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**D E C I S I O N**  
**of 28 January 2004**

**Case Number:** T 1090/01 - 3.2.6

**Application Number:** 95102693.9

**Publication Number:** 0674035

**IPC:** D04H 1/56

**Language of the proceedings:** EN

**Title of invention:**

Polyethylene meltblown fabric with barrier properties

**Applicant:**

KIMBERLY-CLARK WORLDWIDE, INC.

**Opponent:**

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**Headword:**

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**Relevant legal provisions:**

EPC Art. 54(1), 83, 84, 123(2)

**Keyword:**

"Support by description (main request) - no"

"Remittal to the first instance (auxiliary request) - yes"

**Decisions cited:**

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**Catchword:**

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Case Number: T 1090/01 - 3.2.6

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.6  
of 28 January 2004

**Appellant:** KIMBERLY-CLARK WORLDWIDE, INC.  
401 North Lake Street  
Neenah, Wisconsin 54956 (US)

**Representative:** Grünecker, Kinkeldey,  
Stockmair & Schwanhäusser  
Anwaltssozietät  
Maximilianstrasse 58  
D-80538 München (DE)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 3 May 2001  
refusing European application No. 95102693.9  
pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** P. Alting van Geusau  
**Members:** G. C. Kadner  
R. T. Menapace

## Summary of Facts and Submissions

- I. European patent application No. 95 102 693.9 was refused by the examining division by decision posted on 3 May 2001.
- II. The reasons given for the refusal were that the subject-matter of the independent claims according to the main request and the first and second auxiliary requests then on file lacked clarity and inventive step. During examination proceedings the following prior-art documents were cited:
- (D1) US-A 4 554 207
  - (D2) EP-A 0 586 937
  - (D3) US-A 4 766 029
  - (D4) US-A-4 758 239
  - (D5) US-A 5 208 098
  - (D6) US-A-4 041 203
  - (D7) US-A-3 978 185
  - (D8) US-A-3 949 241
  - (D9) US-A-4 830 907
- III. On 13 July 2001 the appellant (applicant) lodged an appeal against this decision and paid the appeal fee the same day. On 12 September 2001 the statement of grounds of appeal was filed.
- IV. In a communication pursuant to Article 11(2) of the Rules of Procedure of the Boards of Appeal dated 11 November 2003, sent together with the summons to oral proceedings, the board expressed doubts whether the parameters of the melt-blowing process defined in the claims would result in the non-woven fabric claimed.

V. Oral proceedings were held on 28 January 2004.

The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the following versions of the claims:

Main request:

"New claim set I" filed with the representative's letter dated 23 December 2003

Auxiliary request:

Set of claims 1 to 14 submitted at the oral proceedings

Claim 1 of the main request reads as follows:

"1. A nonwoven fabric of meltblown dispersed fibers of a thermoplastic polyethylene resin, said fabric having a hydrohead of at least 40 cm, and a cup crush peak load value of less than 40 g."

Claim 1 of the auxiliary request reads as follows:

"1. A process of producing a soft nonwoven barrier fabric comprising the steps of:

melting at least one thermoplastic polyethylene polymer, said polymer having a density in the range of about 0.86 to about 0.97 grams/cc;

extruding said polymer through fine openings;

drawing said polymer to produce fibers, and;

depositing said fiberized polymer on a collecting surface to form a layer of meltblown dispersed (*not: disbursed!*) fibers as a web, wherein said web has a hydrohead of at least 40 centimeters, a cup crush peak

load value of less than 40 grams, and a basis weight of about 0.5 osy (17 gsm);

where the polymer is a Dow's Aspun<sup>®</sup> XUR-1567-45766-30A linear low density polyethylene resin;

the polymer melt temperature and the temperature of the drawing air is about 500°F (260°C);

the drawing air flows at about 420 SCFM;

the throughput is about 2 pounds per die plate inch per hour (357 g/cm/hour); and

the distance from the die tip to the collecting surface is about 6 inches (15 cm)."

VI. In support of its requests the appellant essentially relied upon the following submissions:

The subject-matter of claim 1 according to the main request was clearly defined and could be determined by a skilled person when measuring the values according to the test methods described in the patent application. Support for its wording was derivable from the description, in particular considering page 2, lines 10 to 22, of the application documents.

In any case, the auxiliary request was to be allowed. Claim 1 was composed of the features of the original filed claim 1 together with the parameters of example 1 of the description (page 14, lines 8 to 16). With the amendments made to the claims it complied with Articles 83, 84 and 123 (2) and (3) EPC.

## Reasons for the Decision

1. The appeal of the applicant is admissible.
2. *Main request - Article 84 EPC*
  - 2.1 Claim 1 as amended is directed to a product which is characterised by two parameters whereas according to the application as originally filed the product was characterised by a production process.
  - 2.2 Having regard to the disclosure of the application, support is available for the production process (page 7, lines 1 to 24; page 12, lines 13 to 34) by which a product is yielded. Since the amended claim 1 as a product claim covers a product yielded by any imaginable production process without any information as to how the parameters of the claim could be achieved, no support is available for such a broadened scope of protection.
  - 2.3 Therefore the board concludes that the application lacks sufficient support for claim 1 and for this reason the request is rejected (Article 84 EPC).
3. *Auxiliary request*
  - 3.1 Amendments

Amended claim 1 is based on claim 1 as originally filed to which the features according to EXAMPLE 1 are added. This amended claim meets the requirements of Articles 84 and 123(2) EPC.

### 3.2 Further procedure

Although novelty of the process of producing a soft nonwoven barrier fabric according to claim 1 of the auxiliary request is given when compared to the prior art disclosed in D1 to D9, the amendments of claim 1 are based on the introduction of the features of EXAMPLE 1 disclosed in the description. Therefore the board is not sure whether the newly claimed subject-matter has been searched for during examination proceedings up to now. Final examination of novelty and inventive step can only be carried out after the search of the relevant prior art is completed with respect to claim 1 including an additional search. Therefore the case is remitted to the examining division for further prosecution.

### **Order**

#### **For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The case is remitted to the first instance department for continuation of the examination proceedings.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau