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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GARY RAYFORD SPRUILL and DOUGLAS VERNE THOM

Appeal 2019-002802
Application 14/065,680
Technology Center 3700

Before JENNIFER D. BAHR, DANIEL S. SONG, and
WILLIAM A. CAPP, *Administrative Patent Judges*.

BAHR, *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 34–53. 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. Appellant identifies the real party in interest as the named inventors. Appeal Br. 1.

CLAIMED SUBJECT MATTER

Appellant's invention is directed to "compression fit pants/shorts, and more particularly to compression fit pants or shorts with gussets, cut-resistant fabric, and protective pads." Spec. 1. Claims 34 and 48 are independent. Appeal Br. 31–32, 35–36 (Claims App.). Claim 34, reproduced below, is illustrative of the claimed subject matter.

34. A compression fit garment configured to be worn over the lower torso of a human, comprising:

a waistband configured to encircle, when worn by the human, a waist portion of the lower torso of the human;

a first gusset coupled to the waistband and configured with a first shape adapted to cover, when worn by the human, a first muscle group of the lower torso of the human, the first gusset comprising a stretchable compression fabric having a first elasticity selected to apply a first compression fit to the first muscle group to isolate the first muscle group;

a second gusset coupled to the first gusset and configured with a different, second shape adapted to cover, when worn by the human, a different, second muscle group of the lower torso of the human, the second gusset comprising a stretchable compression fabric having a different, second elasticity selected to apply a different, second compression fit to the second muscle group to isolate the second muscle group; and

a portion of cut-resistant fabric attached to and covering a first portion of an exterior surface of a selected one of the first gusset or the second gusset so that a remaining second portion of the exterior surface of the selected one of the first gusset or the second gusset is not covered by the portion of cut-resistant fabric, the cut-resistant fabric formed of a different material than the selected one of the first gusset or the second gusset.

EVIDENCE

The prior art relied upon by the Examiner is:

Brown	US 8,214,926 B2	July 10, 2012
Davis	US 2005/0229282 A1	Oct. 20, 2005
Nilforushan	US 2008/0040831 A1	Feb. 21, 2008
Duffy	US 2009/0025115 A1	Jan. 29, 2009
Berner	US 2010/0024101 A1	Feb. 4, 2010
Sims	US 2010/0024105 A1	Feb. 4, 2010
Wyner	US 2013/0061377 A1	Mar. 14, 2013

REJECTIONS

- I. Claims 34–53 stand rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.
- II. Claims 34–38, 40, 41, 45, 46, 48, and 51–53 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Duffy and Davis.
- III. Claim 39 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Duffy, Davis, and Sims.
- IV. Claims 42–44 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Duffy, Davis, and Brown.
- V. Claims 47 and 49 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Duffy, Davis, Nilforushan, and Wyner.
- VI. Claim 50 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Duffy, Davis, and Berner.

OPINION

Rejection I—Written Description

The basis of the Examiner’s rejection for failure to comply with the written description requirement is that “[c]laims 47 and 49, recite ‘... poly-paraphenylene terephthalamide...’.” Final Act. 3. Although the Examiner includes claims 34–53 in this rejection, the Examiner does not set forth any reasons why claims 34–46, 48, and 50–53, which do not recite “poly-paraphenylene terephthalamide,” fail to comply with the written description requirement. Thus, we do not sustain the rejection of claims 34–46, 48, and 50–53 under 35 U.S.C. § 112, first paragraph.

With respect to claims 47 and 49, Appellant submits that “[t]he originally filed written description identified ‘Kevlar’ as a suitable cut-resistant fabric that could be used in some embodiments.” Appeal Br. 11. Appellant, noting that it is improper to use a trademark to identify goods themselves, amended both the Specification and claims 47 and 49 to identify the polymer associated with the trademark Kevlar[®] by its generic name (“poly-paraphenylene terephthalamide”), “as would be recognized by the skilled artisan.” *Id.* at 11–12. In support of the position that those skilled in the art would associate the trademark Kevlar[®] with the polymer poly-paraphenylene terephthalamide, Appellant cites Meier (US 2015/0272256 A1, published October 1, 2015). *Id.* at 12; *see* Meier, Abstract (disclosing a material including “poly-paraphenylene terephthalamide (i.e., Kevlar[®])”); ¶ 16 (disclosing same).

