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**Datasheet for the decision
of 31 January 2007**

Case Number: T 0362/05 - 3.2.06

Application Number: 96930556.4

Publication Number: 0847265

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Absorbent article having a stabilizing absorbent element

Patentee:

McNEIL-PPC, Inc.

Opponent:

Kimberly-Clark Worldwide, Inc.

Headword:

-

Relevant legal provisions:

EPC Art. 111(1)

Keyword:

"Late filed document - admitted (yes)"
"Remittal - yes"

Decisions cited:

-

Catchword:

-



Case Number: T 0362/05 - 3.2.06

DECISION
of the Technical Board of Appeal 3.2.06
of 31 January 2007

Appellant: Kimberly-Clark Worldwide, Inc.
(Opponent) 401 North Lake Street
Neenah, WI 54956 (US)

Representative: Davies, Christopher Robert
Frank B. Dehn & Co.
St Bride's House
10 Salisbury Square
London EC4Y 8JD (GB)

Respondent: McNEIL-PPC, Inc.
(Patent Proprietor) 199 Grandview Road
Skillman, NJ 08558 (US)

Representative: Mercer, Christopher Paul
Carpmaels & Ransford
43, Bloomsbury Square
London WC1A 2RA (GB)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 5 January 2005
rejecting the opposition filed against European
patent No. 0847265 pursuant to Article 102(2)
EPC.

Composition of the Board:

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

Summary of Facts and Submissions

I. The appeal lies from the decision of the opposition division rejecting the opposition against European patent 0 847 265.

Claim 1 of the patent as granted reads as follows:

"An absorbent article (5) having longitudinal sides (100), transverse ends (110), a body-facing surface (20) and a garment-facing surface, said article (5) comprising:

- a) a fluid-permeable cover (10) on said body-facing surface (20);
- b) a fluid-impermeable barrier (30) on said garment-facing surface;
- c) a fluid-absorbent core (40) containing wood pulp fluff between the fluid-permeable cover (10) and the fluid impermeable barrier (30), said fluid-absorbent core (40) having a central region (60), transverse ends (130) and a thickness of at least about 0.20 inches (0.508 cm); and
- d) a stabilising absorbent element (120) adjacent an upper portion of the central region (60) of the absorbent core (40), wherein the stabilising element (120) is capable of absorbing fluids and remaining stable when wet, characterised in that the fluid absorbent core (40) contains two preferential bending zones (50) in a region outside the transverse ends of the stabilizing element (120); the stabilising element (120) has a lateral width in a range from at least 0.5 inches (1.27 cm) to less than 1.75 inches (4.445 cm) and is substantially planar; and, in use, bending at the

preferential bending zones (50) allows the absorbent article (5) to cup while the stabilising element (120) maintains the absorbent article (5) in an essentially planar configuration in the perineal area."

II. In its decision the opposition division held that the prior art known from documents

D1: US-A-3 375 827, and

D2: US-A-4 936 839,

did not prejudice maintenance of the patent as granted. In particular, it considered that the subject matter of claim 1 was novel over D1 because the feature "fluid absorbent core .. having a thickness of at least about 0.20 inches (0.508 cm)" could not be found anywhere in D1. Furthermore it would not have been obvious for the skilled person starting from D1 and his common knowledge to provide the article of D1 with this feature in order to arrive at the subject-matter of granted claim 1.

III. With the grounds of appeal the appellant (opponent) submitted document

D3: EP-A-0 570 016,

which, in addition to D1, allegedly deprived the subject-matter of claim 1 as granted of novelty.

IV. The respondent (proprietor) requested that D3 not be admitted into the proceedings and, if the Board would nevertheless allow the newly filed document into the proceedings, that the case be remitted to the

- department of first instance. With respect to D1, it was argued that, in addition to the distinguishing feature identified by the opposition division, the feature "a fluid-impermeable barrier on said garment-facing surface" was also not disclosed.
- V. In a communication dated 20 June 2006 sent by the Board of Appeal to the parties, the Board took the view that D3 appeared *prima facie* more relevant than D1 and D2 concerning novelty of the claimed subject matter. Consequently, D3 should be admitted into the proceedings and the case remitted to the department of first instance for continuation of opposition proceedings. The parties were asked to reconsider their requests for oral proceedings.
- VI. In reply to the communication of the Board, both parties withdrew their requests for oral proceedings, conditional upon the case being remitted to the opposition division for further examination.

Reasons for the Decision

1. The appeal is admissible.
2. Admissibility of D3

D3 appears *prima facie* more relevant than the prior art known from D1 or D2. D1 does not disclose the thickness of the absorbent structure of the absorbent article. Furthermore, although fluid-impervious baffles of plastic film may be employed on the absorbent core, these would nevertheless be enclosed in a fluid-

pervious wrapper (column 2, lines 34-38 and 59-61). The baffles would therefore not be located on said garment-facing surface. In contrast, D3 discloses an absorbent article having, amongst other features of claim 1, a liquid-impervious outer shell (column 5, lines 55/56). D3 also indicates a thickness for the absorbent structure within a range of 3.18 to 38.10 mm (about 0.125 to about 1.5 inches; column 7, lines 33-36). Therefore, D3 throws serious doubt on the novelty of the subject matter of claim 1.

D3 was filed by the appellant after the expiry of the opposition period set in Article 99(1) EPC, without, however, any valid reason being provided that D3 could not have been submitted in due time. Pursuant to Article 114(2) EPC, its possible admission into the proceedings is at the Board's discretion. Since the opposition division did not agree to its objection concerning lack of novelty based on D1, the appellant then filed D3 at the earliest possible opportunity, with the grounds of appeal, in response to the reasons given in the decision under appeal regarding novelty. The Board therefore concludes that the document filed was in time for considering its relevance to the question of novelty. D3 is thus admitted into the proceedings (Article 114(2) EPC; Chapter VI.F.3.1.5, Case Law of the Boards of Appeal, 4th Edition, 2001).

3. Consideration of novelty and inventive step with regard to the newly filed document D3 is necessary. It is the prevailing view in case law under such circumstances, to remit the case to the department of first instance, so that the parties are given the opportunity to prosecute their rights at two levels of jurisdiction

(cf. Chapter VI.F.7, Case Law of the Boards of Appeal, 4th Edition, 2001). The Board therefore decides to remit the case to the opposition division for further prosecution (Article 111(1) EPC).

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 for further prosecution.

The Registrar

The Chairman

M. Patin

P. Alting van Geusau