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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* MICHAEL J. VAILLANCOURT, MARSHALL KERR, and  
MICHAEL PFEFFERKORN

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Appeal 2019-005110  
Application 15/193,681  
Technology Center 3700

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Before ST. JOHN COURTENAY III, LARRY J. HUME, and  
PHILLIP A. BENNETT, *Administrative Patent Judges*.

COURTENAY III, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellant filed a Request for Rehearing (“Request”) under 37 C.F.R. § 41.52(a)(1) for reconsideration of our Decision on Appeal, mailed on March 27, 2020 (“Decision”).<sup>1</sup> Our Decision affirmed the Examiner’s decision rejecting claims 1, 2, 4–10, 12, and 15 under 35 U.S.C. § 103 as being obvious, and reversed the Examiner’s rejections under 35 U.S.C. § 103 of claims 13, 14, 16–18, and 21–23.

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<sup>1</sup> We use the word “Appellant” to refer to “Applicants” as defined in 37 C.F.R. § 1.42(a). According to Appellant, the real party in interest is Michael J. Vaillancourt, Marshall Kerr, and VLV Associates, Inc. Appeal Br. 1.

Regarding the affirmed rejections of claims 1, 2, 4–10, 12, and 15, Appellant contends two points were “misapprehended or overlooked” by the Board Decision in affirming the rejection of claim 1 and the claims [2, 4–10, 12, and 15] dependent therefrom. Request 1. In particular, Appellant contends:

1. Howell [WO 2014/039891] does not encase a catheter.
2. Modifying Howell with the teachings or suggestions of Rossen would not result in the claimed structure, i.e. a dressing with a cover with a bubble for positioning over and encasing a catheter on a base.

*Id.*

In support, Appellant argues: “contrary to the Examiner’s position that the film 718 over the window 714 of Howell “encases the catheter...”, the Decision holds: “We are not persuaded by Appellant’s arguments because we find item 708, as depicted in Figs. 67 and 68, shows encasing a catheter.” Request 3 (quoting Decision 7).

We note claim 1 recites, in pertinent part: “said cover having a window with a preformed bubble for positioning over and **encasing** a catheter.” (emphasis added).

As reproduced by Appellant in the Request (2), the Examiner finds Howell teaches:

**a cover 708** (Fig. 57) secured to said base for movement between an opened position (e.g., Fig. 57) spaced from said base and a closed position (e.g., **Fig. 67**) over said base,

said cover having a window (combination of 714 and 718; Fig. 57) with a bubble (i.e., the film 718 is flexible so that it can deform into a bubble shape when the catheter is placed beneath the film) for viewing of said base and . . .

Final Act. 2–3 (emphasis added).

The Examiner modifies Howell with Rossen, and finds: “Rossen teaches the use of a dressing for a medical site, comprising a film 50 which can be preformed into a bubble shape (paras [0079] and [0092]).” Final Act. 3.

The Examiner further explains in the Answer that “the Rossen reference was invoked to teach a film which can be preformed into a bubble shape (see Final Rejection dated 10/04/2018, pg. 3).” Ans. 19.

Turning to the evidence, Rossen ¶ 79 describes, in pertinent part: “The observation door 50 may have a conformation other than flat. For example, it may have a convex or **bubble shape**.” (emphasis added). *See also* Rossen, Fig. 4b, depicting observation door 50.

Rossen ¶ 92 similarly describes: “The observation door 50 may simply have a transparent window through which the site can be observed . . . Further, the door 50 may have a conformation other than flat, such as a convex or **bubble shape** . . . that would provide added height above the procedure site.” Rossen ¶ 92 (emphasis added). *See also* Rossen, Figs. 10a, 10b, depicting observation door 50.

### *Claim Construction*

As an initial matter of claim construction of the disputed term “encasing,” we turn to the Specification for *context* and find no explicit definition, nor any limiting description. In fact, the Specification is silent as to the disputed claim term “**encasing**” except for its use in canceled original claim 3: “A dressing as set forth in claim 1 wherein said window has a

bubble for positioning over and **encasing** a catheter on said base.” (emphasis added). Current claims 1, 16, and 23 also recite “**encasing**.” *Cf.* independent claim 16 (not before us on rehearing): “a cover having a window of polyurethane of rectangular shape with a preformed bubble for positioning over and **encasing** a catheter on said base . . . .” *Cf. also* dependent claim 23 (not before us on rehearing): “A dressing as set forth in claim 14 wherein said window of said second cover has a preformed bubble for positioning over and **encasing** multiple catheters of a catheter assembly therein.” (emphasis added).