In response, the Examiner cites common dictionaries to refute Appellant’s position regarding Kevlar[®]. Ans. 3 (stating that “Kevlar is not the same as ‘poly-paraphenylene terephthalamide’”).

The fundamental factual inquiry for ascertaining compliance with the written description requirement is whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date. *See Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc). Although Appellant correctly notes that a trademark is used to identify the source of goods, rather than the goods themselves, we are persuaded that persons of ordinary skill in the art associate Kevlar[®] with the generic name poly-paraphenylene terephthalamide of the polymer marketed under that trademark. Thus, Appellant’s disclosure of “[c]ut-resistant fabrics such as Kevlar” on page 2 of the originally filed Specification of the present application reasonably conveys to those skilled in the art that Appellant had possession of the subject matter (i.e., a cut-resistant fabric comprising poly-paraphenylene terephthalamide) now recited in claims 47 and 49 as of the filing date. Accordingly, we do not sustain the rejection of claims 47 and 49 under 35 U.S.C. § 112, first paragraph.

Rejections II–IV and VI—Obviousness based on Duffy and Davis, alone or in view of one of Sims, Brown, and Berner

Independent claim 34 recites, in pertinent part, “a portion of cut-resistant fabric attached to and covering a first portion of an exterior surface of a selected one of the first gusset or the second gusset . . . , the cut-resistant fabric formed of a different material than the selected one of the first gusset or the second gusset.” Appeal Br. 31–32 (Claims App.). Independent claim 48 includes a similar recitation, namely, “a portion of cut-resistant fabric attached to and covering a first portion of an exterior surface of a selected one of the first, second, third or fourth gussets . . . , the selected one

of the first, second[,], third[,], or fourth gussets formed of a first material,” and “the portion of cut-resistant fabric formed from a different, second material.” *Id.* at 36.

The Examiner finds that Davis lacks a portion of cut-resistant fabric attached to and covering an exterior surface of a selected one of the gussets as called for in claims 34 and 48. Final Act. 5, 13. However, the Examiner finds that Davis teaches attaching a portion of cut-resistant fabric to the outer surface of each knee area of pants to form a pocket. *Id.* at 5, 13–14 (citing Davis, Fig. 1; ¶ 13). In making this finding, the Examiner states that “every fabric materials is configured to cut resistant at a certain degree [*sic*].” *Id.* at 5, 14. The Examiner determines it would have been obvious “to provide knee protective devices/a portion cut-resistant fabric of Davis to attach on the outer surface of knee region 44 of the pants of Duffy in order to provide better protection to the wearer’s knee areas during crawling.” *Id.* (citing Davis ¶ 14). The Examiner adds:

[S]o that a remaining second portion of the exterior surface of the selected one of the first gusset (fig.1 of Davis shows the knee protection pad is being disposed on the knee area of the garment of Duffy while the second gusset without the knee protection pad) or the second gusset is not covered by the portion of cut-resistant fabric, the cut-resistant fabric formed of a different material than the selected one of the first gusset or the second gusset.

Final Act. 5–6.

Appellant argues that the Examiner’s construction of “cut-resistant fabric” is unreasonable, and thus is not the broadest *reasonable* construction, “because it eviscerates the modifier ‘cut-resistant’ and simply changes ‘cut-resistant fabric’ to mean ‘fabric.’” Appeal Br. 15. Further, Appellant

emphasizes that claims 34 and 48 also require that the cut-resistant material be a different material than the underlying gusset to which the cut-resistant fabric is attached. *Id.* at 17. Appellant contends that “the pocket material in Davis is the same material as the underlying pants, and regardless is not a cut-resistant fabric as understood by the skilled artisan.” *Id.* According to Appellant, “[u]nless Davis intended the purchaser of his product to allow an infant to crawl over something that could be a cutting hazard to the child, which is not supported by the reference, there would be no purpose for making the fabric cut-resistant in the manner claimed.” *Id.*

In response, the Examiner points out that Davis shows two layers of material attached to the front pockets 44 and 46 and concludes that, thus, “it would have been obvious to one of ordinary skill in the art to recognize that each material layer, fiber and/or fabric of the pocket is configured to cut resistant at a certain degree and/or to prevent some external impact force that affecting wearer’s skin [*sic*].” Ans. 4.

We agree with Appellant that the Examiner’s position that all fabrics are “cut-resistant” to some degree and, thus, the layer of fabric forming pocket 44 or 46 of Davis is a “cut-resistant fabric” as claimed is unreasonable in that it effectively reads “cut-resistant” out of the claim. *See Stumbo v. Eastman Outdoors, Inc.*, 508 F.3d 1358, 1362 (Fed. Cir. 2007) (denouncing claim constructions which render phrases in claims superfluous). Appellant’s Specification provides some guidance as to what is meant by “cut-resistant” by providing two examples (“Kevlar” and “Steelskin ®”) of “[c]ut-resistant fabrics.” *See* Spec. 2. Davis gives no indication that the layers of fabric forming pockets 44 and 46 of knee protective devices 24, 26 are made of fabrics manufactured to exhibit cut-

resistance of this nature. Rather, the purpose of Davis's pockets is to receive removable inserts of soft padding 42 to provide padding for protection during crawling. Davis ¶¶ 13, 14, 17.

Further, claims 34 and 48 also recite that the "cut-resistant fabric" is made of a "different material" than the selected gusset to which the "cut-resistant fabric" is attached. Appeal Br. 31–32, 35–36. The Examiner's cryptic explanation, quoted above, bridging pages 5 and 6 of the Final Action is not sufficiently enlightening to satisfy the Examiner's burden to articulate a reason with rational underpinnings as to why a person having ordinary skill in the art would have been prompted to attach a portion of cut-resistant fabric to a portion of an exterior surface of a selected one of Duffy's gussets, wherein the cut-resistant material is of a different material than the selected gusset.

For the above reasons, we do not sustain the rejection of independent claims 34 and 48, or claims 35–38, 40, 41, 45, 46, and 51–53, which depend from either claim 34 or claim 48, as being unpatentable over Duffy and Davis.

The Examiner's application of Sims, Brown, or Berner in rejecting dependent claims 39, 42–44, and 50 does not overcome the aforementioned deficiency in the combination of Duffy and Davis. Accordingly, we do not sustain the rejection of claim 39 as being unpatentable over Duffy, Davis, and Sims; the rejection of claims 42–44 as being unpatentable over Duffy, Davis, and Brown; or the rejection of claim 50 as being unpatentable over Duffy, Davis, and Berner.

Rejection V—Obviousness based on Duffy, Davis, Nilforushan, and Wyner

Claims 47 and 49 depend from claims 34 and 48, respectively, and further recite that the selected “gusset comprises spandex, and the portion of cut-resistant fabric comprises poly-paraphenylene terephthalamide.” Appeal Br. 35, 37 (Claims App.). The Examiner relies on Nilforushan for a teaching to make Duffy’s compression material of spandex, and on Wyner for a teaching to make the inner and outer layers of a cushioning pad of an abrasion-resistant fabric such as Kevlar. Final Act. 15–16 (citing Nilforushan ¶ 55, Fig. 1; Duffy ¶ 29, Fig. 1). In particular, the Examiner determines it would have been obvious “to provide the Kevlar material for the *insert pad* of Duffy as taught by Wyner in order to provide the abrasion resistant [*sic*] for the garment.” *Id.* at 16 (emphasis added).

The Examiner’s application of Nilforushan does not address the cut-resistant fabric and, thus, does not cure the aforementioned deficiency in the rejection of claims 34 and 48. The Examiner’s proposed modification of Duffy in view of Wyner also fails to remedy the aforementioned deficiency of the rejection of claims 34 and 48 because the insert pad of the combination of Duffy and Davis is placed within pocket 44 or 46 and, thus, is not attached to the underlying panel (i.e., gusset) as is required of the portion of cut-resistant fabric in claims 47 and 49. *See* Appeal Br. 28 (arguing that Wyner “fails to teach or suggest providing a layer of such material onto a portion of a gusset formed of compressive material in the manner claimed.”).

Accordingly, we do not sustain the rejection of claims 47 and 49 as unpatentable over Duffy, Davis, Nilforushan, and Wyner.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
34–53	112, first paragraph	Written Description		34–53
34–38, 40, 41, 45, 46, 48, 51–53	103(a)	Duffy, Davis		34–38, 40, 41, 45, 46, 48, 51–53
39	103(a)	Duffy, Davis, Sims		39
42–44	103(a)	Duffy, Davis, Brown		42–44
47, 49	103(a)	Duffy, Davis, Nilforushan, Wyner		47, 49
50	103(a)	Duffy, Davis, Berner		50
Overall Outcome				34–53

REVERSED