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**Datasheet for the decision
of 9 January 2013**

Case Number: T 0289/12 - 3.2.06

Application Number: 01935336.6

Publication Number: 1284705

IPC: A61F 13/56, A61F 13/15

Language of the proceedings: EN

Title of invention:
Absorbent articles with refastenable side seams

Patentee:
KIMBERLY-CLARK WORLDWIDE, INC.

Opponent:
SCA Hygiene Products AB

Headword:
-

Relevant legal provisions:
EPC Art. 123(2)

Relevant legal provisions (1973):
EPC Art. 56

Keyword:
"Inventive step - (yes)"
"Amendments - added subject-matter (no)"

Decisions cited:
-

Catchword:
-



Case Number: T 0289/12 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 9 January 2013

Appellant I: KIMBERLY-CLARK WORLDWIDE, INC.
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Appellant II: SCA Hygiene Products AB
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
30 November 2011 concerning maintenance of
European patent No. 1284705 in amended form.

Composition of the Board:

Chairman: M. Harrison
Members: M. Hannam
W. Sekretaruk

Summary of Facts and Submissions

- I. The appellant/opponent filed an appeal against the interlocutory decision of the opposition division in which it found that European Patent No. 1 170 472 in an amended form met the requirements of the European Patent Convention (EPC), and requested that the decision of the opposition division be set aside and that the patent be revoked.
- II. The appellant/opponent's request for revocation was based on the following objections:
- a) the subject-matter of claim 1 of the amended patent contravened Article 123(2) EPC; and
 - b) the subject-matter of claim 1 lacked novelty over the disclosures in
- D1: WO-A-00/37010; and
- D2: WO-A-97/19664
- III. The appellant/patentee also filed an appeal against the decision of the opposition division, requesting that the decision of the opposition division be set aside and that the patent be maintained as granted or, auxiliarily, according to a first auxiliary request.
- IV. In its response to the patentee's appeal, the appellant/opponent argued that the subject-matter of claim 2 of both the main request and the first auxiliary request contravened Article 123(2) EPC. It further submitted that the subject-matter of claim 1 of the main and the first auxiliary requests lacked novelty over *inter alia* each of D1 and D2.

- V. In its response to the appellant/opponent's grounds of appeal, the appellant/patentee filed second to sixteenth auxiliary requests.
- VI. The Board issued a summons to oral proceedings including a communication containing its provisional opinion. In regard to the main request, the Board indicated *inter alia* that the requirement of Article 123(2) EPC appeared not to be met by the subject-matter of claim 2 and that the subject-matter of claim 1 lacked novelty over both D1 and D2 and that the subject-matter of claims 1 or 2 in each of the second to fifteenth auxiliary requests failed to meet the requirement of Article 123(2) EPC.
- VII. With its letter of 10 December 2012, the appellant/patentee filed a new main request and new first and second auxiliary requests replacing all previous requests.
- VIII. In its letter of 21 December 2012, the appellant/opponent stated that it would not be represented at the oral proceedings and submitted arguments that:
- a) the subject-matter of claim 1 of the requests on file contravened Article 123(2) EPC; and
 - b) the subject-matter of claim 1 of each request lacked an inventive step in view of both D1 in combination with the general knowledge of the skilled person, and
- D5: EP-A-0 597 331
- in combination with D1.

IX. Oral proceedings were held before the Board on 9 January 2013, at which the appellant/opponent was, as previously advised, not present.

In the course of the oral proceedings the appellant/patentee replaced all previous requests with a new request which added further features to the main request previously on file.

The appellant/patentee requested that the decision under appeal be set aside and the European patent be maintained with the following documents:

Claims: 1-4, filed 9 January 2013;
Description: pages 2,8,10 and 12, filed 9 January 2013;
Description: pages 3-7,9 and 11 as granted;
Drawings: Figs. 1-26 as granted

The absent appellant/opponent had requested in writing that the decision under appeal be set aside and that the European patent be revoked.

X. Claim 1 of the sole request reads as follows:

"An absorbent garment (20) comprising:
a chassis (32) comprising a front panel (34) and a back panel (134), and defining a waist opening (50) and first and second leg openings (52);
a first refastenable seam extending from the waist opening to the first leg opening between the front panel and the back panel; and

a second refastenable seam extending from the waist opening to the second leg opening between the front panel and the back panel;
wherein each of the first and second refastenable seams comprises:
a fastening component (82) bonded to an outer surface (30) of the chassis (32) adjacent a distal edge (68a, 68b) of one of the front panel and the back panel; and
a mating fastening component (84) having a surface adapted to refastenably connect to the fastening component (82), wherein
said surface of the mating fastening component (84) is bonded to a surface adjacent a distal edge (68a, 68b) of the other one of the front panel and the back panel
and a standing butt seam (88) is formed between the mating fastening component (84) and the corresponding one of the front panel and the back panel to which said surface is bonded, wherein the distal edge (68a, 68b) of said one of the front panel and the back panel to which the fastening component (82) is bonded is spaced from the standing butt seam (88); characterised in that the fastening component (82) is bonded to said one of the front panel and the back panel inboard of the distal edge (68a, 68b) of the panel, and wherein the front panel (34) comprises a pair of elastic front side panels to which the mating fastening components (84) or the fastening components (82) are bonded, and wherein the back panel (134) comprises a pair of elastic back side panels to which the mating fastening components (84) or the fastening components (82) are bonded."

XI. The arguments of the appellant/opponent, as far as they are relevant for the present decision, may be summarised as follows:

(a) Article 123(2) EPC

There was no basis in the originally filed application for the subject-matter of claim 1. A disclosure for an absorbent garment having the claimed butt seam that also had refastenable seams between stretchable front and rear side panels could not be directly and unambiguously derived from the application as originally filed. The claimed subject-matter could only be derived by inadmissibly extracting selected features from various independently described embodiments.

(b) Article 56 EPC

D1 disclosed a pant-type diaper with three possible locations for a refastenable joint: on the front abdominal region of the wearer; on the back waist region; and along a side seam between the front and back panels. That the region at the sides of the diaper were least subject to movements of the wearer was considered common general knowledge, such that providing a seam in this region would also have been obvious to the skilled person. As a lap seam provided significantly greater shear strength than a butt seam, it would also have been obvious for the skilled person to provide such a lap seam as the refastenable seam at the sides of the diaper.

Alternatively, D5 disclosed in Fig. 1 an absorbent garment with stretchable front and rear side panels. Faced with the problem of providing a refastenable joint at a favourable location, the skilled person would refer to D1 which disclosed three equally viable

positions for location of the refastenable seam. Selecting a solution from three equally viable alternatives could not be credited with an inventive step.

XII. The arguments of the appellant/patentee may be summarised as follows:

(a) Article 123(2) EPC

The subject-matter of claim 1 was fully disclosed through Figs. 1, 4, 6, 8 and 9 in combination with the accompanying passages of the description. The skilled person would not read these sections in isolation, since it was unambiguously derivable that the various seam arrangements (in particular of these Figures) were alternatives, and it was unambiguous that no further elements were required in the claim. The elastic properties of the front and back side panels were disclosed in the description to Figs. 4, 8 and 9, particularly on page 19, lines 6-8 of the application as filed (which corresponds to PCT publication WO-A-01/87216). Furthermore the inclusion of details to the distal edge of the front and back panels relative to the fastening component and the standing butt seam ensured that all essential, technically relevant features of the diaper from Figures 8 and 9 were included in claim 1.

(b) Article 56 EPC

D1 was prior art falling under Article 54(3) EPC and could therefore not be considered in deciding whether there had been an inventive step. The

appellant/opponent's only arguments in relation to inventive step all relied on the use of D1.

