

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FIRST QUALITY BABY PRODUCTS, LLC,
Petitioner,

v.

KIMBERLY-CLARK WORLDWIDE, INC.,
Patent Owner.

Case IPR2018-00519
Patent 8,556,877 B2

Before JANET A. GONGOLA, *Vice Chief Administrative Patent Judge*,
KEN B. BARRETT, and SUSAN L. C. MITCHELL,
Administrative Patent Judges.

MITCHELL, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
Inter Partes Review
35 U.S.C. § 318(a) and 37 C.F.R. § 42.73

I. INTRODUCTION

This is a final written decision in *inter partes* review of claims 1–28 of U.S. Patent No. 8,556,877 B2 (Ex. 1001, “the ’877 patent”) entered pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73. For the reasons set forth below, we determine that Petitioner has shown, by a preponderance of the evidence, that claims 1, 4–9, 13, 15–17, 19, 21–23, and 28 of the ’877 patent are unpatentable under 35 U.S.C. § 102, and claims 2 and 3 are unpatentable under 35 U.S.C. § 103. *See* 35 U.S.C. § 316(e). Also, for the reasons set forth below, we determine that Petitioner has not shown, by a preponderance of the evidence, that claims 10–12, 14, 18, 20, and 24–27 of the ’877 patent are unpatentable.

A. Procedural History

Petitioner First Quality Baby Products, LLC (“Petitioner”) filed a Petition (Paper 1, “Pet.”) requesting an *inter partes* review of claims 1–28 (the “challenged claims”) of the ’877 patent. Pet. 7; *see* 35 U.S.C. §§ 311–319. Petitioner relied upon the Declaration of Daniel D. Gardner to support its challenge. *See* Pet. 7–8; Ex. 1004. Patent Owner Kimberly-Clark Worldwide, Inc. (“Patent Owner”) filed a Preliminary Response. Paper 6 (“Prelim Resp.”).

Pursuant to 35 U.S.C. § 314(a), on August 3, 2018, we instituted an *inter partes* review of challenged claims 1, 4–9, 13–17, 19, 21–23, and 28 under 35 U.S.C. § 102(b) as anticipated by Fletcher, challenged claims 2, 3, 10–12, 18, 20, 26, and 27 under 35 U.S.C. § 103(a) as obvious over Fletcher, and challenged claims 24 and 25 under 35 U.S.C. § 103(a) as obvious over Fletcher and Allen. Paper 7, 18 (“Dec.”).

Patent Owner filed its Patent Owner Response (Paper 11, “PO Resp.”), along with a Declaration of Joseph Coenen (Exhibit 2003), to support its positions.

Petitioner filed a Reply (Paper 14, “Reply”) to the Patent Owner Response along with a Rebuttal Declaration of Mr. Gardner (Exhibit 1006). Pursuant to our authorization (Paper 16, 2), Patent Owner filed a Sur-Reply (Paper 19, “PO Sur-Reply”).

An oral hearing was held on May 8, 2019. A transcript of the hearing is included in this record. Paper 25 (“Tr.”).

B. Related Proceedings

No federal court litigation proceedings or PTO proceedings involving the ’877 patent are identified in the parties’ mandatory notices required by 37 C.F.R. § 42.8(a). Pet. 5; Paper 4, 1.

C. The ’877 Patent

The ’877 patent relates to an absorbent pant garment having a refastenable seam formed between front and back side panels, with fastening components on the front and back side panels. Ex. 1001, Abstract, 4:60-65. The shape of the leg openings and the location of the fasteners are configured to transfer stresses away from the fasteners with the goal of suppressing inadvertent disengagement of the fasteners, i.e., pop-opens. Ex. 1001, 1:49–52, 1:59–62, 4:63–65, 7:49–53. Additionally, one of fastening components 82, 84 constitutes a smaller fastening component than the other. Ex. 1001, 4:22–27, 6:46–53, 13:12–26.

The ’877 patent describes and illustrates, in Figure 2 depicted below, a front and backside panel configuration.

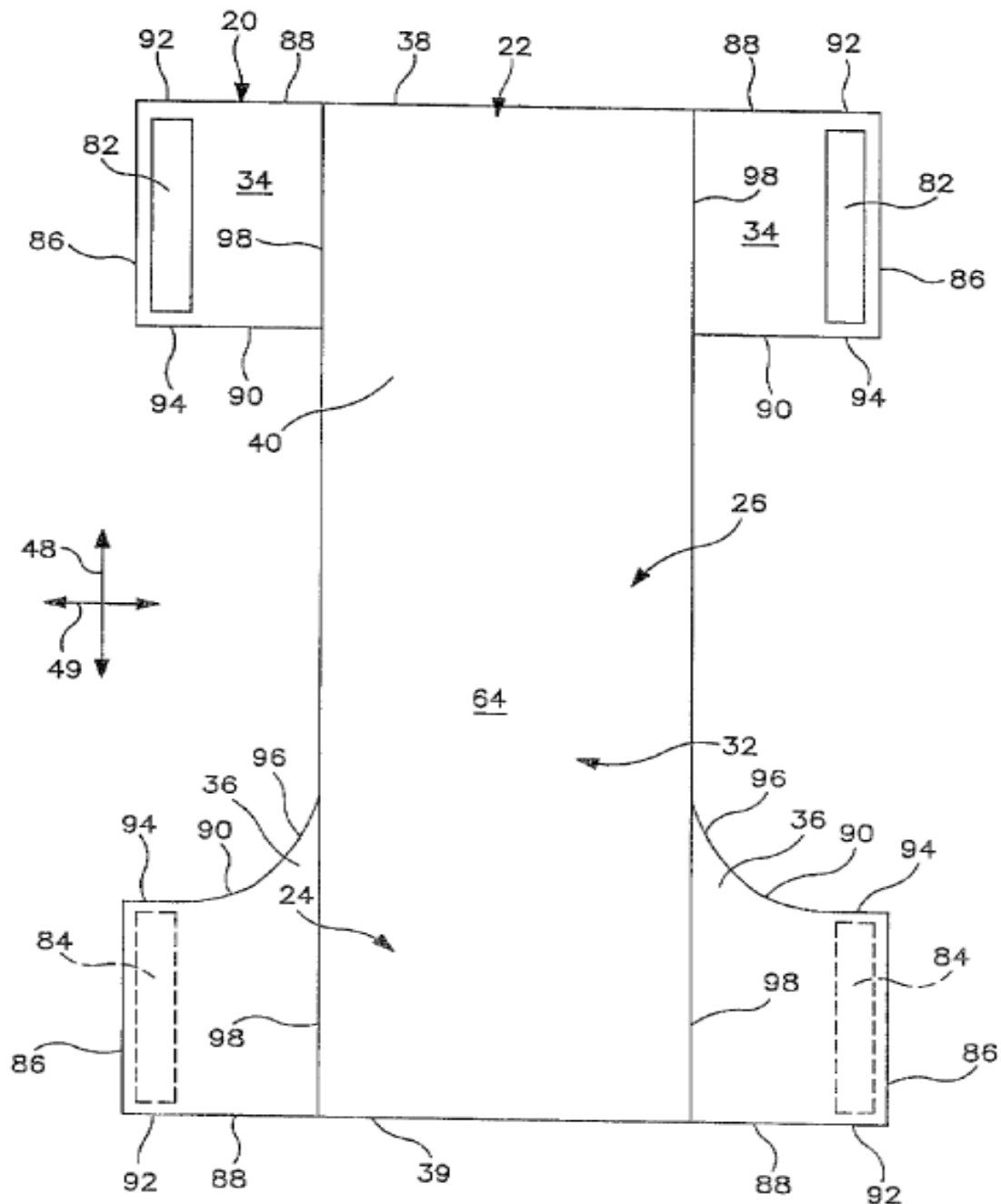
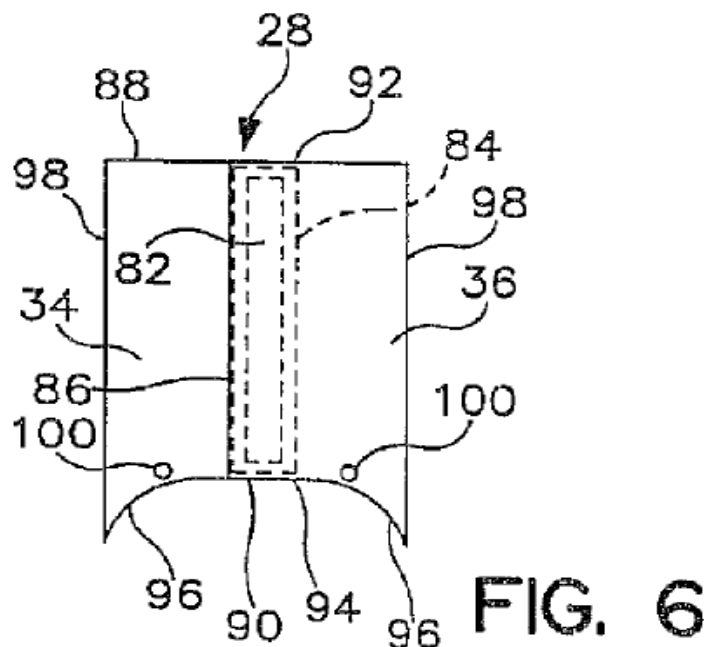


FIG. 2

This front and backside panel configuration includes a portion 92 of the waist end edge 88 and a portion 94 of the leg end edge 90 substantially parallel to one another adjacent the distal edge for a distance greater than a transverse width of the smaller of the fastening components. Ex. 1001, 6:43–63. This configuration avoids

“any curved or angled edges directly above or directly below the fastening components, thus avoiding placement of the fastening components on any concentrated stress points.” Ex. 1001, 2:22–36, 7:30–33 (stating panel stresses should not be directly applied to the fastening components 82, 84). The ’877 patent states that these concentrated stress points are found through qualitative means to be at corners where angled portions 96 meet the parallel edge portions 92 or 94. *Id.* at 7:33–35. An example of such stress point 100 is depicted in Figure 6 shown below where angled portions 96 meet parallel edge portion 94.



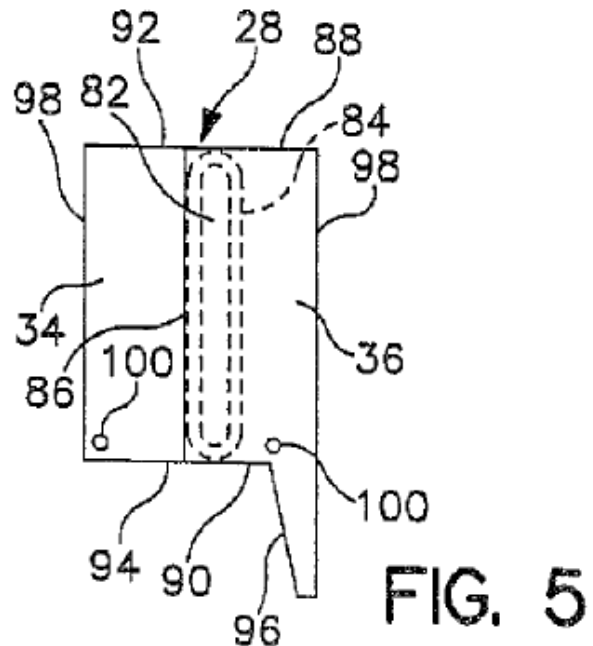
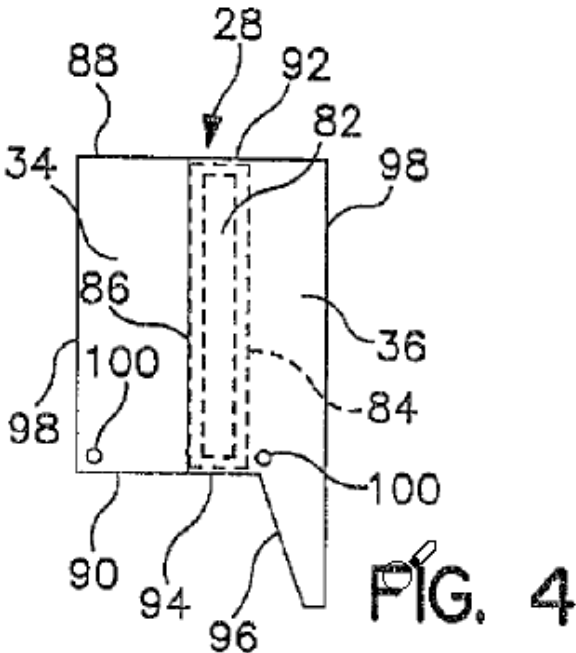
The '877 patent further describes this configuration, an example of which is shown in Figures 2 and 6 depicted above, as follows.

The parallel portions 92, 94 of the waist end edges 8 and leg end edges 90 are provided to distance the fastening components 82 and the mating fastening components 84 away from concentrated stress points 100. More particularly, the side panels 34, 36 are designed such that there is no curvature along the leg end edges 90 longitudinally aligned with the

fastening components 82, 84, with any curvature along the leg end edges being transversely offset from the fastening components.

Id. at 7:41–49.

Such transverse offset is further described in relation to Figures 4 and 5 depicted below.



Referring to Figures 4 and 5 shown above, the '877 patent further states that to achieve this transverse offset,

[t]he parallel portions 92, 94 of the waist end edges 88 and leg end edges 90 suitably have a length greater than the transverse width of the smaller fastening component of the refastenable seam formed therebetween, or a length of at least 1.2 times the transverse width of the smaller fastening component of the refastenable seam formed therebetween (FIG. 4), or a length of at least 1.5 times the transverse width of the smaller fastening component of the refastenable seam formed therebetween (FIG. 5), to provide sufficient spacing between the fastening components 82, 84 and the concentrated stress points 100.

Id. at 7:53–63.

The '877 patent also states that “[e]ach of the side panels 34, 36 can include one or more individual, distinct pieces of material,” such as elastomeric material, and that “[s]uitable elastic materials, as well as processes of incorporating side panels into a training pant, are known to those skilled in the art, and are described for example, in U.S. Pat. No. 4,940,464 issued Jul. 10, 1990 to Van Gompel et al., which is incorporated herein by reference.” *Id.* at 8:28–29, 8:41–45, respectively. According to the '877 patent, constructing the absorbent pant garment in the manner described above minimizes fastener pop-opens. Ex. 1001, 13:4-7.

D. Illustrative Claim

Petitioner challenges claims 1–28 of the '877 patent. Claim 1, reproduced below, is the only independent claim, and is illustrative. Claims 2–28 each depend directly from claim 1.

1. A method for constructing an absorbent pant garment, comprising:

providing an absorbent chassis defining a waist opening and first and second leg openings;

providing at least one front side panel and at least one back side panel wherein the at least one front side panel and the at least one back side panel form at least one refastenable seam there between;

forming the at least one refastenable seam so that the at least one refastenable seam is refastenable from the waist opening to one of the leg openings;

providing at least one fastening component on a first surface of an elastomeric layer of the at least one front side panel adjacent to a distal edge of the at least one front side panel refastenably connected to at least one mating fastening component on a second surface of the at least one back side panel adjacent to a distal edge of the at least one back side panel, wherein the second surface is opposite the first surface, one

of the at least one fastening component and the at least one mating fastening component being a smaller fastening component of the at least one refastenable seam;

forming the at least one front side panel to include a waist end edge, a distal edge, and a leg end edge, with a portion of the waist end edge and a portion of the leg end edge substantially parallel to one another adjacent the distal edge for a distance greater than a transverse width of the smaller fastening component of the corresponding refastenable seam;

forming the at least one back side panel to include a waist end edge, a distal edge, and a leg end edge, with a portion of the waist end edge and a portion of the leg end edge substantially parallel to one another adjacent the distal edge for a distance greater than a transverse width of the smaller fastening component of the corresponding refastenable seam; and

forming the at least one refastenable seam to include a transverse overlap wider than a transverse width of the smaller fastening component of the at least one refastenable seam.

Ex. 1001, 13:46–14:18.

E. The Instituted Grounds of Unpatentability

We instituted the instant trial based on the following grounds of unpatentability. Dec. 18.

References	Basis	Claims Challenged
Fletcher ¹	§ 102(b) ²	1, 4–9, 13–17, 19, 21–23, and 28
Fletcher	§ 103(a)	2, 3, 10–12, 18, 20, 26, and 27
Fletcher and Allen ³	§ 103(a)	24 and 25

II. ANALYSIS

A. Claim Construction

In an *inter partes* review, claim terms in an unexpired patent are given their broadest reasonable construction in light of the specification of the patent in which they appear. 37 C.F.R. § 42.100(b) (2017)⁴; *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016) (affirming applicability of broadest reasonable construction standard to *inter partes* review proceedings). “Under a broadest

¹ Amy Lynn Fletcher et al., WO 00/37009, published June 29, 2000 (Ex. 1002, “Fletcher”). Unless otherwise stated, when we refer to page numbers of Fletcher, we refer to the original page numbers and not the page numbers assigned by Petitioner.

² The Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (“AIA”), amended 35 U.S.C. §§ 102 and 103. Because the challenged claims of the ’877 patent have an effective filing date before the effective date of the applicable AIA amendments, we refer to the pre-AIA versions of 35 U.S.C. § 103 throughout this Decision.

³ Patrick Jay Allen et al., U.S. Patent No. 6,149,637, issued Nov. 21, 2000 (Ex. 1003, “Allen”).

⁴ The Final Rule changing the claim construction standard to the federal court claim construction standard that is used to construe a claim in a civil action under 35 U.S.C. § 282(b) does not apply here, as the Petition was filed before the effective date of the Final Rule, November 13, 2018. See *Changes to the Claim Construction Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board*, 83 Fed. Reg. 51,340, 51,340, 51,344 (Oct. 11, 2018) (codified at 37 C.F.R. § 42.100 (2019)).

reasonable interpretation, words of the claim must be given their plain meaning, unless such meaning is inconsistent with the specification and prosecution history.” *TriVascular, Inc. v. Samuels*, 812 F.3d 1056, 1062 (Fed. Cir. 2016). Any special definitions for claim terms must be set forth with reasonable clarity, deliberateness, and precision. See *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994). In the absence of such a definition, limitations are not to be read from the specification into the claims. *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993). Only terms in controversy must be construed and only to the extent necessary to resolve the controversy. *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

In our Decision on Institution, we acknowledged Petitioner’s identification of express definitions set forth in the ’877 patent for the following terms: “absorbent pant garment;” “elastomeric;” “layer;” “permanently attached;” “refastenable;” “smaller fastening component;” “stretch-bonded laminate;” “stretchable;” “substantially parallel;” and “transverse.” Dec. 5, n.3 (citing Pet. 17). We stated that we would “employ, where appropriate and necessary in this proceeding, those definitions in construing corresponding claim terms.” *Id.* at 5.

We declined to construe the claim language “forming the at least one refastenable seam to include a transverse overlap wider than a transverse width of the smaller fastening component of the at least one refastenable seam” for which Petitioner sought an express construction. Dec. 6 (citing Pet. 17). We stated that “[b]ased on the current record, we do not discern any substantive difference between Petitioner’s rephrasing and the claim language itself, and the construction of this claim language does not appear to be in dispute.” *Id.* Accordingly, we determined that we need not define expressly the claim phrase for purposes of our Decision on Institution. *Id.*

In its Patent Owner Response, the Patent Owner does not provide any express constructions of any claim term. *See generally* PO Resp.; *see* Tr. 8:7–10 (Petitioner asserting Patent Owner did not ask for construction of “back side panel”). During oral argument in this case, both parties appeared to assert that no express claim construction is needed to resolve the issues in this case. *See* Tr. 28:1–9 (Patent Owner stating that the construction of “back side panel” hasn’t come up during the proceeding and is clear for people of skill in the art); *id.* at 39:1–24 (Patent Owner stating no express construction offered for the term “integral” and that the common meaning or plain meaning offered in Fletcher applies); *id.* at 45:8–11 (Petitioner stating that terms should be given their ordinary meaning and Patent Owner agreed); *id.* at 48:4–11 (Petitioner’s counsel stating that we do not need to expressly define the term “back side panel” other than by the explicit language provided in the claims to resolve the issues in this case).

We agree with the parties that no express construction is necessary for any claim term in this proceeding. We will continue to apply the specific definitions set forth in the definitions section of the specification of the ’877 patent to the extent necessary to resolve the issues in this case. *See* Ex. 1001, 3:29–55.

B. Principles of Law

As set forth above, we instituted trial on all of Petitioner’s challenges to the claims of the ’877 patent on anticipation and obviousness grounds. Dec. 18; Pet. 7. The following principles of law guide our analysis of the asserted grounds.

1. Anticipation

To establish anticipation, each and every element in a claim, arranged as recited in the claim, must be found in a single prior art reference. *Net MoneyIN, Inc. v. VeriSign, Inc.*, 545 F.3d 1359, 1369 (Fed. Cir. 2008); *Karsten Mfg. Corp. v.*

Cleveland Golf Co., 242 F.3d 1376, 1383 (Fed. Cir. 2001). “A reference anticipates a claim if it discloses the claimed invention ‘such that a skilled artisan could take its teachings in combination with his own knowledge of the particular art and be in possession of the invention.’” *In re Graves*, 69 F.3d 1147, 1152 (Fed. Cir. 1995) (internal citation and emphasis omitted). Moreover, “it is proper to take into account not only specific teachings of the reference but also the inferences which one skilled in the art would reasonably be expected to draw therefrom.” *In re Preda*, 401 F.2d 825, 826 (CCPA 1968); see *Eli Lilly v. Los Angeles Biomedical Res. Inst.*, 849 F.3d 1073, 1074–75 (Fed. Cir. 2017).

2. Obviousness

A claim is unpatentable under 35 U.S.C. § 103(a) if the differences between the claimed subject matter and the prior art are such that the subject matter, as a whole, would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including: (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3) the level of ordinary skill in the art; and (4) objective evidence of nonobviousness. *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966). “Both the suggestion and the expectation of success must be founded in the prior art, not in the applicant’s disclosure.” *In re Dow Chemical Co.*, 837 F.2d 469, 473 (Fed. Cir. 1988).

In that regard, an obviousness analysis “need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, 550 U.S. at 418; see *Translogic*, 504 F.3d at 1259. In *KSR*,

the Supreme Court also stated that an invention may be found obvious if trying a course of conduct would have been obvious to a person having ordinary skill:

When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense. In that instance the fact that a combination was obvious to try might show that it was obvious under § 103.

550 U.S. at 421. “*KSR* affirmed the logical inverse of this statement by stating that § 103 bars patentability unless ‘the improvement is more than the predictable use of prior art elements according to their established functions.’” *In re Kubin*, 561 F.3d 1351, 1359–60 (Fed. Cir. 2009) (citing *KSR*, 550 U.S. at 417).

We analyze the asserted grounds of unpatentability in accordance with the above-stated principles.

C. Level of Ordinary Skill

Petitioner states that a person of ordinary skill in the art is a person with two to four years of work experience in product design and testing of absorbent articles such as diapers, training pants, and incontinence briefs. *See* Pet. 49 (citing Ex. 1004 ¶¶ 114–115). Patent Owner agrees with this definition, but adds that a person of ordinary skill would also have experience in manufacturing such articles in addition to product design and testing. PO Resp. 2, n.1 (citing Ex. 2003 ¶¶ 21–23).

We agree with Patent Owner that one of ordinary skill in the art would have experience not only in product design and testing, but also in the manufacture of absorbent articles. The ’877 patent, as well as the cited art such as Fletcher, refer to the manufacturing process when describing the absorbent garments that are the subject of the respective disclosures. *See* Ex. 1001, 10:16–18 (discussing desirable

manufacture of inner layer), 10:57–11:15 (discussing manufacture of body side liner); 11:34–37 (“The absorbent assembly 44 can be manufactured in a wide variety of sizes and shapes, and from a wide variety of liquid absorbent materials commonly used in the art.”); *see* Ex. 1002 (similar disclosures).

We thus find that a person of ordinary skill in the art is a person with two to four years of work experience in product design, manufacturing, and testing of absorbent articles such as diapers, training pants, and incontinence briefs. We also find that Messrs. Gardner and Coenen have at least the level of experience of a person of ordinary skill in the art. *See* Ex. 1004 ¶¶ 2–10; Ex. 1005 (curriculum vitae of Mr. Gardner); Ex. 2003 ¶¶ 8–18; Ex. 2004 (curriculum vitae of Mr. Coenen).

D. Anticipation by Fletcher

Petitioner contends that claims 1, 4–9, 13–17, 19, 21–23, and 28 are anticipated by Fletcher under 35 U.S.C. § 102(b). Pet. 7, 19–48. Petitioner asserts that these challenged claims are anticipated by Fletcher, a Patent Cooperation Treaty Publication filed by Patent Owner, which shows the same design for a training pant. Pet. 3–4. As support, Petitioner provides detailed explanations as to how each claim limitation is met by the reference, including a claim chart for each challenged claim, as well as supporting Declarations of Mr. Gardner. *See* Pet. 19–48; Exs. 1004, 1006.

Patent Owner responds that “Fletcher is missing the very heart of the ’877 patent claims: ‘forming [a] back side panel to include’ substantially parallel portions of a waist end edge and a leg end edge,” because Petitioner erroneously “relies on a separate add-on component that is bonded to, and not part of, the back side panel.” PO Resp. 2. Additionally, Patent Owner asserts that because

Fletcher’s drawings are not to scale, Petitioner has failed to show that Fletcher’s add-on components have substantially parallel portions of a waist and leg end edge, and Petitioner has inappropriately relied on teachings from multiple embodiments of Fletcher for its anticipation challenge. *Id.* at 2–3.

We have reviewed the complete record before us, including the parties' explanations and supporting evidence presented during this trial. We determine that given the evidence on this record, Petitioner has shown, by a preponderance of the evidence, that claims 1, 4–9, 13, 15–17, 19, 21–23, and 28 are anticipated by Fletcher. We also determine that Petitioner has not shown, by a preponderance of the evidence, that claim 14 is anticipated by Fletcher.

1. Fletcher (Ex. 1002)

Fletcher discloses a refastenable training pant, depicted in Figure 1, reproduced below:

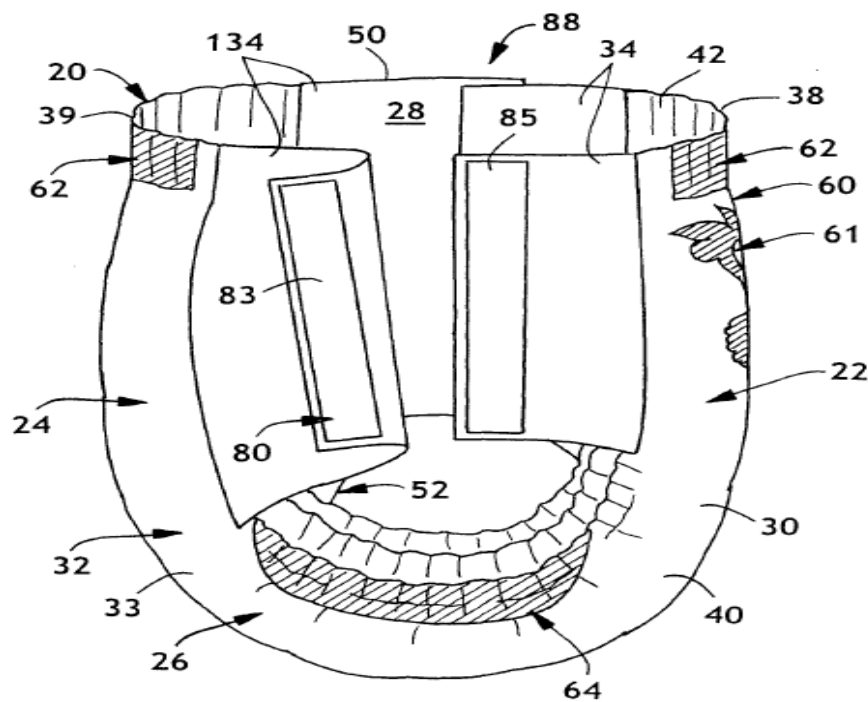


FIG. 1

Figure 1 of Fletcher depicts a side view of a disposable absorbent article—training pant 20—with absorbent chassis 32, front waist region 22, back waist region 24, crotch region 26, inner surface 28, and outer surface 30. Front side panel 34 and back side panel 134 are connected by fasteners 82, 83 and fasteners 84, 85 to form refastenable seams 88 (collectively, fastening system 80). Ex. 1002, 11:19–29, 19:18–32, 22:7. In Figure 1, fastening system 80 is shown engaged on one side of the absorbent article and disengaged on the other side. *Id.* at 10:27–30.

Figure 3 of Fletcher, reproduced below, depicts the absorbent article, training pant 20, shown in Figure 1, in an unfastened, flat condition.

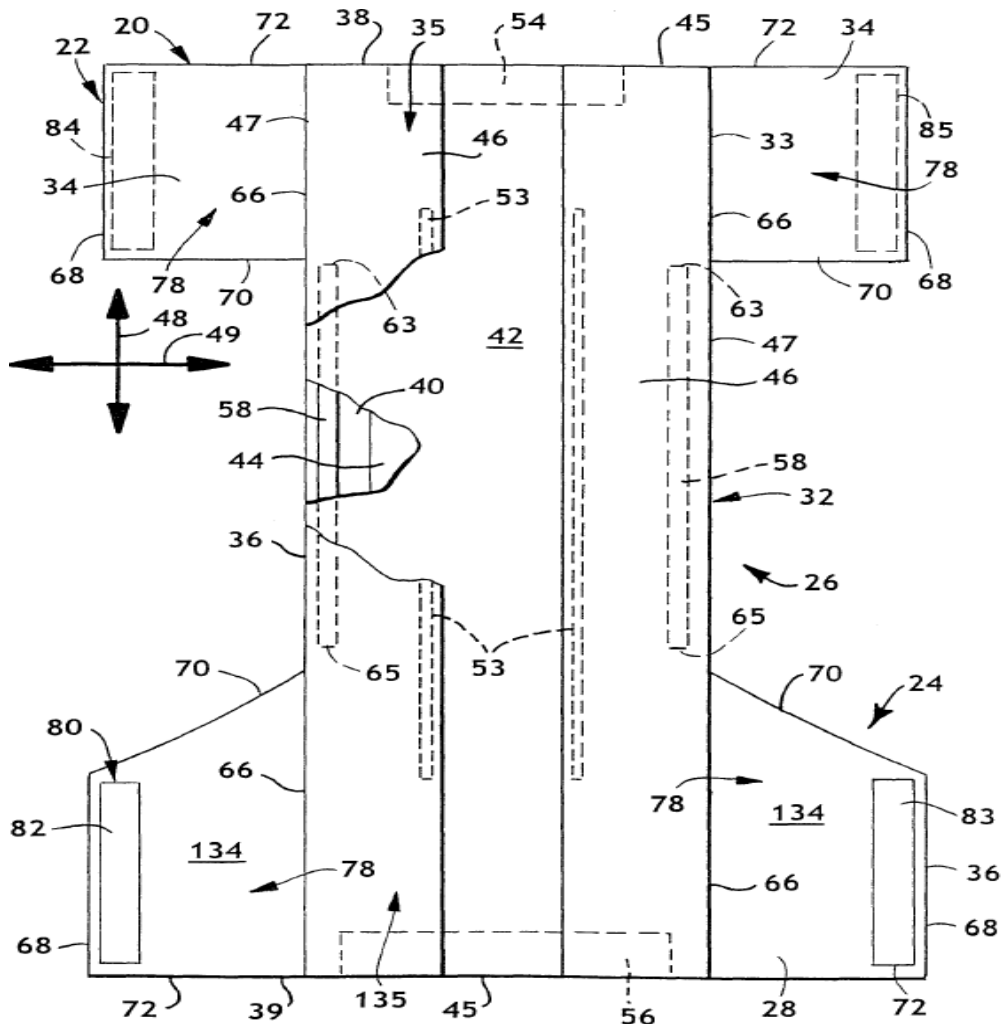


FIG. 3

Figure 3 of Fletcher depicts fastening components 82, 83 located on the inner surface of back side panels 134 and mating fastening components 84, 85 disposed on the outer surface of front side panels 34. Ex. 1002, 10:34, 20:22–26. Consistent with the depictions in Figures 1 and 3 above, Fletcher describes that back waist region 24 has leg end edges 70 which are desirably angled relative to transverse axis 49 and waist end edges 72 which are desirably parallel to transverse axis 49. Ex. 1002, 18:3-7.

Fletcher states that:

The design of the absorbent chassis and the fastening components provides the absorbent article with a fastening system which is resistant to accidental disengagement of the fastening components. The location of the refastenable seams at the sides of the wearer over the hips is particularly desirable because that is an area of the absorbent article that is least subject to movements of the wearer, such as articulation of the legs. The side refastenable seams have distinct advantages over front attachment designs, which are more subject to separation forces caused by bending at the waist and movements of the legs of the wearer. Furthermore, in particular embodiments, there can be elastic panels on either side of the refastenable seams to isolate the fastening components from stress and strain caused by movement of the body. In this way, the elastic panels function in a manner similar to shock absorbers to reduce stress and strain on the fastening components.

Id. at 3:11–22.

Figure 8 of Fletcher, reproduced below, depicts another embodiment of Fletcher's disposable absorbent article, training pant 400, shown in an unfastened, flat condition.

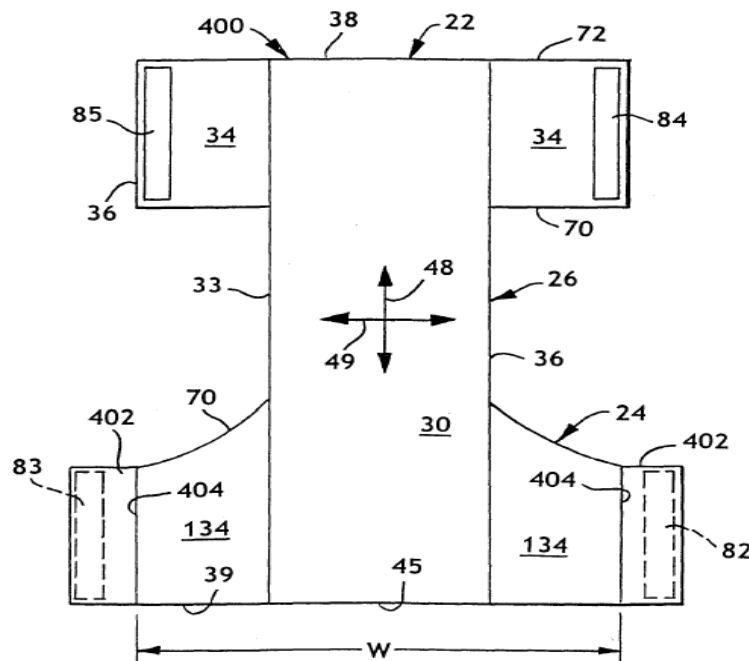


FIG. 8

Figure 8 of Fletcher depicts elastomeric front side panels 34, support members 402 bonded to and extending transversely outward from panels 134, and fastening components 82, 83 disposed on the inner surface of support members 402. Ex. 1002, 25:7–32. Fletcher states that “support members 402 desirably although not necessarily comprise inelastic materials that are bonded to the side panels 134 at seams 404 using adhesives, sonic or thermal bonds, or the like.” *Id.* at 25:22–24. Also, Fletcher states that “fastening components 82 and 83 can comprise separate structures bonded to the support members 402 or comprise integral portions, surfaces or regions of the support members.” *Id.* at 25:31–32. Fletcher further discloses that fastening components 82, 83, are “adapted to releasably engage first and second mating fastening components 84 and 85 that are connected to the [outer surface of] respective front side panels 34.” *Id.* Consistent with the configuration depicted in Figure 8 above, Fletcher describes waist edges 38 and 39 as being parallel to transverse axis 49. *Id.*, 25:9–10.

2. *Analysis*

Petitioner principally relies on Figure 8 and accompanying disclosure in Fletcher to establish that claims 1, 4–9, 13–17, 19, 21–23, and 28 are anticipated by Fletcher. *See* Pet. 19–48. We begin our analysis with the only independent claim, claim 1, as Patent Owner’s arguments focus on the limitations of this claim.

a. Claim 1

As in the ’877 patent, Petitioner asserts that Fletcher locates refastenable seams in areas where there is no curvature on the leg end edges, i.e., away from concentrated stress points. *Id.* at 19, 25. Petitioner points out that both the ’877 patent and Fletcher are concerned with avoiding pop-opens. *Id.* at 25. Petitioner states that:

Fletcher provided the same solution to the pop-open problem, albeit several years earlier. Specifically, Fletcher teaches to place the refastenable seams in a location “least subject to movements of the wearer, such as articulation of the legs.” (Ex. 1002, 3:13–15; *see also id.*, 3:18–22) (teaching to “isolate the fastening components from stress and strain caused by movement of the body”). Fletcher accomplishes this objective by using the same training pant design as the ’877 Patent

Pet. 25 (citing Ex. 1004 (Gardner Declaration) ¶ 75).

Petitioner provides a comparison of Figure 8 from Fletcher and Figure 2 from the ’877 patent to show that both Fletcher and the ’877 patent have the same training pant design as claimed in claim 1 of the ’877 patent. *See* Pet. 27–28. This side-by-side comparison is shown below.

Fletcher

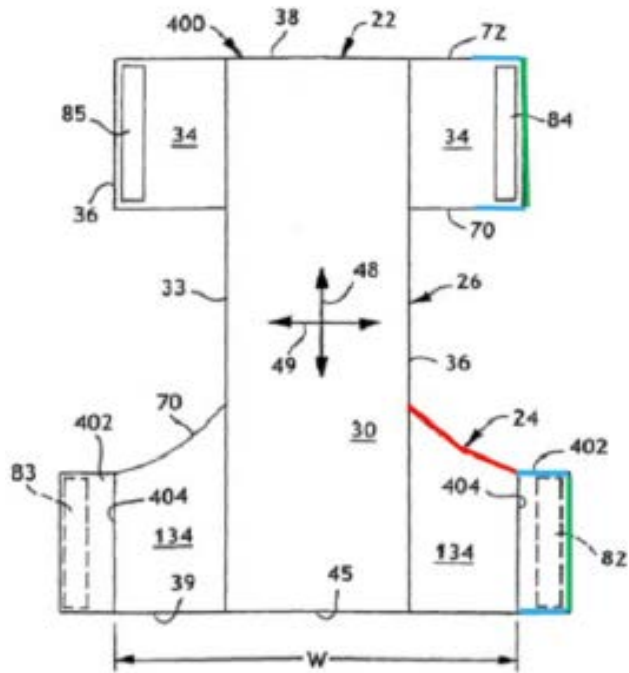
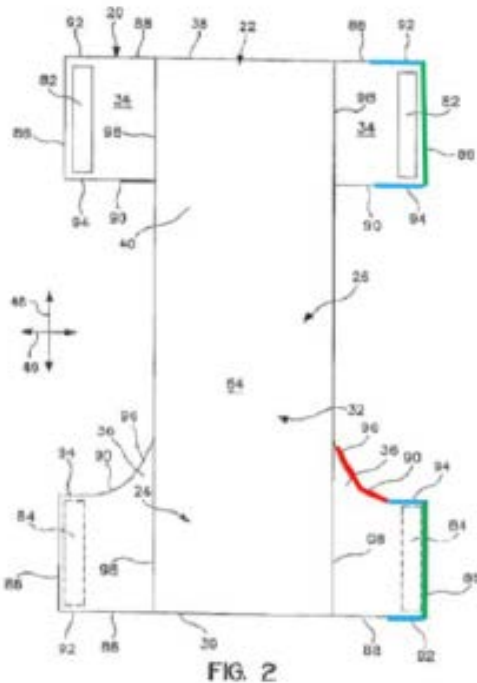


FIG. 8

'877 Patent



Pet. 28 (citing Ex. 1004 ¶ 79) (annotated by Petitioner).

Petitioner explains how Fletcher’s Figure 8 along with other disclosure in Fletcher shows that Fletcher teaches each limitation of claim 1 arranged as set forth in the claims. *See* Pet. 27–30, 39–43 (claim chart); Ex. 1004 ¶¶ 78–87. With reference to annotated Figure 8 from Fletcher and annotated Figure 2 from the ’877 patent set forth above, Petitioner states:

As indicated by the blue lines added to Figure 8, both the front and back side panels include a portion of the waist end edge and a portion of the leg end edge that are parallel to each other. As can be seen, these parallel portions are adjacent the distal edges (green) of the back side panels 402/134 and front side panels 34, as required by Claim 1. And, the parallel portions are wider in the transverse direction than the width of the mating front fastening components 84, 85 (the “smaller fastening components”), as required by Claim 1. (Ex. 1004 ¶ 80.)

Any argument by Patent Owner that the support members 402 are not part of the back side panels would be contrary to the teachings of the '877 Patent. The specification of the '877 Patent explains that the side panels can “include one or more individual, distinct pieces of material.” (Ex. 1001, 8:28–29.) This is exactly how the back side panels in Figure 8 of Fletcher are made, i.e., the support member 402 is bonded to the elastomeric side panels 134. (Ex. 1002, 25:20–21; Ex. 1004 ¶ 81.)

Pet. 28–29.

Concerning requirement in claim 1 that the refastenable seam “include a transverse overlap wider than a transverse width of the smaller fastening component,” Petitioner asserts that:

[t]he overlapping parallel portions (traced in blue in Figure 8 above) on the front and back side panels overlap each other in the transverse direction when the refastenable seam is formed. These overlapping portions are wider than the transverse width of the front fastening components 84, 85, which as discussed above, are the smaller fastening components in the refastenable seam. (Ex. 1002, 21:4–5, Fig. 8)

Pet. 30.

1. The Arguments Regarding Whether the '877 Patent and Fletcher Solve the Same Problem in the Same Way

Patent Owner responds that the specific problems and solutions in Fletcher and the '877 patent are different. PO Resp. 8. Patent Owner asserts that Fletcher's resistance to “pop-opens” is tied to the location of the fastening components relative to the body, i.e., providing seams at the side of the wearer and the use of elastic panels, not to the shape of the garment and the location of the fastening components relative to that shape or concentrated stress points as in the '877 patent. *Id.* at 8–9.

Patent Owner concludes:

Indeed, Fletcher is entirely silent as to stress points or locating the fastening components relative to stress points or to a particular

shape of the garment itself. Ex. 2003, ¶¶49-50. Fletcher's only mention of stress simply indicates that "the elastic panels function in a manner similar to shock absorbers to reduce stress and strain on the fastening components." Fletcher, 3:20-22. And Fletcher is not concerned with placing a fastening components between parallel portions of the waist end edge and leg end edge of side panels, as shown in Fletcher's Figure 6 (reproduced below). See Fletcher, FIG. 6; Ex. 2003, ¶¶48-50.

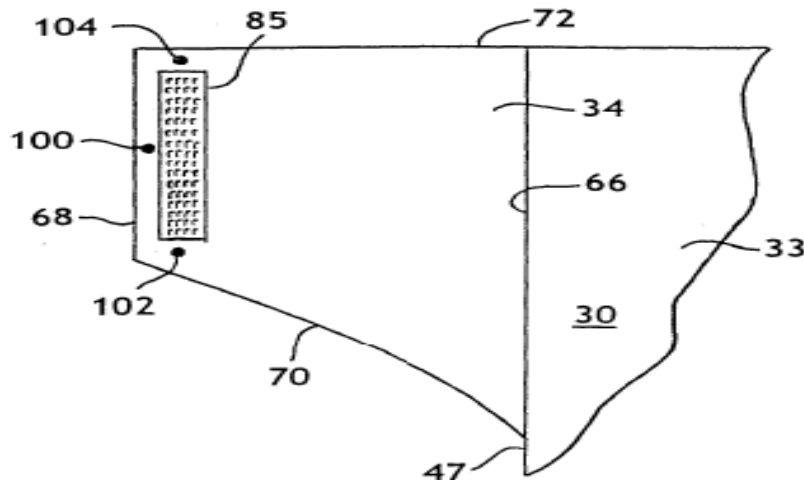


FIG. 6

Fletcher, FIG. 6.

