotated version of Graneto’s Figure 4.



Id. at 23. Appellant argues that Graneto’s two rear members “separate to define an opening,” that extends all the way to the neck opening of the gown, “confirm[ing] that there is no rear member.” *Id.* at 24.

The Examiner responds that Graneto’s rear members are attached at their tops, and the attached portion of the rear members is interpreted as the rear portion. Ans. 4. The Examiner continues that Graneto’s head insertion aperture “is separated from the opening/abutment of the rear members by the attached portion of the rear members that is adjacent the neck opening.” *Id.*

Looking at Appellant’s Specification to properly interpret the term “rear portion,” we see that Appellant’s rear portion is “configured to cover at least a portion of a wearer’s shoulder blades” and can have “a substantially similar length with the front portion,” or can be shorter or longer than the

front portion. Spec. ¶ 48. In an embodiment, an opening 201 extends distally from the rear portion 203, and one or more perforations 202 extends across the rear portion 203 that can be torn to split the rear portion 203. *Id.* at ¶¶ 51–52. Other embodiments disclosed throughout the Specification similarly describe the rear portion.

We are apprised of no definition or interpretation of the term “rear portion” that would exclude the upper attached area of Graneto’s rear members, which area defines a rear of Graneto’s head insertion aperture and resides between the head insertion aperture and the rear gown opening, and would appear to cover a portion of a wearer’s shoulder blades. Appellant has provided us with no reason why an attached portion of two members cannot form a “rear portion.” Graneto thus includes a rear portion.

Appellant notes that independent claim 17 recites perforations extending across the rear portion between the opening and the head insertion aperture, such that the perforations also separate the opening and the head insertion aperture. App. Br. 23. Appellant argues that the above annotated version of Graneto’s Figure 4 shows that Graneto’s perforations “pass across the opening itself” because Graneto’s opening “extends all the way to the neck opening due to Graneto’s failure to provide the rear portion.” *Id.* Appellant further argues that, like the rear portion, the claimed perforations separate the opening and the head insertion aperture, and Graneto fails to teach perforations in such a location, because “its perforations pass across the opening, as is clearly shown in FIG. 7 (and [annotated] FIG. 4 above).” *Id.* at 24.

Regarding perforations, independent claim 1 and 17 recite “one or more perforations extending across the rear portion at least partially between

the opening and the head insertion aperture.” The Examiner responds that some (i.e., one or more) of Graneto’s perforations extend across the above-described rear portion, and “are between the top of the opening/bottom of the attachment and the top of the attachment/neck opening.” Ans. 5.

As explained above, we agree with the Examiner that Graneto discloses a rear portion. Graneto discloses at least one perforation extending across that rear portion at least partially between the rear opening and the head insertion aperture.

For these reasons, we sustain prior art Rejections III–IX.

DECISION SUMMARY

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
5, 6	101	human organism	5, 6	
3–9, 18–20	112(b)	Indefinite	8, 9	3–7, 18–20
17–19	102(b)	Graneto	17–19	
1–8, 10–13	103(a)	Graneto, Matsushita	1–8, 10–13	
9	103(a)	Graneto, Matsushita, Sonderegger	9	
14	103(a)	Graneto, Matsushita, Lair	14	
15	103(a)	Graneto, Matsushita, Lin	15	
16	103(a)	Graneto, Matsushita, Burton	16	
20	103(a)	Graneto	20	
Overall Outcome:			1–20	3–7, 18–20

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

Appeal 2019-000652
Application 14/942,755

AFFIRMED