Thus, the term “encasing” is only used in the claims, but no specific definition is provided within the claims, or in the Specification. In this context, we emphasize that, because “applicants may amend claims to narrow their scope, a broad construction during prosecution creates no unfairness to the applicant or patentee.” *In re ICON Health and Fitness, Inc.*, 496 F.3d 1374, 1379 (Fed. Cir. 2007) (citation omitted).

However, Appellant urges: “The Decision is not consistent with the Examiner's position at EA 19, i.e. that the film 718 over the window 714 of Howell **encases** the catheter[.] As such, the Decision presents *a new ground of rejection*.” Request 4 (emphasis added). Appellant further argues: “the Decision does not consider the fact that Fig. 68 of Howell illustrates the medical device [(i.e. catheter)] as projecting from under the item 708 and therefore not **encased**.” *Id.*

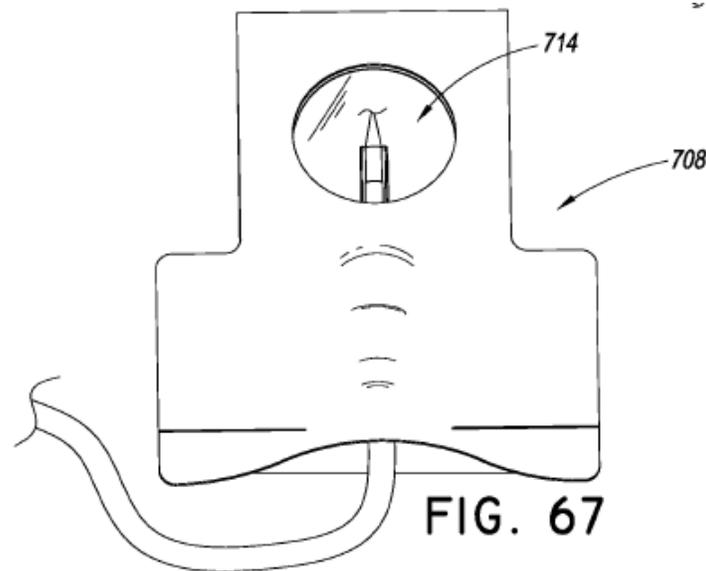
What Appellant appears to mean is that in the Examiner’s proffered combination of Howell and Rossen, the catheter is not *fully* encased. *Id.* But we conclude a broad but reasonable interpretation of claim 1 does not require *fully encasing* the catheter. Given the lack of a limiting definition

for the term “**encasing**” (claim 1), as discussed above, we agree with the Examiner: “the conventional definition of “**encasing**” consistent with the specification means “*to enclose in.*” Ans. 19 (emphasis added). On this record, we conclude the Examiner’s interpretation of “**encasing**” is not overly broad, unreasonable, nor inconsistent with the Specification.

The Examiner finds “Howell does, indeed, disclose that the window **encases** the catheter, as clearly shown in Fig. 68, since the window is positioned over the catheter and at least partially encloses it such that it can be viewed from above.” Ans. 19 (emphasis added). We note Figure 67 of Howell also shows cover 708 **encasing** the catheter, as discussed further below.

Nor do we agree with the Appellant that our Decision sets forth a new ground of rejection, because the Examiner points to Howell’s foldable **cover 708** and Howell’s Figure 57 on page 2 of the Final Action. *See also* Howell Figures 62, 64, 65, and 67 which depict **cover 708** from different visual perspectives.

In particular, Figure 67 of Howell depicts folding the cover 708 over the catheter, thus **encasing** it, as shown below:



*Figure 67 of Howell depicts folded cover 708 above with window 714*

But Appellant focuses on the “preformed bubble” limitation of claim 1, and urges that it is the “preformed bubble” that encases the catheter:

The Decision is in error in holding that the item 708 shows encasing a catheter since claim 1 **requires the bubble -- not the cover--** to encase the catheter.

Further, as illustrated in Fig. 67 of Howell, the film 714 is disposed only over a minor portion of the medical device 244.

Thus, as a matter of fact, the cover of Howell does not have a window for positioning over and encasing a catheter as required by claim 1.

Request 4 (emphasis added).

We disagree with Appellant. We note the plain language of claim 1 requires a “*cover having a window* with a preformed bubble for positioning over and **encasing** a catheter.” (emphasis added).

The Examiner relies upon Howell for teaching folder cover 708 having window 714 and film 718. *See* Final Act. 3: “said cover having a

window (combination of 714 and 718; Fig. 57) with a bubble (i.e., the film 718 is flexible so that it can deform into a bubble shape when the catheter is placed beneath the film).

The Examiner relies upon Rossen (¶¶ 79, 92), as discussed above, for teaching the *bubble deformation* of Howell's window 714. *See* Final Act. 3: "It is noted that Howell does not appear to disclose that the bubble is 'preformed' (although the film 718 is preformed, it does not appear to be preformed into a bubble shape). Rossen teaches the use of a dressing for a medical site, comprising a film 50 which can be preformed into a bubble shape (paras [0079] and [0092])."

Our reviewing court guides that nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures. *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Moreover, the test for obviousness is not whether the claimed invention is expressly suggested in any one or all of the references, but whether the claimed subject matter would have been obvious to those of ordinary skill in the art in light of the *combined teachings* of those references. *In re Keller*, 642 F.2d 413, 425 (CCPA 1981).

Here, to the extent Appellant argues that the Examiner finds Howe's film 718 over the window 714 "**encases** the catheter, as clearly shown in Fig. 68, since the window is positioned over the catheter and at least partially *encloses* it" (Request 3), we find Appellant is arguing the references separately. (emphasis added). Moreover, we conclude the Examiner's broader interpretation of the claim 1 term "**encasing**" is not inconsistent with the Appellant's Specification, because we do not find a

limiting definition for the term “**encasing**” in the Specification or in the claims.<sup>2</sup>

Because Appellant’s arguments are directed to attacking the references individually, and not to the Examiner’s proffered modification of Howell’s window 714 (and film 718) with Rossen’s bubble-shaped observation door 50 (Final Act. 2–3), on this record, we are not persuaded the Examiner erred.

Because Howell (¶ 138, Fig. 57) describes that “flap 708 includes a film 718 disposed over the window 714” and Rossen (¶¶ 79, 92) teaches a bubble-shaped window, as discussed above, we disagree with Appellant’s second contention that “[m]odifying Howell with the teachings or suggestions of Rossen would not result in the claimed *structure*, i.e. a dressing with a cover with a bubble for positioning over and **encasing** a catheter on a base.” Request 1 (emphasis added).

“[W]hen a patent ‘simply arranges old elements with each performing the same function it had been known to perform’ and yields no more than one would expect from such an arrangement, the combination is obvious.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007) (quoting *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 282 (1976)). Moreover, the question under 35 U.S.C. § 103 “is not merely what the references expressly teach but what they would have suggested to one of ordinary skill in the art at the time the invention was made.” *Merck & Co. v. Biocraft Laboratories, Inc.*, 874 F.2d 804, 807 (Fed. Cir. 1989) (emphasis added); *see also* MPEP § 2123.

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<sup>2</sup> We give the contested claim limitations the broadest reasonable interpretation (BRI) consistent with the Specification. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

This reasoning is applicable here. We have reconsidered our Decision, in light of Appellant’s arguments in the Request. On this record, we are not persuaded that we have misapprehended or overlooked any points in rendering our Decision, for the reasons discussed *supra*.

DECISION

We grant Appellant’s Request for Rehearing only to the extent that we have reconsidered our Decision. For the reasons discussed above, we are not persuaded that we misapprehended or overlooked any points in rendering our Decision. Our Decision is final for purposes of judicial review. *See* 37 C.F.R. § 41.52(a)(1).

*Outcome of Decision on Rehearing*

<b>Claims</b>	<b>35 U.S.C §</b>	<b>Basis</b>	<b>Denied</b>	<b>Granted</b>
1, 2, 9, 12	103	Howell, Rossen	1, 2, 9, 12	
4	103	Howell, Rossen, Sung	4	
5, 15	103	Howell, Rossen, Souza	5, 15	
6	103	Howell, Rossen, Hatanaka, Roberts	6	
7, 8	103	Howell, Rossen, Cartmell	7, 8	
10	103	Howell, Rossen, Roberts	10	
<b>Overall Outcome</b>			1, 2, 4–10, 12, 15	

*Final Outcome of Appeal after Rehearing*

<b>Claims</b>	<b>35 U.S.C. §</b>	<b>Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1, 2, 9, 12	103	Howell, Rossen	1, 2, 9, 12	
4	103	Howell, Rossen, Sung	4	
5, 15	103	Howell, Rossen, Souza	5, 15	
6	103	Howell, Rossen, Hatanaka, Roberts	6	
7, 8	103	Howell, Rossen, Cartmell	7, 8	
10	103	Howell, Rossen, Roberts	10	
<b>Overall Outcome</b>			1, 2, 4–10, 12, 15	13, 14, 16–18, 21–23. <sup>3</sup>

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv). *See* 37 C.F.R. § 41.50(f).

DENIED

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<sup>3</sup> See Decision 16–17 regarding the rejections we reversed for claims 13, 14, 16–18, and 21–23.