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**D E C I S I O N**  
**of 1 February 2001**

**Case Number:** T 0806/98 - 3.2.6

**Application Number:** 88112819.3

**Publication Number:** 0302523

**IPC:** A61F 13/15

**Language of the proceedings:** EN

**Title of invention:**

A pad for absorption of human exudate

**Patentee:**

KIMBERLY-CLARK WORLDWIDE, INC.

**Opponent:**

Mölnlycke AB  
The Procter & Gamble Company

**Headword:**

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**Relevant legal provisions:**

EPC Art. 56, 84, 123(2)

**Keyword:**

"Amendments - added subject-matter (no)"  
"Amended claims - clarity (yes)"  
"Inventive step (yes)"

**Decisions cited:**

-

**Catchword:**

-



Case Number: T 0806/98 - 3.2.6

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.6**  
**of 1 February 2001**

**Appellant:** KIMBERLY-CLARK WORLDWIDE, INC.  
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**Respondent:** Mölnlycke AB  
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**Representative:** Boon, Graham Anthony  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 2 June 1998  
revoking European patent No. 0 302 523 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** P. Alting van Geusau

**Members:** T. Kriner

M. Dardo-Dino

## Summary of Facts and Submissions

- I. The appellant (patent proprietor) lodged an appeal, received at the EPO on 12 August 1998, against the decision of the Opposition Division dispatched on 2 June 1998 concerning the revocation of the European patent No. 0 302 523. The appeal fee was paid simultaneously and the statement setting out the grounds of appeal was received at the EPO on 12 October 1998.
- II. Opposition was filed against the patent as a whole by respondents I and II (opponents 01 and 02) and based on Article 100(a), in conjunction with Articles 52(1), 54(1) and 56 EPC.

The contested decision was based on a main request and four auxiliary requests filed during the opposition proceedings.

The Opposition Division held that the subject-matter of the main request and of the first auxiliary request lacked novelty, that the subject-matter of the second auxiliary request did not involve an inventive step, and that the third and fourth auxiliary requests were not allowable in view of Article 123(2) EPC.

- III. With respect to the appellant's request filed during the oral proceedings before the Board of Appeal (see section IV), the following documents played a role during the appeal proceedings:

D1: EP-A-0 136 524

D2: EP-A-0 162 451

D3: US-A-4 673 403

D4: US-A-3 575 174

D13: US-A-2 964 039.

IV. Oral proceedings before the Board took place on 1 February 2001.

The appellant requested that the decision under appeal be set aside and the patent in suit be maintained on the basis of

**Claims:** 1 to 10 as filed during the oral proceedings;

**Description:** pages 2 to 11 as filed during the oral proceedings;

**Drawings:** Figures 1 to 5 filed with facsimile dated 21 December 2000.

The respondents requested that the appeal be dismissed.

V. Claim 1 of the appellant's request reads as follows:

"A pad (80) for absorption of human exudate comprising an impermeable outer cover, a liquid permeable bodyside web, and an absorbent therebetween, said pad comprising a substantially flattened or concave front portion for positioning exterior of the clitoris and pubic mons, and comprising: a rearward portion having an upraised peak, said rearward portion of the pad being folded generally at its longitudinal center and said peak being formed from an adhesively (92-96) held tuck at

said longitudinal center, said peak being generally continuous and rising gradually from said flattened portion and extending to the rearward end of said pad, and wherein the rear about one-half to two thirds of said pad forms said peak (82), and at least a portion of the outer cover being provided with pressure-sensitive garment attachment adhesive characterized by the pad having a length of at least 17.78 cm (7 inches), and the upraised peak (82) being for aligning the pad with, and maintaining the pad in alignment with, the creases of the perineum, buttocks and a rearward portion of the pudendal cleft, said garment attachment adhesive consisting of adhesive portions (85,86) extending from the front to the rear of the pad."

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

All new features of the present claim 1 had a basis in the originally filed documents.

The feature according to which the claimed pad had a length of at least 17.78 cm (7 inches) was disclosed on page 2, lines 44, 45 of the description of the patent specification which corresponded to the originally filed description. Since this portion of the description referred to general aspects of the claimed invention, it was clear that a length of at least 7 inches was intended for all embodiments of the pads described in the originally filed documents.

The feature according to which the peak was formed by the rear about one-half to two-thirds of the pad, had been described in originally filed claim 4, and the

feature according to which the garment attachment adhesive consisted of adhesive portions extending from the front to the rear of the pad, was based on originally filed Figures 11 to 15 in conjunction with the corresponding description.

Moreover, claim 1 of the present request was clear and supported by the description.

The feature according to which the peak of the claimed pad was provided for aligning the pad with, and maintaining it in alignment with the buttocks, was described in the initial portion of the description on page 2 which referred to general aspects of the invention. Figure 10A of the patent specification was only a schematic drawing where the buttocks were not completely shown, so that the arrangement of the pad between the buttocks was not visible in this figure.

The expressions "front of the pad" and "rear of the pad" did not correspond to the front and rear ends (14, 16) shown in the drawings, but to areas adjacent the front end and the rear end. The feature according to which the adhesive portions extended from the front to the rear of the pad therefore gave the clear teaching that the adhesive portions had to end in these areas. This teaching was supported by Figures 12 and 13 of the patent in suit.

Hence, the claims according to the present request met the requirements of Articles 84 and 123(2) EPC.

D2 and D3 referred to a pad as defined in the preamble of the present claim 1. The pad disclosed in these documents related to an intermediate between a tampon

and a sanitary towel and had to be worn internally with its raised profile extending into the pudendal cleft. As a result of this kind of use, the known pad did not need any garment adhesive, and its size was restricted to a range between 5 and 6 inches. This size was, however, not well accepted by the consumer. Furthermore, if the pad according to D2 or D3 was not correctly positioned, it tended to slide. In order to overcome these problems, the pad according to the patent in suit had been redesigned so that it had to be worn generally externally of the pudendal cleft and was held in place by long adhesive portions.

These steps were not obvious, essentially because a lengthening of the pad according to D2 or D3 would be against the teaching of these documents. If such a pad having a maximum length of 6 inches was increased more than 1/2 inch in the rear portion, its peak would become too big for the intended use, and would chafe the clitoris when worn in the way described in D2 or D3. If it was increased in the front portion, this would result in a waste of material which unnecessarily raised the costs for the pad. Therefore, although the skilled person could lengthen the pad according to D2 or D3, he would not consider such a step.

With respect to the garment attachment adhesive, D2 clearly described, for example on page 10, lines 21 to 26, or on page 12, lines 6 to 14, that such an adhesive was only optionally provided on the pad, and that it was entirely unnecessary under most circumstances. In case an adhesive was used, it had to be restricted to a limited area at the neutral zone of the undergarment to minimize tendencies toward relative motion between the undergarment and the pad which would inevitably result



in rubbing and chafing of the peak in the vulva. The provision of adhesive portions which extended over the complete length of the pad was only practical when the pad was worn externally so that its peak was arranged outside the pudendal cleft. Therefore, the skilled person was prevented from providing adhesive on the pad according to D2 or D3 outside of the limited area described above.

In view of these findings, the subject-matter of the present claim 1 was not only new, but also based on an inventive step.

VII. Respondent I disputed the views of the appellant. His arguments can be summarized as follows.

Claim 1 of the appellant's present request did not meet the requirements of Article 84 EPC.

According to this claim, the peak was provided for aligning the pad with, and maintaining it in alignment amongst others with the buttocks. However, the pad shown in figure 10A of the patent specification did not extend to the buttocks. Therefore, the subject-matter of claim 1 was not supported by the description.

Furthermore, the subject-matter of claim 1 differed from that which was disclosed in D2 or in D3 only in that the pad had a length of at least 7 inches, and in that the garment attachment adhesive consisted of adhesive portions extending from the front to the rear of the pad.