PO Resp. 9.

We do not agree with Patent Owner's assessment of Fletcher's teachings as set forth above. First, we note that whether Fletcher is solving the same problem as in the '877 patent is not a relevant inquiry for an anticipation ground. See *Twin Disc, Inc. v. U.S.*, 231 USPQ 417, 424 (Cl. Ct. 1986) (stating arguments that the art is not recognized as solving the problem solved by the claimed invention are not germane to an anticipation analysis). As the Federal Circuit has stated, "A reference may be directed to an entirely different problem than the one addressed by the inventor, or may be from an entirely different field of endeavor than that of the claimed invention, yet the reference is still anticipatory if it explicitly or

inherently discloses every limitation recited in the claims.” *State Contracting & Eng’g Corp. v. Condotte Am., Inc.*, 346 F.3d 1057, 1068 (Fed. Cir. 2003).

We also disagree with Patent Owner’s premise that Fletcher is not dealing with the same problem with the same solution as the ’877 patent. Fletcher may not use the specific term “stress point,” but Fletcher specifically addresses the problem of “pop-opens” by referring to the reduction of stress on the refastenable seams. As Petitioner points out, “the ’877 patent recognized that ‘stress points and tension’ are exerted on the angled portions of side panels when the wearer’s legs bend,” causing “pop-opens.” Pet. 25 (citing Ex. 1001, 1:41–44). As Petitioner also notes, Fletcher teaches the same solution. “Specifically, Fletcher teaches to place the refastenable seams in a location ‘least subject to movements of the wearer, such as articulation of the legs.’” *Id.* (citing Ex. 1002, 3:13–15, 3:18–22); *see also* Ex. 1004 ¶¶ 73–75 (discussing that Fletcher teaches placing refastenable seams in a location least subject to movement of the wearer); Ex. 2005, 38:16–24 (stating the Fletcher manages concentrated stress points in the product design). We note that Fletcher also teaches that side refastenable seams are superior to front attachment designs because such designs “are more subject to separation forces caused by bending at the waist and movements of the legs of the wearer.” Ex. 1002, 3:16–18.

Not only do Fletcher and the ’877 patent deal with the same problem, they both solve the problem in the same way. As Petitioner points out, one of the solutions to reduce stress on refastenable seams that Fletcher teaches is shown in Figure 8 set forth above where the fastening component 82 is placed between two parallel portions of the waist end edge and leg end edge. Pet. 28 (citing Ex. 1004 ¶ 80). Patent Owner’s references to Fletcher’s use of elastic panels to reduce stress

on the fastening components and to Figure 6 of Fletcher do not detract from what is taught in Figure 8 of Fletcher.

Although, as Patent Owner points out, Fletcher talks about using elastic panels to function similarly to shock absorbers to reduce stress on the fastening components, see PO Resp. 9, that disclosure is in addition to Fletcher's discussion concerning placement of the refastenable seams to reduce stress on the seams. See Ex. 1009 (Patent Owner's declarant admitting that because claim 1 covers elastic back side panels, claim 1 "covers a product that doesn't face the problem addressed by the '877 patent"). Petitioner did not rely on Figure 6 to teach this limitation of the challenged claims, so Patent Owner's argument concerning Figure 6 is inapposite. See Ex. 2003 ¶¶ 48–50 (asserting that Figure 6 of Fletcher shows a fastening component above an angled portion of side panel 34 establishes that Fletcher does not appreciate concentrated stress points).

2. Support Member 402 is Part of a "Back Side Panel"

Patent Owner also asserts that Petitioner fails to show that Fletcher anticipates any claim of the '877 patent because "attempting to get around Fletcher's lack of disclosure, [Petitioner] relies on components that are not part of the side panel, drawings that are admittedly not to scale, and picking and choosing disparate teachings from Fletcher." PO Resp. 11 (citing Ex. 2003 ¶¶ 58–115). Patent Owner asserts that a person of ordinary skill in the art would not view support member 402 upon which Petitioner relies as part of the back side panel disclosed in Fletcher. *Id.* at 11–30. Because support member 402 cannot be considered part of the back side panel, Patent Owner asserts that Fletcher fails to teach at least the following limitation of claim 1:

forming the at least one back side panel to include a waist end edge, a distal edge, and a leg end edge, with a portion of the waist end edge and

a portion of the leg end edge substantially parallel to one another adjacent the distal edge for a distance greater than a transverse width of the smaller fastening component of the corresponding refastenable seam.

PO Resp. 11–12 (transverse width limitation).

Patent Owner provides two main arguments to establish that support member 402 is not part of a back side panel. First, Patent Owner looks to Fletcher’s disclosure to assert that support members 402 are add-on components separate from the back side panel, and second, Patent Owner asserts that when viewed in light of the ’877 patent disclosure, one of skill in the art would not view the support member 402 as part of a back side panel. *See* PO Resp. 11–30.

We agree with Petitioner that Patent Owner fails to analyze the language of claim 1 in determining whether Fletcher’s support member 402 may be considered to be part of the “back side panel” as claimed in claim 1. *See* Reply 2.⁵ We agree with Petitioner that the broadest reasonable construction of the back side panel limitation of claim 1 in light of the written description of the ’877 patent includes a two-piece panel as in Fletcher’s Figure 8, which includes side panel 134 and support member 402. *See id.* at 2, 4–6.

In describing the formation of the “at least one back side panel,” claim 1 states that such a panel includes the following: (1) a waist end edge, (2) a distal edge, (3) and a leg end edge, “with a portion of the waist end edge and a portion of the leg end edge substantially parallel to one another adjacent the distal edge for a distance greater than a transverse width of the smaller fastening component of the corresponding refastenable seam.” Ex. 1001, 14:8–14. There is no restriction in this claim language requiring the back side panel to be constructed in one

⁵ Petitioner also notes that neither party requested construction of this limitation. *See* Reply 5.

continuous piece. Mr. Coenen, Patent Owner's declarant, agreed. Ex. 1009, 56:20–23.⁶

Mr. Gardner, Petitioner's declarant, whom we credit here, further confirmed this interpretation of the meaning of “back side panel” as used in the challenged claims in light of additional limitations of the claims. Mr. Gardner testified:

[A] POSITA would have understood that the “elastomeric side panel 134” and “support member 402” combine to make up a back side panel since this composite structure connects to the front side panel when the pant is worn.

Claim 1 requires, in part, “providing at least one front side panel and at least one back side panel . . . [that] *form* at least one refastenable seam *there between*.” (See Ex. 1001, 13:50-53 (emphasis added).) In Figure 8 of Fletcher, the refastenable seam is *formed between* the front side panel 34 and the support member 402. Support member 402, together with elastic side panel 134, therefore forms the back side panel required by the claim. (Ex. 1002, Fig. 8, 25:28–34.)

Ex. 1004 ¶¶ 82–83; Ex. 1006 ¶ 9.

Patent Owner erroneously uses Fletcher's disclosure to establish that one of ordinary skill in the art would not view support member 402 as part of the back side panel. See PO Resp. 12–18. As we have previously stated with regard to claim construction, a claim term must be given the broadest reasonable construction in light of the specification of *the patent* in which they appear. See *supra* Section II.A. In discussing the side panels, which include the back side

⁶ Patent Owner attempts to qualify Mr. Coenen's admission as referring to multiple layers making up the back side panel versus pieces of material connected in series. See Sur-Reply 6 n.2. Patent Owner, however, had the opportunity to question Mr. Coenen in re-direct during his deposition to clarify this unequivocal admission, but failed to do so. See Ex. 1009, 57. Having failed to do so, Patent Owner cannot now attempt to qualify Mr. Coenen's statement through unsupported attorney argument.

panel, the '877 patent states that “[e]ach of the side panels 34, 36 can include one or more individual, distinct pieces of material. . . . Suitable elastic materials, as well as processes of incorporating side panels into a training pant, are known to those skilled in the art, and are described, for example, in U.S. Pat. No. 4,940,464 issued Jul. 10, 1990 to Van Gompel et al., which is incorporated herein by reference.” Ex. 1001, 8:28–29, 41–45; *see* Pet. 28–29.

Patent Owner reads this language in the '877 patent as restricted to individual or distinct *layers* of material explaining what the side panels include, and not separate pieces of material put together in series. PO Resp. 24–25. Mr. Coenen pointed to discussion in the '877 patent immediately following the statements quoted above concerning the types of fabric that may make up the side panel that he argues supports his view that this discussion talks about distinct pieces of material that are arranged in layers. *See* PO Resp. 23–24; Ex. 2003 ¶¶ 81–83.

We discern no limitation on the incorporation of the entirety of Van Gompel’s disclosure into the '877 patent as described by Patent Owner. The Federal Circuit has found that the language such as “is incorporated herein by reference” is plainly sufficient to incorporate Van Gompel in its entirety. *See Paice LLC v. Ford Motor Co.*, 881 F.3d 894, 907 (Fed. Cir. 2018) (citing *Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1282 (Fed. Cir. 2000)). Qualifying statements relating to the incorporated reference do not diminish the complete incorporation by reference. For instance in *Paice*, the Federal Circuit viewed a qualifying statement concerning the incorporated reference as referring to the applicability of certain features of the incorporated reference to the claimed invention of the patent incorporating the reference, and not as a statement to which textual portions of the reference are actually

incorporated. *Id.* at 907–908. The Federal Circuit stated that “[t]he applicability of a document’s disclosed features and the incorporation of the document itself are distinct concepts, and one does not imply the other.” *Id.* at 908 (citations omitted).

Also, here the qualifying statements that precede Van Gompel’s complete incorporation by reference concern generally “processes of incorporating side panels into a training pant” that are known to those skilled in the art. *See* Ex. 1001, 8:41–43. Patent Owner would have us read this general statement as restricted to what comprises the layers of the side panel, *see* PO Resp. 25; Sur-Reply 6–8, but there is no support in the record to read this statement so restrictively. This statement specifically references “side panels” and their incorporation into a training pant. Petitioner points to where Van Gompel shows side panels made up of pieces of material in series as in Fletcher’s Figure 8. *See* Reply 7–9 (citing Ex. 1006 ¶¶ 10–15; Ex. 1008, 3:10–30). We therefore find that the ’877 patent’s written description supports a back side panel with more than one piece of material in series.

The fact that Fletcher uses the similar term “back panel” to refer to only one of the elements that Petitioner asserts teaches claim 1’s “back side panel” is not particularly helpful to our inquiry here. As we have previously stated, claim 1 encompasses training pants with more than one piece of fabric arranged in series making up the back side panel. *See* Reply 1–3. Fletcher’s Figure 8 teaches the claimed back side panel limitation with the combination of support members 402 and back panels 134, as well as the other limitations of claim 1.

Patent Owner relies on Mr. Coenen’s testimony concerning the manufacturing efficiencies of having the same width for the front side and back side panels, and Mr. Coenen’s observation that support members 402 are bonded to and extend transversely outward from back panels 134, to conclude that “a POSA

would have considered support member 402 to be an add-on component that is not part of its side panel.” PO Resp. 14 (citing Ex. 2003 ¶ 62); *see* PO Resp. 13–18; Ex. 2003 ¶¶ 61–64. Again, whether support member 402 is considered an add-on component in Fletcher is not relevant when claim 1 encompasses a back side panel that may be made up of more than one piece of fabric arranged in series.

3. *Petitioner Appropriately Relies on Fletcher’s Figure 8*

Patent Owner also asserts that Petitioner’s reliance on Figure 8 of Fletcher is misplaced because Fletcher’s drawings are not drawn to scale. *See id.* at 30–37. Patent Owner states that drawings that are not drawn to scale cannot be relied on to teach a specific size, shape, or relative feature. *Id.* at 31 (citations omitted).

Patent Owner is correct that “it is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.” *Hockerson-Halberstadt, Inc. v. Avia Group Internat’l, Inc.*, 222 F.3d 951, 956 (Fed. Cir. 2000); *see* PO Resp. 30–31. In determining the proper scope to be afforded disclosure based on a figure, however, we should evaluate the figures or drawings “on the basis of what they reasonably disclose and suggest to one skilled in the art.” *In re Aslanian*, 590 F.2d 911, 914 (CCPA 1979). As such, drawings may be used to show unpatentability of claims “even though the feature shown in the drawing was unintended or unexplained in the specification of a reference patent.” *Id.* (citations omitted). Therefore, drawings and figures can anticipate claims if they clearly show the structure which is claimed. *See In re Mraz*, 455 F.2d 1069, 1072 (CCPA 1972) (“Description for the purposes of anticipation can be by drawings alone as well as by words.”).

With these legal principles in mind, we examine the parties’ respective arguments concerning the applications of Fletcher’s Figure 8 as applied to the

challenged claims. As we have previously discussed, Petitioner, relying on the testimony of Mr. Gardner, explains by a preponderance of the evidence how Figure 8 of Fletcher teaches all of the limitations of claim 1 arranged as in the claim. *See supra* Section II.D.2.a. (setting forth Petitioner’s explanation of how claim 1 is met by Fletcher’s Figure 8); Pet. 27–30; Ex. 1004 ¶¶ 78–87.

Mr. Coenen’s analysis of Fletcher applies an erroneous legal standard concerning what a drawing that is not drawn to scale teaches one of skill in the art. Mr. Coenen testified that

the drawing’s purpose is to help clarify the words [of the written description] so it’s important to have the drawings in order to help form the picture in one’s mind that the words are attempting to portray. But the words are needed to add clarity to what the drawings, the lines of the drawing are trying to depict.

Ex. 1009, 42:13–20. Mr. Coenen then confirmed that he believes what one of skill in the art can learn from the drawings of a patent is limited to what is stated in the specification of a patent. *Id.* at 42:21–43:2. Therefore, we do not credit Mr. Coenen’s testimony concerning what one of skill in the art would understand from the drawings of Fletcher, and specifically, Figure 8. *See* Ex. 2003 ¶¶ 107–115; ¶ 110 (stating “[b]ecause Figure 8 is not to scale, it does not reasonably convey to a POSA precise proportions of the components. Proportions would include the relationship of the components in size or shape (e.g., angles between components, including whether they are substantially parallel”)).

4. Petitioner Shows Limitations of Claim 1 Arranged as in the Claim in Fletcher

Finally, Patent Owner asserts that Petitioner improperly picks and chooses from different embodiments in Fletcher to establish anticipation of the challenged claims. *See id.* at 37–46. Therefore, Petitioner fails, according to Patent Owner, to

show that Fletcher teaches each limitation of the challenged claims *arranged as in the claims*. *Id.*

Patent Owner specifically takes issue with Petitioner’s support for Fletcher’s teaching of the limitation “wherein the second surface is opposite the first surface, one of the at least one fastening component and the at least one mating fastening component being a smaller fastening component of the at least one refastenable seam.” PO Resp. 39. Petitioner’s support for this limitation is two lines of text from Fletcher, in addition to Figure 8. Pet. 41, *cited in*, PO Resp. 39–40. Patent Owner contends that those two lines of text apply to Figure 2 and not to Figure 8, and that Mr. Gardner admitted that the training pant shown in Figure 2 is a different embodiment than that shown in Figure 8. PO Resp. 39. Finally, Patent Owner argues that because Figure 8 is not drawn to scale, one of skill in the art would not glean from Figure 8 the relative sizes of the fastening components. *Id.* at 40.

First, we disagree with Patent Owner’s assertion that the relied upon text of Fletcher is limited to the embodiment of Fletcher’s training pant shown in Figure 2. We note that Patent Owner is correct that the paragraph containing the text begins “[w]ith particular reference to Figure 2,” but further in the paragraph, the remaining description, including Petitioner’s relied upon text, is more generally applied to “certain embodiments.” *See* Ex. 1002, 20:30–21:6. Mr. Coenen admitted that the text upon which Petitioner relies is not limited to Figure 2 in light of the reference to “certain embodiments.” *See* Ex. 1009, 46:23–48:6.

The text upon which Petitioner relies states “the fastening components can be sized larger than the mating fastening components” *Id.* at 21:4–5. In the description immediately preceding this disclosure, fastening components 82 and 83 and mating fastening components 84 and 85 are specifically referenced. In

Figure 8, mating fastening components 84 and 85 appear smaller than fastening components 82 and 83, just as described. *See* Ex. 1002, Fig. 8. We agree with Dr. Gardner that Figure 8 reasonably shows this difference in sizing between the fastening components as confirmed by the cited text of Fletcher. *See* Ex. 1004 ¶ 89; Pet. 41; *see In re Aslanian*, 590 F.2d at 914 (stating figures may be relied upon “on the basis of what they reasonably disclose and suggest to one skilled in the art”). Petitioner did not inappropriately pick and choose from different embodiments in Fletcher, but instead points to how all the limitations of claim 1 are taught by Figure 8, especially when viewed in light of the accompanying disclosure of Fletcher.

On the record before us, we find that Petitioner has shown, by a preponderance of the evidence, that claim 1 is anticipated by Fletcher for the reasons that we have outlined above.

b. Dependent Claims 4–9, 13–17, 19, 21–23, and 28

Petitioner sets forth its analysis of how each additional limitation added by dependent claims 4–9, 13–17, 19, 21–23, and 28 are taught by Fletcher, again relying predominantly on Figure 8 of Fletcher, and also provides a claim chart summarizing its arguments. Pet. 31–48; Ex. 1004 ¶¶ 88–113, claim chart.

1. Uncontested Dependent Claims 8, 9, 13, 15, and 21–23

Patent Owner does not specifically address Petitioner’s analysis as to claims 8, 9, 13, 15, or 21–23 other than to assert that Petitioner’s case is deficient as to these claims that each depend directly from claim 1 for the same reasons provided for claim 1 that we have addressed above and found to be unpersuasive. *See* PO Resp. 30–45.

In reviewing Petitioner’s arguments and evidence provided for claims 8, 9, 13, 15, and 21–23, we find on the record before us that Petitioner has shown, by a preponderance of the evidence, that these claims are anticipated by Fletcher.

Claims 8 and 9 require the fastening components to be bonded to the front side panel and back side panel, respectively. *See* Ex. 1001, 14:48–53. Petitioner points to statements in Fletcher that the fastening components shown on the back side panels in Figure 8 “can comprise separate structures bonded to the support members 402 or comprise integral portions, surfaces or regions of the support members,” and the fastening components on the front side panels may also be bonded to the panels of integral with them. Ex. 1002, 25:30–33, 21:14–16, 21:19–23; Ex. 1004 ¶¶ 93–94, *cited in*, Pet. 33. Accordingly, we find that Petitioner has shown, by a preponderance of the evidence, that claims 8 and 9 are anticipated by Fletcher.

Claim 13 adds the limitation that “the leg end edge of the at least one back side panel further comprises a portion transversely offset from the at least one mating fastening components that is non-parallel and non-perpendicular to the waist end edge of the at least one back side panel.” Ex. 1001, 14:63–67. Petitioner explains:

As to Claim 13, as shown in annotated Figure 8 below, the leg end edge of the back side panels includes an angled portion (red) that is neither parallel nor perpendicular to the waist end edge (blue). This angled portion is offset from the back fastening components 82, 83 in the transverse direction 49. (Ex. 1004 ¶ 96.) Thus, Fletcher anticipates Claim 13. (*Id.*).

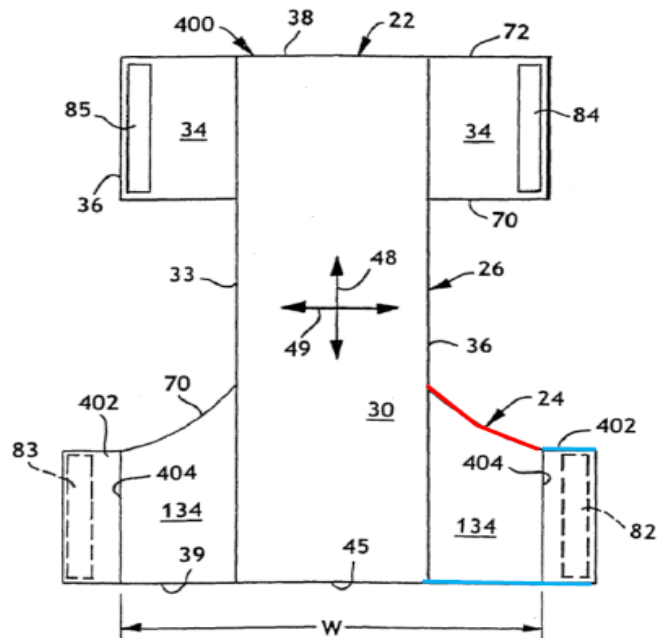


FIG. 8

We agree with Petitioner’s analysis of how Figure 8 of Fletcher teaches the additional limitation of claim 13. We find that Petitioner has shown, by a preponderance of the evidence, that claim 13 is anticipated by Fletcher.

Claim 15 adds “wherein each side panel is permanently attached to the outer cover of the absorbent chassis along an attachment edge opposite the distal edge of each side panel.” Ex. 1001, 15:6–8. Petitioner points to where “Fletcher teaches that the front side panels 34 and the back side panels 134/402 [shown in Figure 8] can be permanently bonded to the absorbent chassis.” Pet. 36 (citing Ex. 1002, 25:14–25, 11:32–34, 17:20–32, Figs. 2, 3, 8; Ex. 1004 ¶ 104). We find that Petitioner has shown, by a preponderance of the evidence, that claim 15 is anticipated by Fletcher.

Dependent claims 21 and 22 require that the front side panel comprise either an “elastic core” or a stretch-bonded laminate. See Pet. 38; Ex. 1001, 16:1–5. Petitioner shows where these teachings are found in Fletcher. Pet. 38 (citing

Ex. 1002, 18:27–35, 19:4–17, 23:22–33; Ex. 1004 ¶ 110). We agree with Petitioner’s analysis and find that Petitioner has shown, by a preponderance of the evidence ,that claims 21 and 22 are anticipated by Fletcher.

Petitioner also shows where Fletcher teaches that side panels may comprise “an **elastic** material capable of stretching in a direction generally parallel to the transverse axis . . . of the training pant,” teaching the additional limitation of claim 23 that “at least one front side panel is stretchable in a direction substantially parallel to the substantially parallel portions of the waist end and leg end edges.” Ex. 1001, 16:6–9. We agree with Petitioner’s analysis and find that Petitioner has shown, by a preponderance of the evidence, that claim 23 is anticipated by Fletcher.

2. Dependent Claims 4–7, 14, 16, 17, 19, and 28

Petitioner describes how the additional limitations of dependent claims 4–7, 14, 16, 17, 19, and 28 are taught by Fletcher. *See* Pet. 31–48. In addition to the deficiencies that Patent Owner asserts concerning claim 1 that were addressed above concerning, Patent Owner asserts that dependent claims 4, 5, 17, and 19, are not anticipated by Fletcher because Petitioner improperly relies on drawings in Fletcher that are not to scale. *See* PO Resp. 34–37.

a. Dependent Claims 4 and 5

Claim 4 and 5 add the limitation that parallel portions of the waist and leg end edges at the distal end of the front side panel be “at least 1.2 times” or “at least 1.5 times,” respectively, “the transverse width of the smaller fastening component of the corresponding refastenable seam.” PO Resp. 40 (citing Ex. 1001, 14:31–42).

Petitioner again reiterates that the fastening components 84 and 85 on the front side panel are the smaller or narrower of the fastening components. Pet. 31 (citing Ex. 1002, 21:4–5, Fig. 8). Petitioner further states that:

“[a]s shown below in Figure 8 (annotated) . . . the entire waist end edge is parallel to the entire leg end (*see* blue tracing) in the front side panels, and these parallel portions are depicted as being about 4 times wider than the transverse width of fastening components 84, 85 (i.e., the smaller fastening components, outlined in yellow).

Id. (citing Ex. 1002, 21:4–5, Fig. 8; Ex. 1004 ¶ 89).

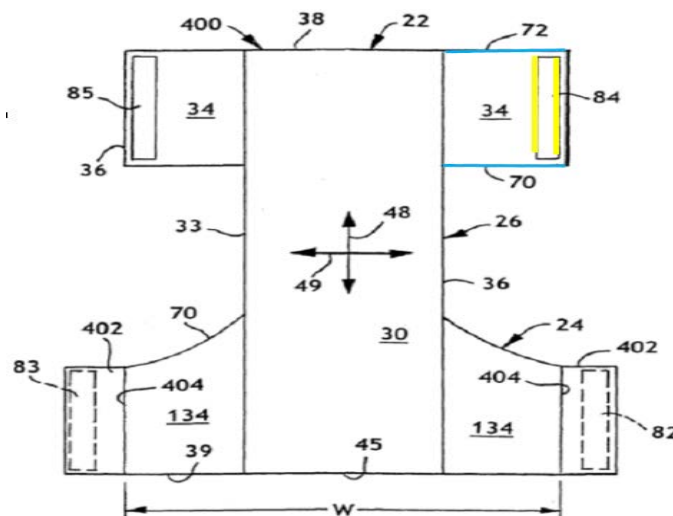


FIG. 8

Pet. 32; Ex. 1004 ¶ 91 (distal edge of the front side panel is traced in green).

We agree with Mr. Gardner that the parallel portions of the waist and leg end edges outlined in blue above are about four times wider than the transverse width of fastening components 84, 85. See Ex. 1004 ¶ 89. Although not drawn to scale, Figure 8 clearly teaches the additional limitations of claims 4 and 5, i.e., the parallel portions shown in blue above are at least 1.2 or 1.5 times the transverse width of fastening components 84, 85. See Reply 14–15.

Mr. Gardner also further supports this assessment of Figure 8 by Fletcher's teaching that the transverse width of the smaller fastening components 84, 85 can be as narrow as 0.5 cm, see Ex. 1002, 22:2–9, and that these components are “desirably spaced transversely inward from the distal edge 68 [of the front side panels 34] by about 1 to about 15 millimeters” (i.e., up to **1.5 cm**). Ex. 1004 ¶¶ 90 (quoting Ex. 1002, 24:16–17).

In referencing annotated Figure 8 above, Mr. Gardner stated:

Specifically, the distance between the distal edge of the front side panel (traced in green) and the right side of the front fastening component 84 (traced in yellow) can be 1.5 cm, and the width of the fastening component 84 can be 0.5 cm. Since the blue parallel portions of the waist end and leg end edges extend from the distal edge (green) to at least the left edge of the fastening component 84 (yellow), the parallel portions extend at least 2.0 cm (1.5 cm + 0.5 cm). As such, the width of these parallel portions (2.0 cm) is at least 4 times wider than the transverse width (0.5 cm) of the smaller fastening components 84, 85.

Ex. 1004 ¶ 91.

Although we find that Figure 8 alone teaches the additional limitations of claims 4 and 5, we also credit Mr. Gardner's testimony set forth above as consistent with the teachings of Fletcher and the logical conclusions that one of ordinary skill in the art would draw from such teachings. This additional testimony further supports that additional limitations of claim 4 and 5 are taught by Figure 8 of Fletcher.⁷

⁷ Petitioner also relies on Figure 4, but we need not consider such reliance as we have found that Figure 8 alone, and certainly as supported by the written description of Fletcher, teaches the additional limitations of claims 4 and 5 of the '877 patent. See *Pet.* 33.

Finally, Patent Owner asserts that Petitioner's reliance on the written description of Fletcher to support Mr. Gardner's conclusion as to what Figure 8 of Fletcher teaches is inappropriate because the text is not linked to the embodiment in Figure 8. PO Resp. 40–41. Although we need not reach this issue because we find that Figure 8 alone teaches the additional limitations of claims 4 and 5, we find that Patent Owner's argument is unpersuasive. Both cited portions of the written description refer to “particular embodiments” and use the reference numbers associated with Figure 8 (as well as other figures). *See* Ex. 1002, 22:2–9; 24:6–18. We find that this provides the necessary link between the cited written description upon which Mr. Gardner relied and Figure 8.

On the record before us, we find that Petitioner has shown, by a preponderance of the evidence, that claims 4 and 5 are anticipated by Fletcher for the reasons that we have outlined above.

b. Dependent Claim 6

Dependent claim 6 requires that one fastening component is integral with the front side panel. *See* Ex. 1001, 14:43–44. Petitioner states that “Fletcher discloses that the front ‘fastening components [84 and 85] can comprise integral portions of the [front] side panels. For instance, the elastomeric front side panels 34 can function as a mating fastening component.” Pet. 45 (quoting Ex. 1002, 21:19–20); (citing Ex. 1001, Fig. 8); Pet. 33.

Patent Owner responds that “[t]his statement is not made in connection with Figure 8. Ex. 2003 ¶ 101. Nor is there a statement in Fletcher that discloses the Figure 8 embodiment would include this feature. *Id.* PO Resp. 41. In fact, Patent Owner points out, the text describing Figure 8 indicates that “first and second mating fastening components 84 and 85 . . . *are connected to* the respective front side panels 34.” PO Resp. 41 (citing Ex. 1002, 25:29–30 (emphasis added)).

We agree with Petitioner that the statement in Fletcher stating that the fastening components can comprise integral portions of the side panels is of general application to the embodiments disclosed in Fletcher. While we appreciate that, as Patent Owner points out, the description of Figure 8 discusses that fastening components 82 and 83 may be separate structures or integral to support members 402 with no commensurate discussion as to fastening components 84 and 85 on the front side panel, Fletcher envisions that these fastening components also may be integral with the front side panels.

Fletcher states:

In a further alternative embodiment, the fastening components and mating fastening components can comprise integral portions of the side panels. For instance, the elastomeric front side panels 34 can function as a mating fastening component in that they can comprise a material that is releasably engageable with the fastening components 82 and 83.

Ex. 1004, 21:19–23.

Although Fletcher's statements refer to an "alternative embodiment," the referenced structures, i.e., the fastening components and front side panel, correspond to Figure 8's fastening components on the back side panels and Figure 8's front side panels. See Ex. 1001, Fig. 8. As Fletcher also states:

Although only a few exemplary embodiments of this invention have been described in detail above, those skilled in the art will readily appreciate that many modifications are possible in the exemplary embodiments without materially departing from the novel teachings and advantages of this invention. Accordingly, all such modifications are intended to be included within the scope of this invention, which is defined in the following claims and all equivalents thereto.

Ex. 1004, 26:16–23.

We agree with Petitioner that Fletcher's Figure 8 in conjunction with the statements that the fastening components on the front side panel may be integral

with that panel anticipates claim 6 of the '877 patent. Although “multiple, distinct teachings that an artisan might somehow combine to achieve the claimed invention” does not establish anticipation, “a reference can anticipate a claim even if it ‘d[oes] not expressly spell out’ all the limitations arranged or combined as in the claim, if a person of skill in the art, reading the reference, would ‘at once envisage’ the claimed arrangement or combination.” *Microsoft Corp. v. Biscotti, Inc.*, 878 F.3d 1052, 1069, 1068 (Fed. Cir. 2017), respectively.

Here, Fletcher specifically states that fastening components 84 and 85 on the front side panel may be integral with the front side panel. The fact that Figure 8 shows what appears to be separate structures for the fastening components 84 and 85 that appear bonded to the front side panel does not foreclose a finding of anticipation when Fletcher specifically discusses that these fastening components can be integral with the front side panels, and further recognizes that “those skilled in the art will readily appreciate that many modifications are possible in the exemplary embodiments without materially departing from the novel teachings and advantages of this invention.” Ex. 1004, 26:18–20.

We find that one of skill in the art considering Figure 8, the written disclosure describing Figure 8, and other “alternative embodiments” that describe tweaks to specifically disclosed embodiments such as in Figure 8, would “at once envisage” an embodiment such as Figure 8 with fastening components 84 and 85 that are integral with front side panels 34 serving the same function to form a refastenable seam with mating fastening components 82 and 83. *See* Ex. 1006 ¶ 32 (stating “[t]here is no reason why this general teaching in Fletcher that the fastening components can be integral with the side panels would not be applied by a POSITA to the embodiment of Figure 8”). As the Federal Circuit has stated: “A reference may still anticipate if that reference teaches that the disclosed

components or functionalities may be combined and one of skill in the art would be able to implement the combination.” *Microsoft*, 878 F.3d at 1068. Fletcher unequivocally states that fastening components may be integral with the front side panels in the different embodiments described in Fletcher, including the embodiment in Figure 8.

On the record before us, we find that Petitioner has shown, by a preponderance of the evidence, that claim 6 is anticipated by Fletcher for the reasons that we have outlined above.

c. Dependent Claim 7

Claim 7 adds the limitation that “at least one mating fastening component is integral with the at least one back side panel.” Ex. 1001, 14:45–47. Petitioner asserts that Fletcher expressly teaches that the back fastening components 82 and 83 can “comprise integral portions, surface or regions of the support members” 402 of the back side panels. Pet. 45 (quoting Ex. 1001, 25:30–34) (citing Ex. 1001, Fig. 8, 21:29–20).

Patent Owner asserts that because support members 402 are not part of the back side panel, the back fastening components 82 and 83 are integral with support member 402 and not with the back side panel to which support members 402 are bonded. See PO Resp. 45–46. We have previously addressed Patent Owner’s argument that support members 402 are not part of the back side panels and found the argument unpersuasive. See *supra* Section II.D.2.a.2. Because we have found that support members 402 and side panel 134 comprise the “back side panel” as used in the challenged claims of the ’877 patent, we find that Petitioner has shown sufficiently that the embodiment of Figure 8 of Fletcher as described in Fletcher anticipates claim 7 of the ’877 patent.

On the record before us, we find that Petitioner has shown, by a preponderance of the evidence, that claim 7 is anticipated by Fletcher for the reasons that we have outlined above.

d. Dependent Claim 14

Claim 14 adds the limitation “wherein the leg end edge of the at least one front side panel further comprises a portion transversely offset from the at least one fastening component that is non-parallel and non-perpendicular to the waist end edge of the at least one front side panel.” Ex. 1001, 15:1–5.

Petitioner states that Fletcher’s Figure 6 teaches that the front side panels can have a shape as required by claim 14, *see* Pet. 34–35 (citing Ex. 1002, 23:34–36; Ex. 1004 ¶ 97), and that support members 402 can be bonded to and extend transversely outward from front side panels 34, Pet. 35 (citing Ex. 1002, 25:24–26; Ex. 1004 ¶ 98). Petitioner concludes:

In view of these teachings, a POSITA would understand that the training pant of Figure 8 can have front side panels that are formed by bonding a support member to the distal edge 68 of the side panel shown in Figure 6, and then attaching this panel to the absorbent chassis. When this is done, the front side panels 34/402 would be a mirror image of the back side panels 134/402 in Figure 8. (Ex. 1004 ¶ 99.) A POSITA would understand that the front fastening components 84, 85 would be bonded to the support members 402 instead of the panel 34, since the fastening components are intended to be “disposed on the support member 402.” (Ex. 1002, 25:27–28; Ex. 1004 ¶ 100.)

Thus, in the foregoing described embodiment of Figure 8, the front side panels would have an angled portion (i.e., edge 70 in Figure 6) that is neither parallel nor perpendicular to the waist end edge. This angled portion would be offset (located away from) from the front fastening components 84, 85 in the transverse direction, which would be disposed on support members 402, as required by Claim 14. (Ex. 1004 ¶ 101.)

Pet. 35–36; *see* Ex. 1006 ¶¶ 35–37.

Patent Owner again asserts that Petitioner is improperly picking and choosing from disparate embodiments of Fletcher to support its anticipation charge for claim 14. *See* PO Resp. 42–44. Mr. Coenen stated that the teaching relied upon by Petitioner concerning Figure 6 is not broadly applicable to other embodiments, but “simply conveys that other side panels of that embodiment (e.g., the side panel on the other side or other side panels not shown) could have the same construction.” Ex. 2003 ¶ 103, *cited in*, PO Resp. 43.

Mr. Gardner stated that “Fletcher’s discussion of Figure 6 is clearly describing, in more detail, a side panel that could apply to various training pant embodiments discussed in Fletcher.” Ex. 1006 ¶ 36; Reply 20. We find that Mr. Gardner has the better view.

In discussing Figure 6, the ’877 patent states: “An enlarged plan view of a side panel 34 of the type shown in Figure 1 is illustrated in Figure 6. Only one side panel 34 is shown in Figure 6, although it should be understood that other side panels can employ a similar construction.” Ex. 1002, 23:34–36. The other views of the different embodiments of training pants taught by Fletcher all show fully parallel waist and leg end edges for the front side panels. *See* Ex. 1001, Figs. 2, 3, 4, 8. It stands to reason that Fletcher’s statements concerning Figure 6 would indicate that this alternative side panel may be used with a training pant such as shown in Figure 8.

Petitioner points to written description support for Figure 8 that support members 402 may be “bonded to and extend transversely outward from the back side panels 134,” to support its assertion that one of skill in the art would combine Figure 6 with support members 402 to create front side panels that mirror the back side panels of Figure 8, meeting the additional limitation set forth in challenged

claim 14. *See* Pet 35. Finally, Mr. Gardner pointed to Fletcher’s teaching that using angled leg end edges on the *back* side panels is to “provide greater coverage.” Ex. 1006 ¶ 37.

We agree with Patent Owner that Petitioner’s anticipation arguments for challenged claim 14 is a bridge too far. Petitioner is asking us to agree that a person of ordinary skill, in looking at Figure 8 and taking into account Figure 6 and the teachings concerning support members 402 and the angled leg end edges on the *back* side panels as shown in Figure 8, would “at once envisage” the claimed arrangement of challenged claim 14 concerning the *front* side panels. These comprise just too many “multiple, distinct teachings” of Fletcher, and accordingly, we do not find that Fletcher discloses the combination as claimed in claim 14 arranged as in the claim. *See Microsoft*, 878 F.3d at 1069 (stating that anticipation is not proven by “multiple, distinct teachings that the artisan might somehow combine to achieve the claimed invention”).

On the record before us, we find that Petitioner has not shown, by a preponderance of the evidence, that claim 14 is anticipated by Fletcher for the reasons that we have outlined above.

e. Dependent Claims 16 and 28

Petitioner sets forth that claim 16 requires that the side panels are continuous or integral with the absorbent chassis, and claim 28 has a similar requirement that the outer cover of the absorbent chassis form “part of a laminate that comprises” either the front or back side panels. Pet. 36. Petitioner concludes:

As to Claims 16 and 28, Fletcher teaches that all of its side panels can be “integrally formed” with the absorbent chassis, e.g. by forming the front and back side panels “as a portion . . . of the outer cover.” (Ex. 1002, 11:32–34; 17:32–33; Ex. 1004 ¶ 105.) Fletcher also explains that the “various components of the training pants . . . 400 [in

Figure 8] can be integrally assembled.” (Ex. 1002, 26:12–14; Ex. 1004 ¶ 106.)⁸ In view of these teachings, a POSITA would understand that the front and back side panels in Figure 8 can be integral with the absorbent chassis. (Ex. 1004 ¶ 107.)

Pet. 36–37 (relying on Fletcher’s definition of integral to mean “various portions of a single unitary element rather than separate structures are bonded to or placed with or placed near one another” (Ex. 1002, 8:34–25)).

Patent Owner asserts that Fletcher expressly teaches that the front side panels and the back side panels are bonded to the absorbent chassis in the embodiment in Figure 8 and not integral with the absorbent chassis. PO Resp. 44. So again, Patent Owner asserts that Petitioner improperly relies on teachings relating to a different embodiment to establish anticipation. *Id.* In this instance, we do not agree.

The first statement upon which Petitioner relies appears to involve the description of Figures 1, 2, and 3, which all refer to training pant 20, when read in the context of the entire paragraph of Fletcher. Ex. 1002, 11:30–12:6. This first statement provides, however, that “[t]he composite structure 33 and side panels 34 and 134 may be integrally formed or comprise two or more separate elements, as shown in Figure 1.” Ex. 1002, 11:32–34. The statement concerning the integral formation of the training pant specifically does not apply to the training pant 20 shown in Figures 1 to 3. It appears to be a statement of general applicability as an alternative way to make a training pant.

⁸ We agree with Patent Owner that this statement in Fletcher is just referring to putting the components of the training pant together and does not support the assertion that the training pant is made of one integral piece. See PO Resp. 44–45; Ex. 2003 ¶ 106 (stating this reference in Fletcher “is simply providing some suitable ways to attach the components to assemble the entire training pant, not suggesting that the entire training pant is integral”).

The second statement upon which Petitioner relies also seems to describe an alternative way of making a training pant other than that disclosed in Figures 1 to 3, which are also the subject of the paragraph within which this second statement is found. After stating that side panels 34 and 134 may be attached by means known to those of skill in the art (such attachment is shown in Figure 1–3), Fletcher states: “The side panels 34 and 134 can also be formed as a portion of a component of the composite structure 33, such as the outer cover or the bodyside liner.” Ex. 1002, 17:32–33. Again, this statement talks about an alternative to what is shown in Figures 1 through 3 and appears to be a statement of general applicability as an alternative way to make a training pant.

Because Fletcher’s Figure 8 shows and describes side panels that are bonded to the chassis, the question is would one of skill in the art in reading the disclosure in Fletcher “at once envisage” the claimed arrangements of challenged claims 16 and 28 that both require that the chassis and side panels be continuous or integral. We find that based on the general teachings in Fletcher upon which Petitioner relies, teachings that are not specific to any figures in Fletcher that all show side panels bonded to the chassis, one of skill in the art in viewing Figure 8 and these general teachings of Fletcher would “at once envisage” the claimed combinations of claims 16 and 28.

On the record before us, we find that Petitioner has shown, by a preponderance of the evidence, that claims 16 and 28 are anticipated by Fletcher for the reasons that we have outlined above.

f. Dependent Claims 17 and 19

Dependent claims 17 and 19 add the limitation that the distal edge of the back side panels, respectively, be perpendicular to the substantially parallel portions of

the waist end and leg end edges. See Ex. 1001, 11–18; Pet. 37. Petitioner shows that these claim limitations are met by Figure 8.

Petitioner states “[a]s shown in annotated Figure 8 below, the distal edges (green) are perpendicular to the parallel portions of the waist end and leg end edges (blue) of the front side panels 34 and the back side panels 134/402.” Pet. 37 (citing Ex. 1004 ¶¶ 108–109).

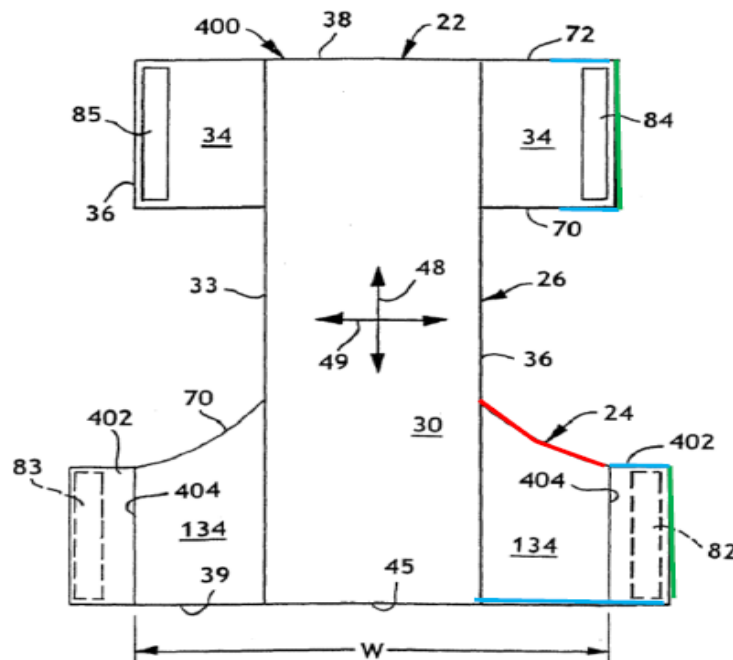


FIG. 8

Pet. 38.

Patent Owner asserts that Petitioner improperly relies on Figure 8 as teaching these limitations because Figure 8 is not drawn to scale. As we have previously discussed, this argument is unavailing. See *supra* Section II.D.2.a.3. Patent drawings can anticipate claims if they clearly show the structure which is claimed. See *In re Mraz*, 455 F.2d at 1072. Here, we agree with Mr. Gardner that Figure 8 clearly shows the distal edges of both the front and back side panels are perpendicular to the parallel portions of the waist end and leg end edges.

On the record before us, we find that Petitioner has shown, by a preponderance of the evidence, that claims 17 and 19 are anticipated by Fletcher for the reasons that we have outlined above.

E. Obviousness over Fletcher

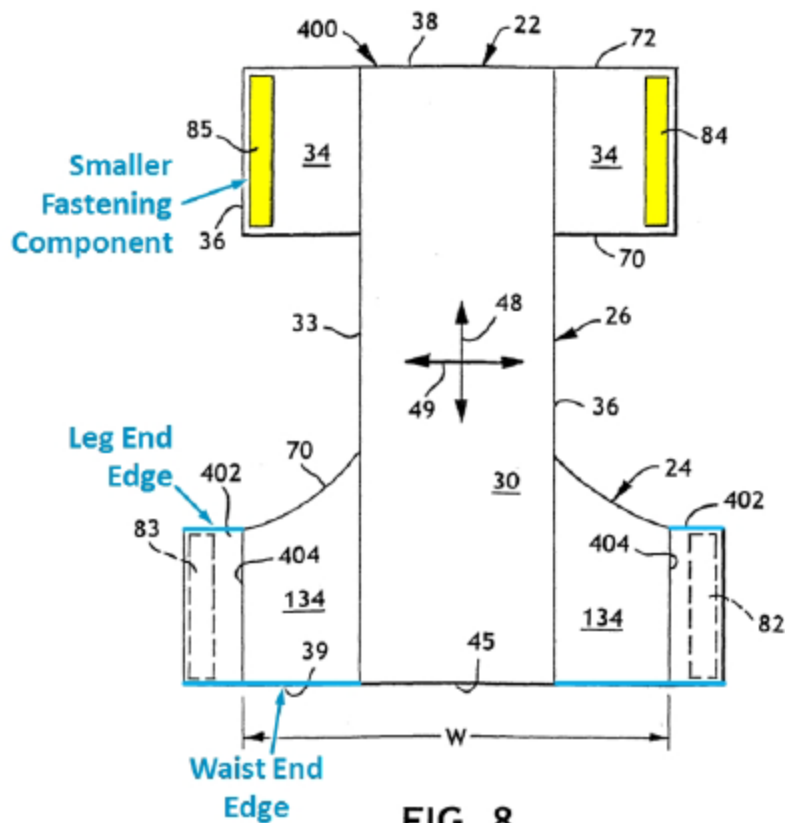
Petitioner asserts that claims 2, 3, 10–12, 18, 20, 26, and 27 would have been obvious over Fletcher. *See* Pet. 48–63. Patent Owner asserts that Petitioner cannot show that claims 2 and 3 would have been obvious because of the reliance on drawings that are not to scale and the application of improper hindsight. *See* PO Resp. 46–49. Patent Owner also asserts that a person of ordinary skill in the art would not have modified Fletcher to arrive at the features in claims 10–12, 18, 20, 26, and 27. *See* PO Resp. 49–57.

Each of these challenged dependent claims depend directly from claim 1. We have addressed Fletcher’s teachings concerning the limitations of claim 1. Therefore, we will address here the additional features added by each of the challenged dependent claims and whether the resulting combination would have been obvious.

1. Dependent Claims 2 and 3

Claim 2 requires that “the portion of the waist end edge and the portion of the leg end edge of the at least one back side panel are substantially parallel to one another adjacent the distal edge for a distance of at least 1.2 times the traverse width of the smaller fastening component of the corresponding refastenable seam.” Ex. 1001, 14:19–24. Claim 3 requires the identical limitation except the substantially parallel distance on the back side panels must be at least 1.5 times the transverse width of the smaller fastening component. *Id.* at 14:25–30.

Petitioner relies on Figure 8 alone to show the limitations of claims 2 and 3. Pet. 51–52; Reply 22. Petitioner provides an annotated Figure 8 of Fletcher to illustrate these teachings.



Reply 22.

Patent Owner reiterates that Petitioner inappropriately relies on Figure 8 of Fletcher because it is not drawn to scale. We agree with Petitioner that Figure 8 reasonably discloses and suggests to one of skill in the art that the distance of the parallel edges of the leg end and waist end edges is at least 1.5 times the transverse width of the smaller fastening component. Such a conclusion is supported by the written description of Fletcher.

In particular, Fletcher teaches that for a child of about 20–30 pounds, the width of the fastening components are desirably from about 0.5 to about 3 centimeters. *See* Ex. 1002, 22:6–9. Fletcher also teaches that:

Where the fastening components 82 and 83 comprise loop type fasteners disposed on the inner surface 28 and the mating fastening components 84 and 85 comprise hook type fasteners disposed on the outer surface 30, the fastening components can be sized larger than the mating fastening components to ensure coverage of the rigid, outwardly-directed hooks.

Ex. 1002, 21:2–6.

The given range for the preferred width of the fastening components, the fact that the fastening components 84 and 85 are sized smaller than the mating fastening components 82 and 83, which are in turn bonded to support members 402 depicted as being significantly wider than the mating fastening components 82 and 83, all support the reasonable conclusion from review of Figure 8 that the width of the parallel portion of the waist and leg end edges of the back side panel is at least 1.5 times the transverse width of the smaller fastening component.⁹

On the record before us, we find that Petitioner has shown, by a preponderance of the evidence, that claims 2 and 3 would have been obvious over Fletcher.

⁹ The parties dispute whether Mr. Gardner’s reliance on a “rule of thumb” that to ensure coverage of the smaller fastening components that the width of the mating fastening components must be sized 20 to 50% bigger is appropriate. *See* PO Resp. 46–49; Reply 24–25. Although we note that Mr. Gardner offered no support for this rule of thumb other than his experience in the field, *see* Ex. 1004 ¶ 122, we do not have to decide whether such a rule of thumb is appropriate here.

2. Dependent Claims 10–12

Dependent claims 10, 11, and 12 require that a fastening component is bonded to and extends past the distal edge of the front side panel, back side panel, and back side, respectively. Ex. 1001, 14:54–62.¹⁰ Petitioner asserts:

A POSITA would have been motivated to reduce the cost of the training pant by reducing the width of the support members, which would cut costs since less material is used in each support member. (Ex. 1004 ¶ 132.) As shown in Figure 8 of Fletcher, the portion of the support member 402 to the left of the back fastening component 82 is not used and therefore could be eliminated, thereby saving costs. When this is done, the width of the back side panels 134/402 will decrease, thereby making the waist and leg openings in the training pant smaller. (Ex. 1004 ¶ 133.)

However, a POSITA would have been motivated [to] maintain the waist and leg openings at about the same size when the width of the support member 402 is reduced, since this would allow the training pant to fit a broader range of differently sized children. (Ex. 1004 ¶ 134.) To do so, it would have been obvious to the POSITA to bond the back fastening component 82 to the distal edge of the support member 402, such that the fastening component 82 extends past the distal edge, as required by Claims 11 and 12. Doing so would effectively increase the width of the back side panels 134/402 (since the fastening component 82 extends beyond the distal edge) to be about the same as its original width, thereby maintain the size of waist and leg openings, yet at the same time reducing costs of the training pant. (Ex. 1004 ¶ 135.)

Pet. 55–56.

The only support offered in this discussion is Mr. Gardner’s testimony. He, however, cites no support for his conclusions other than his own first-hand experience in the industry. See Ex. 1004 ¶¶ 132–135. In his rebuttal declaration,

¹⁰ Dr. Gardner asserted that there is no substantive difference between claims 11 and 12. Ex. 1004 ¶ 127.

other than a citation to a general teaching in Fletcher, Mr. Gardner offered no additional support for his opinions besides his personal knowledge. *See* Ex. 1006 ¶¶ 60–67. Mr. Coenen disagreed with Mr. Gardner’s conclusions as to how a person of ordinary skill in the art would go about reducing cost for making an absorbent garment, and asserts that a skilled artisan would not modify Figure 8 to arrive at the claimed invention in dependent claims 10 to 12. *See* Ex. 2003 ¶¶ 126–131; PO Resp. 49–52.

Although we recognize that Mr. Gardner has a wealth of experience in the manufacture of absorbent garments, *see* Ex. 1005, such personal knowledge, without some corroboration from patents or printed publications, is insufficient for us to find dependent claims 10 to 12 would have been obvious, especially in light of another declarant’s opposing views.

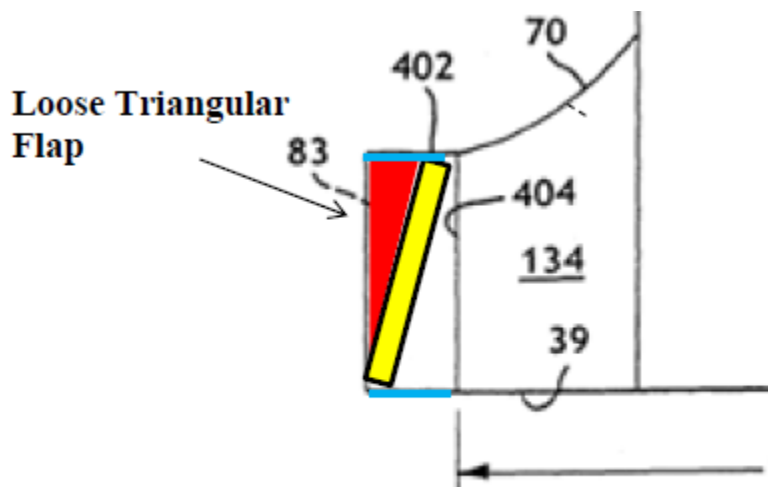
As we have recently stated in the Trial Practice Guide Update, expert testimony “cannot take the place of a disclosure in a prior art reference, when that disclosure is required as part of the unpatentability analysis.” Trial Practice Guide Update, 4 (Aug. 2018). The Trial Practice Guide Update elaborates that “[expert testimony may explain “patents and printed publications,” but is not a substitute for disclosure in a prior art reference itself.” *Id.* at 5. Mr. Gardner’s testimony without support from disclosure in patents or printed publications is simply not sufficient evidence that dependent claims 10, 11, or 12 would have been obvious over Fletcher.

On the record before us, we find that Petitioner has not shown, by a preponderance of the evidence, that claims 10, 11, or 12 would have been obvious over Fletcher.

3. *Dependent Claims 18 and 20*

Dependent claims 18 and 20 require the distal edge of the back side panel or front side panel, respectively, “is non-perpendicular to the portion of the waist end edge and the portion of the leg end edge that are substantially parallel to one another.” Ex. 1001, 15:11–18.

Petitioner relies on Fletcher’s teaching that the refastenable seams are “generally parallel” to the longitudinal axis of the absorbent article, and the definition of “generally parallel” as an angle within about 35 degrees or less of the referenced axis. Pet. 57 (citing Ex. 1002, 5:27–6:1); Ex. 1004 ¶ 142. Petitioner provides the following figure showing a modification to Figure 8 to demonstrate fasteners angled at 35 degrees.



Back Side Panel Of Fletcher Having Angled Fastener

Petitioner explains:

As can be seen, when the fastening component 83 (yellow) is at an angle of 35°, the support member 402 on the back side panel (as well as the front side panel 34) will have a loose triangular flap (red). Fletcher discloses that such loose flaps may, on the one hand, be beneficial in that they make it “easier for children and parents to” separate the seam when removing the pant, but on the other hand, disadvantageous because the pant will not have a “garment like-

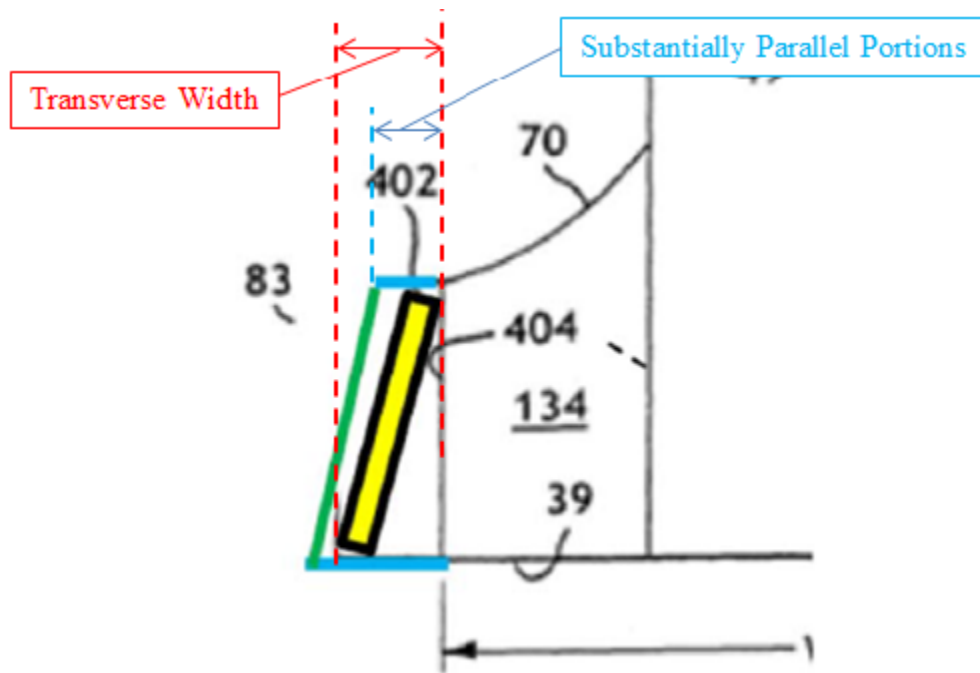
appearance.” (Ex. 1002, 24:13–16; Ex. 1004 ¶¶ 144–45.) Fletcher also discloses that the loose flaps can be eliminated to give the pant a “more garment-like appearance” (which is advantageous), but that doing so would make it harder to separate the seam (which is disadvantageous). (Ex. 1002, 24:13–16; Ex. 1004 ¶ 146.)

Pet. 58.

Petitioner concludes that when using the angled seam in Figure 8, a person or ordinary skill in the art would have good reason to eliminate the flap shown in red to create a more garment-like appearance creating the angled distal edge of the front or back side panels as required by claims 18 and 20. *Id.* at 59–60.

Patent Owner responds that Petitioner never provides a reason for why one of skill in the art would choose an angled seam. *See* PO Resp. 53–54. Patent Owner cites to a colloquy with Mr. Gardner in which he states that using a diagonally oriented seam would be more expensive and more difficult to do, and there is no clear reason why a person or ordinary skill would want to do that. *Id.* at 54 (citing Ex. 2005, 30:8–31:3).

Patent Owner also asserts that if an angled or diagonal seam is implemented as shown in the figure above and the flap of material shown in red is removed, the resulting training pant would no longer meet the transverse width limitation of claim 1 of having “a portion of the waist end edge and a portion of the leg end edge substantially parallel to one another adjacent the distal edge for a distance greater than a transverse width of the smaller fastening component of the corresponding refastenable seam.” PO Resp. 55–56 (citing Ex. 2003 ¶ 135); Ex. 1001, 14:8–14. Patent Owner provides the following annotated figure to illustrate this point.



PO Resp. 56; Ex. 2003 ¶ 135.

We agree with Patent Owner that Petitioner fails to provide a rationale why one of skill in the art would choose an angled or diagonal seam and modify Fletcher’s Figure 8 to implement such a seam with the removal of the extra flap of material to meet the limitations of claims 18 and 20. As Mr. Gardner testified, he could think of no reason why one of skill in the art would implement an angled seam except possibly for aesthetics, but he was “speculating” at such a reason. See Ex. 2005, 30:8–31:3.

We also agree with Patent Owner that Petitioner fails to show how such a modification of Figure 8 would continue to meet the transverse width limitation of claim 1. As is shown in the annotated figure above, the transverse width of smaller fastening component (which would be slightly smaller than the fastener marked in yellow) would be greater than the substantially parallel portions of the waist and leg end edges. See Ex. 1001, 3:46–54 (defining “transverse”). In any event,

Petitioner did not provide any explanation as to how the transverse width limitation of claim 1 would continue to be met with the modification of Figure 8 to use an angled seam.

On the record before us, we find that Petitioner has not shown, by a preponderance of the evidence, that claims 18 or 20 would have been obvious over Fletcher.

4. Dependent Claims 26 and 27

Dependent claims 26 and 27 requires the front side panel or the back side panel, respectively, to comprise “a plurality of elastic strands adjacent the leg end edge.” Ex. 1001, 16:17–22.

Petitioner begins its discussion of how the limitations of claims 26 and 27 are taught by Fletcher by setting forth two options how Fletcher teaches providing elastic in the front side panels 34 and panel 134. Pet. 62. Petitioner states that option 1 includes “using a three layered laminate, where the first and third layers are non-woven, and an elastic film is sandwiched between the first and third layers,” Pet. 62 (citing Ex. 1002, 19:8–10, 23:22–33), and option 2 includes “adhering a plurality of elastic ‘strands’ along the transverse width of the front side panels 34 and panels 134,” *id.* (citing Ex. 1002, 23:34–33; Ex. 1004 ¶¶ 160–61).

Petitioner then evaluates which option a person of ordinary skill would choose based on garment-like appearance and cost. *See* Pet. 62 (citing Ex. 1004 ¶ 162). Petitioner relies on Mr. Gardner’s explanation that there were two groups of consumers in 2002, one group that prefers high quality, garment-like training pants and are willing to pay for them, and a second group that is more cost conscience. *Id.* (citing Ex. 1004 ¶ 163).

Petitioner concludes:

Fletcher does not indicate a preference as to how the elastic front side panels 34 and elastic back panels 134 are made, and therefore, allows for either Option 1 or Option 2 to be used. (Ex. 1004 ¶ 164.) As explained by Mr. Gardner, a POSITA would have chosen Option 2 to meet the needs of the Second Group of Consumers, and Option 1 to meet the needs of the First Group of Consumer. Since the entire front side panels 34 and back panels 134 are elastic, when using Option 2, a POSITA would have placed a plurality of elastic strands adjacent the leg end edges of both panels 34 and 134. Providing elastic at the leg end edges is particularly desirable since the elastic would help prevent excrement (e.g., urine and feces) from leaking out of the side the training pant. (Ex. 1004 ¶ 165.)

Pet. 62–63.

Patent Owner responds that a person of ordinary skill would not have modified Fletcher to use elastic strands that cause the side panels to ruffle because it contradicts Fletcher’s goal of a training pant having a garment-like or underwear-like look. PO Resp. 56–57 (citing Ex. 1002, 4:1–3); Ex. 2003 ¶ 138.

We agree with Patent Owner that Petitioner’s explanation concerning why a person of ordinary skill would choose to add the elastic strands adjacent the leg end edge is flawed. Mr. Gardner testified that Fletcher does not indicate a preference as to how the elastic front or back side panels are made, but Fletcher does indicate that a training pant with a garment-like appearance is the goal of Fletcher’s disclosure. *See* Ex. 1002, 2:1–3 (“Thus, it would be desirable to have a disposable absorbent article that provides the garment-like or underwear-like look of a traditional training pant yet affords the option of being applied either like a diaper or like a pant.”). Mr. Gardner admitted that using the elastic strands creates gathers and a less garment-like look. *See* Ex. 1004 ¶ 168.

Petitioner provides no other explanation as to why one of skill in the art would choose to use elastic strands except by referencing a consumer group that

would like a cheaper option. Pet. 62–63; Ex. 1004 ¶ 165. Mr. Gardner, however, provided no other support for this consumer group than his own personal knowledge and does not link this knowledge to what one of ordinary skill in the art would have known. See Ex. 1004 ¶¶ 163–169, 170 (stating “my own experience supports my opinion that it would have been obvious to add elastic strands along the leg end edges of the front and back side panels”). As we have previously discussed, Mr. Gardner’s testimony without support from disclosure in patents or printed publications is simply not sufficient evidence to support a finding that claims 26 and 27 would have been obvious.

On the record before us, we find that Petitioner has not shown, by a preponderance of the evidence, that claims 26 or 27 would have been obvious over Fletcher.

F. Obviousness over Fletcher and Allen

Petitioner asserts that claims 24 and 25 would have been obvious over the combination of Fletcher and Allen. Pet. 64–71. Patent Owner responds that one of ordinary skill in the art would not have combined the teachings of Fletcher and Allen to arrive at the claimed combinations. PO Resp. 57–65.

1. Allen (Ex. 1003)

Allen involves a disposable absorbent article, such as a training pant, having an elasticized chassis which provides laterally oriented contractive forces about the lower torso of the wearer. Ex. 1003, Abst. Allen emphasizes the importance of a snug fit about the lower torso for the training pant to reduce the risk of leakage of bodily fluids from the pant. *Id.* at 1:15–23. Allen states: “It has been found that the fit of an absorbent article can be greatly improved by making the article elastically contractible.” *Id.* at 21–23.

Figure 1 of Allen set forth below shows a disposable training pant. *Id.* at 2:33–35.

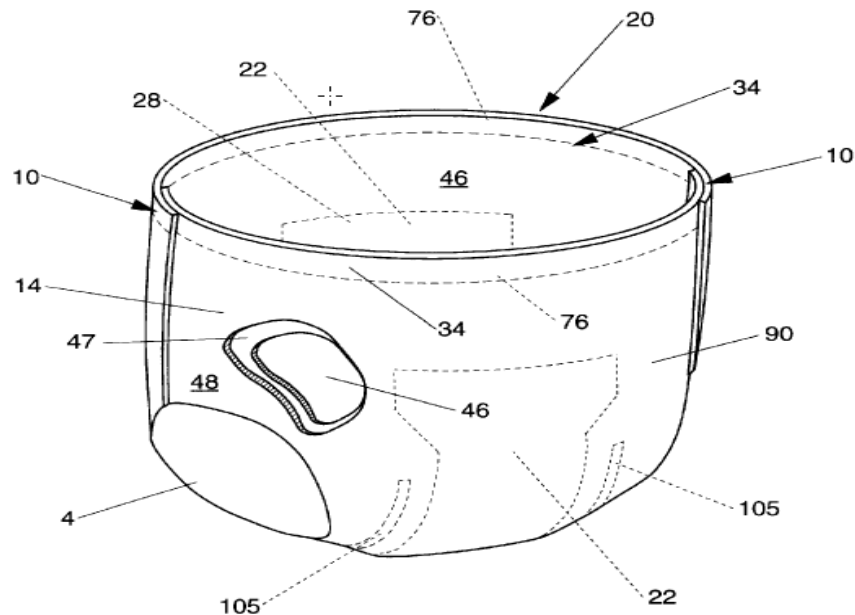


Fig. 1

With reference to Figure 1 above, Allen states:

The chassis 14 is comprised of a laminate 90 which comprises an elastomeric adhesive lamina 47 joined in face-to-face relation with relatively inextensible outboard lamina 46, 48 which face outwardly and define the two opposed faces of the laminate 90. The outboard lamina 46, 48 are joined to the elastomeric lamina 47 while the elastomeric lamina 47 is prestretched in at least the lateral, or cross machine, direction. . . . As used herein, the term “cross machine direction” shall refer to the direction transverse to the machine direction of a moving web.

Id. at 3:9–29.

In further describing the elastomeric lamina 47, Allen explains that it will be elastomeric in at least the cross machine direction, preferably in both the cross

machine and machine directions, and most preferably in all directions. *Id.* at 3:55–59.

2. Analysis

Claim 24 requires that a front side panel is stretchable “in a direction substantially nonparallel to the substantially parallel portions of the waist end and leg end edges.” Ex. 1001, 16:10–13. Claim 25 requires a front side panel to be stretchable in multiple directions. *Id.* at 16:14–15.

Petitioner explains that because Fletcher teaches that its training pant stretches in only one direction, the front side panels will not lie flush against the areas directly above and below the hips, thus fitting loosely in the hip region causing the pant to be less garment-like and possibly leak. Pet. 68 (citing Ex. 1004 ¶¶ 188–189). Petitioner points to Allen, which is in the same field of endeavor, as providing the solution of a snug fit for a training pant from a fully elasticized chassis. *Id.* at 68–69 (citing Ex. 1004 ¶ 191–193; Ex. 1003, 1:17–21, 1:45–48, 8:21–31).

Petitioner concludes:

Since Fletcher expresses a need for side panels that provide a good fit and comfort, and further since Fletcher’s training pant will not conform . . . all of the varying contours of the child’s body, a POSITA would have looked to Allen’s solution to this problem to improve the fit of the training pant in Figure 8 of Fletcher. (*Id.*, ¶ 194.)

In this regard, a POSITA would have used the methods and materials to make the front side panels 34 in Figure 8 of Fletcher from Allen’s elastic lamina. Doing so would improve the fit of Fletcher’s training pants since it would enable the side panels [to] better conform to the contours of the child, while at the same time reduce the likelihood of leakage. (*Id.*, ¶ 195.)

Pet. 69.

Patent Owner counters that the thrust of Allen is to make a fully elasticized chassis, even if stretchable in only one direction, and notes that “a laminate which is only extensible in the transverse or cross-machine direction has been found to work well for the chassis 14 of the present invention.” PO Resp. 60 (citing Ex. 1003, 5:15–18). Patent Owner asserts that Petitioner only seeks to modify the front side panels 34 of Fletcher’s Figure 8 with Allen’s elastic lamina, but Allen does not suggest that this would improve fit. *Id.* (citing Pet. 69; Ex. 2003 ¶ 145).

Patent Owner’s declarant disagrees with Petitioner’s assessment that Fletcher’s training pant would not fit well in the hip region. *Id.* at 62. Relying on its expert, Patent Owner points out that Mr. Coenen testified that

[a]s long as the minimum circumference of the child (e.g., above the hip or below the hip) is larger than the relaxed circumference of the training pant, the transverse elasticity will cause the training pant to contract around the child. Thus, training pants that are stretchable in only the transverse direction, such as Fletcher’s, provide the desired fit.

Ex. 2003 ¶ 148; PO Resp. 62.

Patent Owner concludes that even if a problem existed with Fletcher’s training pant fit, adding longitudinal stretch from Allen would not create a better fit. *Id.* at 64 (citing Ex. 2003 ¶¶ 151–153). A person of ordinary skill in the art would, therefore, not have looked to combine the teachings of Allen and Fletcher to arrive at the claimed combination in challenged claims 24 and 25. *Id.* at 65.

We agree with Patent Owner and find that Petitioner has failed to provide a reason why one of skill in the art would combine the teachings of Fletcher and Allen to arrive at the claimed combinations of claims 24 and 25. Although Mr. Gardner acknowledged that Fletcher states that the described training pant “fits closely about the body of the wearer” and provides a good fit, Mr. Gardner

asserted that “side panels that stretch in multiple directions would provide even a better fit.” Ex. 1004 ¶¶ 186–187 (citing Ex. 1002, 5:14–20).

Mr. Gardner, however, provided no support for his assertions that elasticity in one direction would provide an inadequate fit and adding elasticity in all directions would provide a better fit. *See* Ex. 1004 ¶ 187; *see also* Ex. 2003 ¶ 153 (stating adding longitudinal stretch can make the fit worse). In fact, as Patent Owner points out and Mr. Gardner acknowledged, Fletcher and Allen both state that one directional elasticity provides a good fit. Therefore, we find that Petitioner has failed to provide a sufficient rationale as to why one of ordinary skill in the art would have combined the teachings of Fletcher and Allen to arrive at the claimed combinations in challenged claims 24 and 25.

On the record before us, we find that Petitioner has not shown, by a preponderance of the evidence, that claims 24 or 25 would have been obvious over Fletcher and Allen.

III. CONCLUSION

After reviewing the information presented in the Petition and the Patent Owner Response, as well as the evidence of record, we determine that Petitioner has shown, by a preponderance of the evidence, that claims 1, 4–9, 13, 15–17, 19, 21–23, and 28 of the ’877 patent are unpatentable as anticipated by Fletcher. We also determine that Petitioner has shown, by a preponderance of the evidence, that claims 2 and 3 would have been obvious under 35 U.S.C. § 103(a) over Fletcher. Finally, we determine that Petitioner has not shown, by a preponderance of the evidence, that claims 10–12, 14, 18, 20, 24–27 are unpatentable.

IV. ORDER

Accordingly, it is

ORDERED that claims 1–9, 13, 15–17, 19, 21–23, and 28 of U.S. Patent No. 8,556,877 B2 have been shown by a preponderance of the evidence to be unpatentable;

FURTHER ORDERED that claims 10–12, 14, 18, 20, and 24–27 of U.S. patent No. 8,556,877 B2 have not been shown by a preponderance of the evidence to be unpatentable; and

FURTHER ORDERED that, because this is a Final Written Decision, parties to the proceeding seeking judicial review of the decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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Patent 8,556,877 B2

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