D2 could thus be considered as the closest prior art starting point for consideration of inventive step. D2 however failed to disclose the elastic front and back side panels of claim 1, such that an objective technical problem could be seen as being how to better isolate forces from the refastenable seam. On page 2, lines 5-11 of D2, elastic side panels were mentioned as being disadvantageous, such that this document could be seen as teaching away from the claimed solution. If elastic side panels were nevertheless incorporated into the diaper of D2, the elastic fastener of D2 would be superfluous and the existing standing butt seam would become the refastenable seam which, due to the poor peel performance of a butt seam, would be undesirable. The claimed arrangement furthermore allowed ease of manufacture in a cross direction assembly. The subject-matter of claim 1 thus involved an inventive step over D2 in combination with the general knowledge of the skilled person.

Reasons for the Decision

1. *Amendment filed during oral proceedings*

Claim 1 of the main request filed during oral proceedings was based upon claim 1 of the previous main request with further features added, thus further limiting the scope of the claim. Noting, under Article 15(3) of the Rules of Procedure of the Boards of Appeal (RPBA), that no step in proceedings need be

delayed by reason only of absence at the oral proceedings of a party duly summoned (in this case the appellant/opponent) and that the appellant/opponent may thus be treated as relying on its written case, and considering the criteria set out in Article 13(1) RPBA, the Board exercised its discretion and admitted the new main request into the proceedings. The Board found that, having objected to claim 1 of the previous main request under Article 123(2) EPC in its written submissions of 21 December 2012, the appellant/opponent could reasonably expect, even in its absence, that the appellant/proprietor would have attempted to overcome this objection through further limitation of the claim.

2. *Article 123(2) EPC*

Claim 1 is based on claim 1 as originally filed with the addition of the following features:

- a) the first and second refastenable seams comprise a mating fastening component having a surface adapted to refastenably connect to the fastening component;
- b) a standing butt seam is formed between the mating fastening component and the corresponding one of the front panel and the back panel to which said surface is bonded;
- c) the distal edge of said one of the front panel and the back panel to which the fastening component is bonded is spaced from the standing butt seam;
- d) the fastening component is bonded to said one of the front panel and the back panel inboard of the distal edge of the panel;
- e) the front panel comprises a pair of elastic front side panels to which the mating fastening components or the fastening components are bonded; and

f) the back panel comprises a pair of elastic back side panels to which the mating fastening components or the fastening components are bonded.

The above identified feature a) is disclosed as being 'according to the present invention' on page 17, lines 17-20 of the PCT publication (all further document references in this section also refer to this PCT publication of the patent application). Furthermore, each and every embodiment of the absorbent garment includes refastenable seams with the features in a), such that these features are clearly and unambiguously disclosed in combination with the features of claim 1 as originally filed.

Regarding feature b), Figs. 6 and 8 disclose a standing butt seam between the mating fastening component and the back panel; Fig. 9 between the mating fastening component and the front panel. Page 18, line 22 - page 20, line 25 describes, with respect to Fig. 4, a method of manufacturing an absorbent garment according to the claimed invention in all respects save for that the fastening component 82 is bonded to an inner surface of the chassis (according to claim 1, the fastening component is bonded to an outer surface of the chassis). This proviso is acknowledged on page 20, line 26 to page 21, line 6 such that the described method of manufacturing would unambiguously be understood by a skilled person as also being for the claimed absorbent garment with the fastening component bonded to an outer surface of the chassis. Thus, whilst Fig. 4 is acknowledged as not disclosing an embodiment of the invention, it is abundantly clear that it is only in this regard that it differs. This method,

particularly on page 19, lines 12-28 clearly indicates the way in which the standing butt seam is produced and thus the physical structure of the seam as being formed between the mating fastening component and the front or back panel of the chassis. The physical structure of the standing butt seam is also clearly recognisable from Figs. 8 and 9 yet these Figures include further technically relevant features of the absorbent garment necessitating the inclusion of features c) and d) in claim 1. The inclusion of features c) and d) in claim 1 is necessitated by both the physical features depicted in Figs. 8 and 9 and the description of how the absorbent garment is made with reference to Fig. 4. Page 19, lines 6-8 describes how the front side panels snap back when cut along line 92. Figs. 4, 8 and 9 all show the resultant gap 79, yet also clearly show, firstly, how the fastening component is bonded to the front and back panel inboard of the distal edges of the panel (feature d)) and secondly how the distal edges of the front panel and the back panel are spaced from the standing butt seam (feature c). These features are necessarily present when the absorbent garment is manufactured according to the method described in Fig. 4. Furthermore, the spacing of the distal edges from the butt seam are *per se* functionally important in order to avoid the seam attaching the distal edge 68a to the fastening component 84 (see page 10, lines 19-20). It thus follows that features c) and d) are to be viewed as technically relevant features of the embodiments depicted in Figs. 8 and 9 and, when extracting other features from these Figures and adding these into an independent claim, must also be taken up in the claim.