When lengthening the known pad so that it had a length of at least 7 inches, which was an obvious step for the

skilled person, the pad had to be worn externally of the pudendal cleft. In this case, the pad was not held in place by itself as in the case when it was worn within the pudendal cleft. In order to avoid slipping of the pad, it was necessary to provide a sufficient amount of garment adhesive on the pad so that it would not slide out of place. In view of this requirement, the selection of adhesive portions which extended over the whole length of the pad was obvious.

Therefore, the subject-matter of claim 1 did not involve an inventive step.

VIII. Respondent II argued as follows.

The feature of claim 1 according to which the claimed pad had a length of at least 17.78 cm (7 inches), had no basis in the originally filed documents. The granted claims 6 and 21 referred to particular embodiments of the claimed pad having a length of greater than about 7 inches, and the granted claim 10 defined a certain range for the length of the pad. The parts of the description of the patent specification concerning the length of the pad also referred to particular embodiments of the claimed pad or to ranges where a lower limit was coupled to an upper limit. However, there was no disclosure that a length of at least 7 inches was intended for the pad defined in claim 1 of the appellant's present request.

Additionally, the originally filed documents did not disclose a pad according to claim 1 wherein the peak was formed by the rear about one-half to two-thirds of the pad. Although this feature was contained in the granted claim 4, it had never been described in

connection with a pad as defined in the present claim 1.

Furthermore, the feature according to which the garment attachment adhesive consisted of adhesive portions extending from the front of the rear of the pad, lacked clarity and had also no basis in the originally filed documents, for the following reasons. Figures 12 to 15 of the originally filed drawings and the corresponding description disclosed only two adhesive portions which extended over the entire front and rearward portion of the pad, and which did not end exactly at the front and rear end of the pad. The new feature of claim 1 therefore resulted in an extension of the subject-matter disclosed in the originally filed documents. Additionally, it was not clear where the claimed adhesive portions ended.

Therefore, the present claim 1 did not meet the requirements of Articles 84 and 123(2) EPC.

The most relevant state of the art was disclosed in each of the documents D2 and D3. The pad defined in the appellant's present claim 1 differed from the pad shown in these documents only by its length of at least 7 inches, and by the provision of a garment attachment adhesive consisting of adhesive portions extending from the front to the rear of the pad.

According to the description of the patent in suit (see page 2, lines 12 to 23), the pads disclosed in D2 and D3 were not well accepted by the consumer as they were so small that the consumers did not find them convincing as to their effectiveness. Therefore, the object of the contested patent was to create a pad with

a larger size (see page 2, lines 24 to 26 of the patent specification). In the light of this situation, it was obvious for the skilled person to lengthen the pad according to D2 or D3 to at least 7 inches, in particular as the length of about 5 to 6 inches proposed for the pad of D3 (see D3, column 14, lines 2 and 3) was very close to 7 inches.

Such a lengthening of the known pad was not in contradiction to the teaching of D2 and D3, because it did not necessarily result in a pad which could no longer be worn within of the pudendal cleft. The length of the peak according to D2 or D3 could vary between one-half to two-thirds of the length of the pad. Therefore, in case of a pad of 6 inches, the maximum peak length amounted to 4 inches which was more than the minimal peak length of 3.5 inches in case of a pad of 7 inches. Furthermore, even the specification of the patent in suit itself described on page 4, lines 42 to 44 that a pad of at least 7 inches could still extend between the labia.

With respect to the adhesive portions of the pad, D2 indicated on page 32, lines 21 to 26 that the provision of a comparatively small singular or discrete location or zone for adhesive was only a most preferred embodiment as opposed to more conventional longitudinal, multiple strips or the like. Consequently, the disclosure of D2 comprised the use of a plurality of longitudinally extending adhesive portions. In the light of this teaching, the selection of adhesive portions extending from the front to the rear of the pad was obvious for the skilled person, in particular for a pad of at least 7 inches which needed a safe fixing against slip.

Hence, the subject-matter of the present claim 1 did not involve an inventive step.

## **Reasons for the Decision**

1. The appeal is admissible.
2. *Amendments*
  - 2.1 Claim 1 according to the appellant's present request differs from the originally filed claim 1 by the following features:
    - (a) the front portion of the pad is substantially flattened or concave;
    - (b) the rearward portion of the pad is folded generally at its longitudinal center;
    - (c) the peak being formed from an adhesively held tuck at the longitudinal center;
    - (d) the peak is generally continuous and rises gradually from the flattened portion;
    - (e) the peak extends to the rearward end of the pad;
    - (f) the rear about one-half to two-thirds of the pad forms the peak;
    - (g) at least a portion of the outer cover is provided with pressure sensitive garment attachment adhesive;

- (h) the pad has a length of at least 17.78 cm (7 inches);
- (i) the upraised peak is for aligning the pad with, and maintaining the pad in alignment with, the creases of the perineum, buttocks, and a rearward portion of the pudendal cleft;
- (j) the garment attachment adhesive consists of adhesive portions extending from the front to the rear of the pad.

When compared to the granted claim, features (b) to (h), and feature (j) have been added.

2.2 Feature (a) has been disclosed in originally filed claim 21 in conjunction with page 4, lines 23, 24 of the originally filed description.

Features (b), (d), (e) and (f) have been described in originally filed claims 3, 2, 16 and 4.

Feature (c) is based on originally filed claim 13 and on originally filed Figure 14.

Features (g) and (j) have been disclosed in originally filed Figure 13 in conjunction with the corresponding description on page 6, lines 32, 33 and on page 4, lines 47 to 50.

Feature (h) is described in the initial portion of the originally filed description on page 2, lines 41, 42, and feature (i) is disclosed in originally filed claim 1 in conjunction with the originally filed description on page 2, lines 31 to 35.

Dependent claims 2 to 10 correspond to originally filed claims 6, 8, 10 to 12, 14, 15, 17 and 18.

The description has been adapted to the claims of the present request.

- 2.3 The arguments of respondent II, according to which features (h) and (j) had no basis in the originally filed documents and feature (f) had not been disclosed in connection with the pad defined by the remaining features of claim 1, are not convincing.

It is true that the originally filed claims, the granted claims and those portions of the originally filed description which are directed to special embodiments of the claimed pad, all refer to a length of the pad which is either greater than about 7 inches or which lays within a certain range having a lower and upper limit. However, the initial portion of the originally filed description states on page 2, lines 41, 42 that the present invention describes a pad having a length of at least 17.78 cm (seven inches). Since this portion of the description refers to general aspects of the invention, and since the length of at least 7 inches covers all the other ranges defined in the originally filed documents, it is clear that this open ended range is valid for all pads disclosed in the patent in suit.

With respect to feature (j), the originally filed Figure 13 shows a garment adhesive consisting of two adhesive portions extending from a location adjacent the front end to a location adjacent the rear end of the pad. However, the corresponding description generalizes (see page 4, line 48) that the pad is

provided with extended adhesive portions. In the light of this information, it is obvious for the skilled person that the garment attachment adhesive is not restricted to two adhesive portions which extend over the entire front and rearward portion, as respondent II states, but rather to adhesive portions extending from the front to the rear of the pad, as defined in the present claim 1.

Feature (f) according to which the upraised peak is formed by the rear about one-half to two-thirds of the pad has been disclosed in originally filed claim 4. This claim additionally includes all features of either claims 1 and 2 or claims 1 and 3. Consequently, it was intended that the general embodiment of the invention defined in originally filed claims 1 to 4 includes feature (f). Since this general embodiment covers the pad according to the present claim 1, feature (f) has also been disclosed in connection with the pad of this claim.

2.4 Consequently, the documents according to the appellant's request do not contain subject-matter which extends beyond the content of the originally filed documents, and the claims have not been amended in such a way as to extend the protection conferred. Therefore, they meet the requirements of Articles 123(2) and (3) EPC.

3. *Clarity*

Respondent 1 held that the subject-matter of claim 1 was not supported by the description, because the pad shown in figure 10A of the patent specification did not show that the pad extended to the buttocks, and



respondent II stated that claim 1 did not clearly define where the adhesive portions ended. These arguments are, however, not convincing for the following reasons.

Figure 10A of the patent specification shows a schematical drawing where the buttocks are merely shown in part. Therefore, this figure cannot be used for assessing whether or not the pad extends to the buttocks. However, the description gives the clear teaching, in particular on page 2, lines 29 to 39, that the pad has to be designed and worn so that it extends at least to the forward portion of the area between the buttocks. Since this portion of the description refers to the basic embodiment of the invention which includes the embodiment defined in the present claim 1, it cannot be said that the subject-matter of this claim is not supported by the description.

With respect to the ends of the adhesive portions, claim 1 indicates that these portions extend from the front to the rear of the pad. It is obvious that this wording does not mean that the adhesive portions extend from exactly the front end to exactly the rear end of the pad, but rather to an area at the front and the rear of the pad. This interpretation is supported by Figure 13 of the originally filed drawings (or Figure 3 of the present request) which shows that the adhesive portions (85, 86) extend to an area adjacent the front end and the rear end of the pad. Claim 1 gives therefore a clear teaching for the arrangement of the ends of the adhesive portions.

Consequently, claim 1 of the appellant's request meets the requirements of Article 84 EPC.

4. *Novelty*

Novelty of the subject-matter in accordance with claim 1 follows from the fact that none of the cited documents discloses in combination a pad having a peak of the form defined in claim 1, a length of at least 17.78 cm and an adhesive portion extending from the front to the rear of the pad. Novelty was not disputed.

5. *Inventive step*

5.1 With respect to claim 1 of the appellant's present request, the most relevant state of the art is undisputedly disclosed in D2 or D3. Each of these documents discloses a pad (30) for absorption of human exudate comprising an impermeable outer cover (70), a liquid permeable bodyside web (80), and an absorbent (74) therebetween, said pad comprising a substantially flattened or concave front portion (56) for positioning exterior of the clitoris and pubic mons (see Figure 1 of D2 or D3), and comprising: a rearward portion (54) having an upraised peak (52), said rearward portion of the pad being folded generally at its longitudinal center (see Figures 3 to 6 of D2 or D3) and said peak being formed from an adhesively (72) held tuck at said longitudinal center, said peak being generally continuous and rising gradually from said flattened portion and extending to the rearward end of said pad (see figure 7 of D2 or D3), and wherein the rear about one-half to two thirds of said pad forms said peak (see D2, page 20, lines 14 to 16, or D3, column 5, lines 13 to 15), and at least a portion of the outer cover being provided with pressure-sensitive garment attachment adhesive (82).

5.2 Although the labial pad disclosed in D2 or D3 is particularly advantageous in that it is discreet, comfortable and highly effective, it has proved difficult to educate the wearer as to proper placement. Furthermore, consumers did not find them convincing as to their effectiveness (see page 2, lines 12 to 21 of the patent in suit). Starting from D2 or D3, the object underlying the patent in suit is to provide a pad not leading to the difficulties encountered with these prior art pads.

5.3 This object is achieved by the combination of the features of claim 1 and in particular by the provision of a length of at least 17.78 cm (7 inches), and garment attachment adhesive consisting of adhesive portions extending from the front to the rear of the pad.

As a result of these features, the pad may be worn in the usual external manner. The upraised peak causes the pad to readily fit to and align itself within the inverted V-shaped regions of the woman's lower abdominal region, and maintaining the pad in alignment with, the creases of the perineum, buttocks and a rearward portion of the pudendal cleft (see page 2, lines 30 to 42).

5.4 The argumentation of respondent I according to which it was obvious to lengthen the pad shown in D2 or D3 to such an extent that it had to be worn externally and for proper functioning required adhesive portions extending over the whole length of the pad to keep it in position, is not convincing.

The Board agrees that there is no reason why the

skilled person would not extend the length of the known pad in accordance with individual anatomy of a wearer. However, considering the teaching of D2 or D3 lengthening should not interfere with the interlabial manner of wearing of the pad, because lengthening to such an extent that the pad inevitably has to be worn outside of the pudendal cleft clearly goes against the teaching of D2 and D3.

As is for example shown in figure 1 of D2 or D3, the pad disclosed in D2 or D3 is intended for internal use where the upraised peak extends into the pudendal cleft of the wearer. With respect to the self-adjusting characteristics of a pad which is worn in this way, a garment attachment adhesive is generally not necessary. If such an adhesive is nevertheless provided, its position is restricted to a small singular zone so that during the use of the pad, the motion of the pad due to its connection to the wearers undergarment is kept as small as possible to avoid rubbing and chafing (see D2, page 32, line 5 to page 33, line 31).

Consequently, there is no reason to provide adhesive portions extending over the whole length of the pad, because this would also go against the teaching of D2 or D3.

- 5.5 The line of argumentation relied upon by respondent II according to which D2 comprised a teaching to use longitudinally extending adhesive portions also in respect of internally worn pads, is also not considered convincing.

It is generally agreed that a lengthening of the pad according to D2 or D3 to 17.78 cm (7 inches) does not

necessarily result in a pad which could no longer be worn within the pudendal cleft, in particular because the minimal peak length of a 7-inch pad could be selected shorter than the maximal peak length of a 6-inch pad known from D2 or D3. It is also agreed that the cited prior art does not prevent the skilled person from selecting a length of for example 7 inches for the known pad, in order to enhance the acceptance of the consumer in respect of expected performance.

However, the indication on page 32, lines 21 to 26 of D2, according to which the provision of a comparatively small singular or discrete location or zone for adhesive is most preferably provided as opposed to more conventional longitudinal strips or the like, cannot be interpreted as suggesting that D2 teaches the provision of adhesive portions extending over an essential portion of the pad's length.

This indication has to be read in the light of the whole content of the description of D2 concerning the provision of garment attachment adhesive (see page 32, line 5 to page 33, line 31) which shows that the self-conforming characteristics of the labial pad disclosed in D2 render garment attaching means unnecessary, and that the provision of such attaching means could lead to rubbing or chafing occasioned by relative motion between the upraised peak of the pad and the wearer's vulva. For these reasons the disclosure of D2 does not go further than that a garment attachment adhesive should be provided only optionally for those who wish the security of a pad attached to the undergarment, and that the adhesive should be restricted to a neutral position which minimizes the relative motion between the pad and the wearer's body. Therefore, the provision

of adhesive portions which extend from the front to the rear of the pad is in contradiction to the teaching of D2, and the skilled person would at best be led to provide longitudinal strips of adhesive which are arranged within the area of said neutral position of the pad.

Consequently, there is no suggestion for the combined provision of lengthening the pad according to D2 or D3 to at least 17.78 cm, and a garment attachment adhesive which consists of adhesive portions extending from the front to the rear of the pad at the same time.

- 5.6 Such suggestion is also not derivable from the further available documents of which only D1, D4, D13 were relied upon by the respondents. D1 relates to a different design of pad which is not preformed in any way. Rather it is provided with a number of grooves, with the intention of allowing the garment to form one of a variety of different shapes in use. Since the napkin is formed of wood pulp fluff the material has minimal stability when worn.

Also neither of D4 or D13 suggests the formation of a peak using an adhesively held tuck and the shaping in these documents is rather only by molding. As with D1, these pads therefore suffer from the problem that the shape of the pad is not very well maintained when the pad is wet. Therefore, there is no reason why the skilled person considering D2/D3 would have any regard to the teachings of D4 or D13, and certainly such a person would not look to their teachings with a view to solving the underlying problem in D2/D3.

6. In view of these assessments, the Board comes to the

conclusion that the subject-matter of claim 1 according to the appellant's request cannot be derived in an obvious manner from the available prior art and accordingly involves an inventive step. This claim together with dependent claims 2 to 10, the description and drawings as filed during the oral proceedings on 1 February 2001 therefore form a suitable basis for maintenance of the patent in amended form.

## 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 with the order to maintain the patent on the basis of the following documents:

**Claims:** 1 to 10 filed during the oral proceedings on 1 February 2001;

**Description:** pages 2 to 11 filed during the oral proceedings on 2 February 2001;

**Drawings:** Figures 1 to 5 filed with facsimile dated 21 December 2000.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau