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27316	7590	12/23/2019	EXAMINER	
Mayback & Hoffman, P.A. 350 East Las Olas Blvd Suite 1750 Fort Lauderdale, FL 33301			GIULIANI, THOMAS ANTHONY	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GARY KALSER and GREGORY L. MAYBACK

Appeal 2019-003946
Application 14/709,060
Technology Center 3700

Before JILL D. HILL, LEE L. STEPINA, and ARTHUR M. PESLAK,
Administrative Patent Judges.

STEPINA, *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 8–13.² 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 parties in interest as the inventors, Gary Kalser and Gregory L. Mayback. Appeal Br. 3.

² Claims 1–7 are withdrawn from consideration. *See* Final Act. 1–2.

CLAIMED SUBJECT MATTER

Appellant's invention relates to a cryotherapy device having cryoprotection. Claim 8, reproduced below, is illustrative of the claimed subject matter:

8. A cryoprotective device, comprising:
 - a hollow cryoprotective needle probe shaped to pierce human tissue and having:
 - a distal tip;
 - a removable obturator; and
 - at least one integral temperature sensor monitoring temperature of the tissue that is adjacent the distal tip when the distal tip has pierced the tissue and at least temporarily resides within the tissue;
 - an injector injecting a cryoprotective substance (CPS) through the cryoprotective probe and out the distal tip into the tissue when the distal tip is within the tissue and the obturator is removed, the CPS preventing freezing of the tissue in which it is injected when adjacent cryotherapy occurs; and
 - a processor monitoring temperature detected by the at least one temperature sensor.

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Rubinsky	US 6,041,787	Mar. 28, 2000
Kochavi	US 2007/0167776 A1	July 19, 2007
Curtis	US 2012/0089211 A1	Apr. 12, 2012

REJECTION

Claims 8–13 are rejected under 35 U.S.C. § 103 as unpatentable over Rubinsky, Curtis, and Kochavi. Final Act. 2.

OPINION

In rejecting independent claim 8 as obvious, the Examiner finds that Rubinsky discloses most features of the cryotherapy device of claim 8 including, *inter alia*, a removable obturator. Final Act. 2. The Examiner also finds that Curtis and Kochavi disclose similar devices having additional features, but does not rely on Curtis or Kochavi to disclose any feature of the obturator. See Final Act. 3–4.

Appellant argues that element 20 of Rubinsky is not an obturator because it does not “completely fill the center channel of the circulating device of Rubinsky to prevent inflow of material.” Br. 20. Specifically, Appellant contends that because the sides of probe 20 are spaced from the inner walls of the device, it does not fill the device, and that because probe 20 is the part of Rubinsky’s device that delivers the freezing fluid, it does not prevent inflow of material. Br. 21. According to Appellant, the claimed obturator protects the CPS injection channel by sealing the inner walls consistent with the plain meaning of “obturator.” Br. 22.

In response, the “Examiner maintains that the ‘obturator’ limitation has been met as it is currently written, due to its breadth.” Ans. 3.

Appellant has the better position. “The correct inquiry in giving a claim term its broadest reasonable interpretation in light of the Specification ... 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 Smith International, Inc.*, 871 F.3d 1375, 1382–1383 (Fed. Cir. 2017). Paragraph 80 of the Specification discloses that “distal tip 1020 of the cryotherapy pretreatment device 1005 is guided trans-rectally alongside the nerves (bilaterally) up to and adjacent the

prostatic plexus with an obturator therein to protect the CPS injection channel.” Br. 22. Paragraph 80 further discloses that “the obturator is removed and the CPS 1105 is injected through the proximal connector 1010,” after the cryotherapy device is placed in position.

A common dictionary definition of the term “obturator” is “something (such as a prosthetic device) that closes or blocks up an opening (such as a fissure in the palate).” www.merriam-webster.com/dictionary/obturator (last visited December 5, 2019). Based on Appellant’s disclosure, in claim 8, the broadest reasonable interpretation of an obturator is a device that closes up the CPS injection channel and that is capable of being removed from the channel once the distal tip is within the tissue. The Examiner does not dispute Appellant’s contentions that probe 20 of Rubinsky does not fill the inner channel and is spaced from the inner walls. Probe 20 is depicted in Figure 3 of Rubinsky, reproduced below.

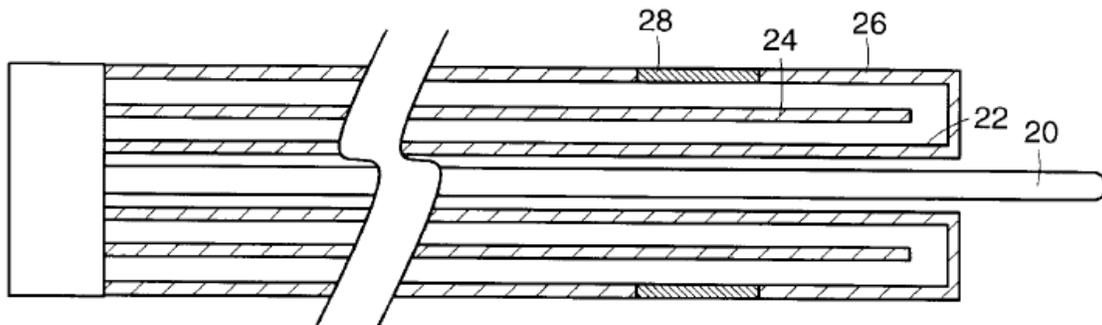


FIG. 3

Figure 3 shows a cross section of one embodiment of a cryosurgery apparatus. Rubinsky, 5:23–24. Although probe 20 is within the inner channel, we agree with Appellant that because probe 20 is spaced from the inner walls of the channel, it does not close up the channel. The Examiner appears to be relying on an unreasonably broad interpretation of the term

“obturator.” Moreover, as Appellant correctly notes, probe 20 delivers the freezing fluid as the protective agent is being delivered through porous region 28. *Id.* at 5:45–6:1; 7:12–13. The Examiner does not explain how or when probe 20 is removed while the remainder of the device is within the tissue. The Examiner’s unreasonably broad claim interpretation led to the Examiner’s incorrect finding that Rubinsky discloses a removable obturator. Because the Examiner does not rely on the disclosures of Curtis or Kochavi to remedy the shortcomings of Rubinsky, we do not sustain the rejection of claim 8 and claims 9–13 depending from claim 8.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Basis	Affirmed	Reversed
8–13	103	Rubinsky, Curtis, Kochavi		8–13
Overall Outcome				8–13

REVERSED