The features b), c) and d) are thus regarded as being clearly and unambiguously disclosed through a combination of Figs. 6, 8 and 9 with the above referenced passages of the description.

Regarding the features e) and f), page 16, lines 15-22 discloses the presence of elastomeric or elastic material in at least one portion of the front and back side panels of selected embodiments of the invention. From the discussion of the method of manufacturing the claimed absorbent garment in Fig. 4, particularly page 19, lines 6-8, it is clear that this embodiment has elastic front side panels. Furthermore, in view of page 20, lines 13-25 it is clear that when the fastening components are bonded to the back region, the back side panels would have the elastic properties. It thus follows that the features e) and f) are also unambiguously present in the embodiment described via Figs. 4, 6, 8 and 9.

In summary, therefore, the Board concludes that the subject-matter of claim 1 is clearly and unambiguously derivable from the originally filed application.

The subject-matter of claims 2 and 3 concerning the refastenable seam comprising hook and loop material is disclosed generally for the absorbent garments described in the application as a whole on page 1, first paragraph. This is found by the Board as unambiguously applicable to all embodiments disclosed in the application. Page 17, lines 25-29 further specifies the alternate positioning of the hooks and the loops on the fastening component or the mating fastening component. For any embodiment incorporating

hook and loop fasteners, the Board finds this alternative placement of the hooks and loops as applicable and thus a clearly disclosed option for the skilled person.

The subject-matter of claim 4 concerning the embodiment of the absorbent garment in different applications is clearly disclosed on page 1, second paragraph. It is not necessary to repeat for each embodiment that the features of this claim apply as this is self-evident.

The Board thus concludes that the subject-matter of all the claims is clearly and unambiguously disclosed in the originally filed application and therefore that the requirement of Article 123(2) EPC is met.

3. *Article 56 EPC 1973*

3.1 D1 as closest prior art

With a filing date of 15 December 1999 and a publication date of 29 June 2000, D1 is comprised in the state of the art under Article 54(3) EPC for the opposed patent (priority date of 16 May 2000) presuming the priority of the opposed patent is valid. With no arguments on file questioning the validity of the priority claimed by the opposed patent and none being immediately evident, the Board sees no need to pursue this matter further of its own motion. D1 can therefore not be relied upon when considering whether an inventive step in the subject-matter of claim 1 is present (Article 56 EPC, 2nd sentence).

3.2 D5 as closest prior art

The appellant/opponent's only argument concerning lack of inventive step when starting from D5 involved a combination with features taken from D1. As identified above however, D1 is comprised in the state of the art only according to Article 54(3) EPC and so cannot be used in combination with D5 to arrive at a conclusion that the subject-matter of claim 1 lacks an inventive step.

With no other arguments starting from D5 having been presented by the appellant/opponent, and the Board seeing no reason to investigate this of its own motion, the subject-matter of claim 1 is considered to involve an inventive step when starting from D5.

3.3 D2 as closest prior art

- 3.3.1 The Board finds that, of the documents available in the proceedings, D2 may be taken to represent the closest prior art for considering inventive step of the subject-matter of claim 1. This discloses:
- an absorbent garment (20) comprising
 - a chassis comprising a front panel (22) and a back panel (24), and defining a waist opening (40) and first and second leg openings (see Fig. 1);
 - first and second refastenable seams (44) extending from the waist opening to the first and second leg openings between the front panel and the back panel;
 - and
 - wherein each of the first and second refastenable seams (44) comprises:

- a fastening component (see loops in Fig. 2) bonded to an outer surface of the chassis adjacent a distal edge (see Fig. 1; this extends the full width of the front panel, but is therefore also bonded adjacent the distal edges) of the front panel; and
- a mating fastening component (44) having a surface adapted to refastenably connect to the fastening component; wherein
 - said surface (see patent [0042] in which 'surface' is equivalent to 'layer', which itself in [0023] may comprise a plurality of elements) of the mating fastening component is bonded (indirectly bonded via expansion member 46; see patent [0010]) to a surface adjacent a distal edge (at 28 in Fig.2) of the back panel and
 - a standing butt seam (indicated at 28 in Fig.2) is formed between the mating fastening component (44) and the back panel (24) to which said surface is (indirectly) bonded, wherein
 - the distal edge of the front panel to which the fastening component is bonded is spaced from the standing butt seam (28).

The subject-matter of claim 1 thus differs from the absorbent garment known from D2 in that:

- the fastening component is bonded to said one of the front panel and the back panel inboard of the distal edge of the panel, and wherein the front panel comprises a pair of elastic front side panels to which the mating fastening components or the fastening components are bonded, and wherein the back panel comprises a pair of elastic back side panels to which the mating fastening components or the fastening components are bonded.

3.3.2 The characterising features primarily concern the attachment of the fastening components and mating fastening components to elastic front and back side panels. When the wearer of the absorbent garment moves, the elastic side panels allow a degree of flexibility in the garment and, by way of their elasticity, isolate some of the forces induced by the wearer's movement from the refastenable seams attached to the side panels. An objective technical problem can thus reasonably be formulated as providing an absorbent garment in which forces induced by the wearer's movements are better isolated from the refastenable seams.

In D2 there is no elasticity in the side portions of the chassis since the fastener (36) itself provides the requisite elasticity allowing the garment to be pulled on and off. From D2 alone, therefore, there is no hint suggesting that elastic side panels might be beneficial. In fact, D2 itself teaches away from the use of elastic side panels on page 2, lines 3-18, stating that such arrangements do not combine ease of donning with a close conforming fit of the garment.

Even if elastic side panels were to be incorporated into the absorbent garment of D2, this would provide elasticity negating the need for the fastener means 36 to be elastic. Furthermore, the primary fastener 42 of the fastening means 36 would no longer be required as the additional elasticity of the garment offered by the elastic side panels would allow the desired conforming fit, without the need for tightening of the garment after donning by way of the primary fastener. It thus follows that, in order to reach the subject-matter of

claim 1, the skilled person would have to carry out structural alterations to the absorbent garment of D2 beyond the simple adoption of elastic side panels, none of which alterations is taught by the prior art or the general knowledge of a skilled person, such that the exercise of inventive skill would be required.

3.3.3 Regarding the appellant/patentee's argument that the claimed absorbent article was beneficial as it could be manufactured easily in a cross direction assembly, it may be added that this was found not to contribute to the recognition of an inventive step. Firstly, a physical item is being claimed, not a method of manufacturing such an item, and thus the item itself must possess the features which allow an inventive step to be recognised rather than the method of its manufacture. Furthermore, the alleged ease of manufacture is achieved through a continuous stream of side-by-side garments being produced in a cross direction assembly, whilst the subject-matter of claim 1 relates to a single absorbent garment, which notably can even be assembled manually if desired. Advantages relating to multiple garments cannot be translated to apply equally to a single garment as claimed.

3.4 In summary, the Board concludes that the subject-matter of claim 1 involves an inventive step over the cited prior art and the arguments advanced by the parties in this regard. The requirement of Article 56 EPC is thus met.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division with the order to maintain the European patent with the following documents:

Claims: 1-4, filed 9 January 2013;
Description: pages 2,8,10 and 12, filed 9 January 2013;
Description: pages 3-7,9 and 11 as granted;
Drawings: Figs. 1-26 as granted

The Registrar

The Chairman

M. Patin

M. Harrison