

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 35

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte SHARON A. BURSTEIN

Appeal No. 96-4137
Application 08/260,674¹

HEARD: January 9, 1998

Before CALVERT, MEISTER and CRAWFORD, Administrative Patent Judges.

CRAWFORD, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the examiner's final rejection of claims 1-8 and 10-23. Claim 9 has been allowed.

¹ Application for patent filed June 16, 1994. According to appellant, this application is a continuation of Application 08/004,990 filed January 15, 1993.

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Appellant's claimed subject matter is an article of furniture which includes a chair which has a convex lumbar support on its backrest.

Claim 1 is exemplary of the subject matter on appeal and recites:

1. Orthopedically correct modular furniture for a child with a growing and pliable bone structure comprising a pair of laterally spaced arm rests having a first plurality of tray adjustment holes formed therein and having a second plurality of tilt control holes formed therein, a first pair of chair legs each coupled to a respective one of said arm rests and spaced from said tray adjustment holes, a second pair of chair legs, each coupled to a respective one of said arm rests on a side of said arm rests that is generally opposite to the places of coupling for said first pair of chair legs, said second pair of chair legs joining said arm rests in the vicinity of said tilt control holes, a chair interposed between said laterally spaced arm rests, said chair being pivotally joined to said arm rests near the places of coupling for said front chair legs, said chair having at least one pair of holes formed in opposite lateral sides thereof for selection alignment with said tilt control holes, a backrest for said chair between the lateral sides thereof, a seat for said chair between said lateral sides thereof, and a convex lumbar support on said backrest and spaced perpendicularly from said seat by a distance that is predetermined by the average size of the child using the modular furniture to produce and orthopedically correct and physiologically healthy support for the growing and pliable bone structure of the child.

THE REFERENCES

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The following references were relied on by the
examiner:

Greenbaum 1950	2,529,687	Nov. 14,
Quinton et al. (Quinton) 1988	4,718,724	Jan. 12,
Cone 1989	4,807,928	Feb. 28,
Turner et al. (Turner)	4,938,603	Jul. 3, 1990
Giambrone 1990	4,968,092	Nov. 6,
Bougher et al. (Bougher) 1991	5,039,169	Aug. 13,
Blaustein (French Patent)	1,110,442	Oct. 12, 1955

In addition to these references, we have relied on the
following

reference in support of new rejections entered pursuant to our
authority under 37 CFR 1.196(b):

Cerf ²	3,288,525	Nov. 29, 1966
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THE REJECTIONS

² This reference was made of record by the Examiner in the
final rejection (Paper No. 19).

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The examiner made the following rejections:³

Claims 22 and 23 stand rejected under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 1, 5, 12, 19, 20 and 22 stand rejected under 35 U.S.C. § 103 as being unpatentable over Turner in view of Quinton.

Claims 2, 3, 4, 13 and 14 stand rejected under 35 U.S.C. § 103 as being unpatentable over Turner and Quinton as applied to claim 1 above, in further in view of Bougher.

Claims 6 and 21 stand rejected under 35 U.S.C. § 103 as being unpatentable over Turner and Quinton as applied to

³ The examiner's answer contained new grounds of rejection of (1) claim 23 under 35 U.S.C. § 112, first paragraph, and (2) claims 13 and 14 under 35 U.S.C. § 112, second paragraph. In response thereto, the appellant filed an amendment on September 9, 1996 (Paper No. 29) to "overcome" these new rejections. The examiner entered this amendment, but made no mention of the new rejections (see the supplemental answer dated December 23, 1996 (Paper No. 30)). In view of the fact that the examiner did not dispute the appellant's position that the amendment overcame the new rejections or otherwise make any mention of these rejections in the supplemental answer, we presume that they have been withdrawn. See Ex parte Emm, 118 USPQ 180 (Bd.App. 1957).

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claim 1 above, in further in view of Cone.

Claims 7, 8, 10, 15, 16 and 18 stand rejected under 35 U.S.C. § 103 as being unpatentable over Turner and Quinton as applied to claim 1 above, and further in view of Greenbaum.

Claim 11 stands rejected under 35 U.S.C. § 103 as being unpatentable over Turner and Quinton as applied to claim 1 above, and further in view of the French Patent.

Claim 17 stands rejected under 35 U.S.C. § 103 as being unpatentable over Turner in view of Quinton, Greenbaum and the French Patent.

Claim 23 stands rejected under 35 U.S.C. § 103 as being unpatentable over Turner in view of Quinton, Bougher, Greenbaum, the French Patent and Cone, as applied above.

Claims 6 and 21 stand rejected under 35 U.S.C. § 103 as being unpatentable over Turner and Quinton as applied to claims 1 and 12, and further in view of Giambrone.

Claim 23 stands rejected under 35 U.S.C. § 103 as being unpatentable over Turner in view of Quinton, Bougher, Greenbaum, the French Patent and Giambrone.

Rather than reiterate the entire arguments of the examiner and the appellant in support of their respective

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positions, reference is made to the appellant's brief (Paper No. 25), the appellant's reply brief (Paper No. 28), the examiner's answer (Paper No. 26), the examiner's supplemental answer (Paper No. 30), and the examiner's second supplemental answer (Paper No. 32) for the full exposition thereof.

OPINION

In reaching our conclusions on the issues raised in this appeal, we have carefully considered appellant's specification and claims, the applied references and the respective viewpoints advanced by the appellant and the examiner. As a consequence of our review, we have made the determinations which follow.

We turn first to the rejection of claims 22 and 23 under 35 U.S.C. 112, second paragraph. It is the examiner's position that the word "average" which occurs several times in both claims 22 and 23 is indefinite, since it appears to be referring to the broad range of sizes of which the furniture could be made.

We initially note that the purpose of the requirements stated in the second paragraph of 35 U.S.C. 112

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is to provide those who would endeavor, in future enterprise, to approach the area circumscribed by the claims of a patent, with the adequate notice demanded by due process of law, so that they may more readily and accurately determine the boundaries of protection involved and evaluate the possibility of infringement and dominance. In re Hammack, 427 F.2d 1378, 1382, 166 USPQ 204, 208 (CCPA 1970). The inquiry as stated in In re Moore, 439 F.2d 1232, 1235, 169 USPQ 236, 238 (CCPA 1971) is;

... whether the claims do, in fact, set out and circumscribe a particular area with a reasonable degree of precision and particularity. ... [t]he definiteness of the language employed must be analyzed-not in a vacuum, but always in light of the teachings of the prior art and of the particular application disclosure as it would be interpreted by one possessing the ordinary level of skill in the pertinent art.

The appellant's disclosure indicates that certain calculations have been done to establish an average radius of curvature, an average lumbar support distance, an average lumbar support width and an average lumbar support center spacing. These calculations depend on the average size of a child. Appellant argues that the average size of a child

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changes over time and that the claim language covers this change. As such, the term "average" in claims 22 and 23 is based on the variable average size of a child. This being the case, whether an article of furniture was covered by the claim at a point in time would be determined not on the basis of the structural elements and their interrelationships, as set forth in the claim, but by the average size of a child at that point in time. This would give rise to uncertainty as to what the average size of a child is and thus uncertainty as to the interpretation of the claim. Cf. Ex parte Brummer, 12 USPQ2d 1653, 1655 (BPAI 1989). Such uncertainty we believe is exactly what the requirements of 35 U.S.C. § 112 seek to avoid. Therefore, we will sustain this rejection.

In regard to the rejection of claims 1, 5, 12, 19, 20 and 22 under 35 U.S.C. § 103 over Turner in view of Quinton, the examiner's answer states:

Turner has a child seat as set forth in the prior office action with a lumbar support comprising portions of elements 76 and 78. Turner discloses that these elements are to support a child's back comfortably. Turner lacks a convex lumbar support. Quinton shows a convex lumbar support 20 on a seat. It would have been obvious to have provided the lumbar support of Quinton on the seat

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of Turner because doing so would provide added support to the lumbar regions of an occupant's back. Quinton further has the advantage of being adjustable to accommodate the needs of a variety of occupants including children of different sizes for whom an adult can adjust said lumbar support. [Examiner's Answer at pages 4-5]

We agree with the analysis of the examiner. In addition, we are of the opinion that motivation for the combination is provided in the body of the Quinton reference in that Quinton discloses that the lumbar support promotes comfort and avoids and alleviates backache (Col. 1, lines 7-8). Therefore, in our opinion, a person of ordinary skill in the art would have been motivated to provide the convex lumbar support disclosed in Quinton on the Turner chair to obtain the advantages of such lumbar support as taught by Quinton. In view of the foregoing, we will sustain the examiner's rejection of claim 1. In addition, we will sustain this rejection as it relates to claims 5, 12, , 20 and 22 because the appellant has not argued the separate patentability of these claims. See In re Nielson, 816 F.2d 1567, 1572, 2 USPQ2d 1525, 1528 (Fed. Cir. 1987).

In regard to claim 19, the appellant argues that

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claim 19 is directed to a structure for tilting the seat and the backrest. We agree with the examiner, that the tilting feature is disclosed in Turner. (Figure 1; column 1, lines 57-67). As such, we will sustain this rejection as it relates to claim 19.

Appellant argues, directing our attention to wing section 78, that Turner does not disclose a lumbar support. We do not find this argument persuasive because the examiner is relying on central section 76 along with wing section 78 for teaching of lumbar support. We agree with the examiner that central section 76 along with some portions of wing section 78 provides support for the lumbar section of a person seated in the chair disclosed.

Appellant also argues that there is no suggestion to compare the wing section 78 with a cushion as disclosed in Quinton. As stated above, in our view it is the central section in addition to the wing section 78 which form the lumbar support in Turner. In addition, as also stated above, it is our view that there is clear suggestion in Quinton for combining the chair disclosed in Turner with the lumbar support disclosed in Quinton

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because Quinton discloses that said lumbar support promotes comfort and avoids or alleviates backache.

We have sustained the examiner's rejection of claim 22 under 35 U.S.C. § 112, second paragraph, because in our view it is uncertain what is meant by the term "average." While we might speculate as to what is meant by the claim language, uncertainty does not provide a proper basis for making the comparison between that which is claimed and the prior art, as we are obligated to do. Rejections under on 35 U.S.C. § 103 should not be based upon "considerable speculation as to the meaning of the terms employed and assumptions as to the scope of the claims." In re Steele, 305 F.2d 859, 862, 134 USPQ 292, 295 (CCPA 1962). When no reasonably definite meaning can be ascribed to certain terms in a claim, the subject matter does not become obvious, but rather the claim becomes indefinite. In re Wilson, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970). Accordingly, we are constrained to reverse the examiner's rejection of claim 22 under 35 U.S.C. § 103. We hasten to add that this reversal is not based upon any evaluation of the merits thereof and does not preclude the examiner's advancement of a rejection

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predicated upon the art against a definite claim.

We now address the rejection of claims 2, 3, 4, 13 and 14 under 35 U.S.C. § 103 as unpatentable over Turner and Quinton and further in view of Bougher. The examiner stated:

Turner lacks a safety restraint system. Bougher teaches a child seat with a safety restraint system... It would have been obvious to provide the safety restraint system disclosed by Bougher for the child seat of Turner since Bougher's safety restraint system is provided to hold a child secure and since the safety restraint system with two shoulder straps as disclosed by Bougher is known to those skilled in the art to limit relative lateral movement of an occupant as well as forward movement. [Examiner's Answer pages 6-7]

We agree with the analysis of the examiner, and thus we will sustain this rejection as it relates to claim 2. We will also sustain this rejection as to claim 13 because appellant has not argued the separate patentability of claim 13. See In re Nielson, 816 F.2d at 1572, 2 USPQ2d at 1528.

Appellant argues that there is no suggestion to combine the safety strap taught by Bougher with the lumbar support taught by Quinton. We do not agree. As stated above, we find ample suggestion for including the lumbar support of

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Quinton in the chair of Turner to obtain the advantages as taught by Quinton of promoting comfort and avoiding or alleviating backache. In addition, in our view, a person of ordinary skill in the art would have been motivated to use the safety strap as taught by Bougher in the child seat of Turner to obtain the self evident advantage of restraining a child seated in the chair.

Appellant argues that there is no suggestion to combine an adjustable safety strap as recited in claim 3, with an infant's lumbar support. This argument is not persuasive because Bougher discloses an adjustable strap and as discussed above, there is ample suggestion to combine the teachings of Turner, Quinton and Bougher. Therefore, we will sustain this rejection as it relates to claim 3.

As appellant argues that claims 4 and 14 are patentable for the same reasons that claim 2 is patentable, we will sustain the rejection as to these claims also, as there has been no argument regarding their separate patentability. See In re Nelson, 816 F.2d at 1572, 2 USPQ2d at 1528.

We now turn to the rejection of claims 6 and 21

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under 35 U.S.C. § 103 over Turner and Quinton and further in view of Cone. Each of claims 6 and 21 recites a tray having one flat surface and another surface generally parallel therewith, the surface having a T shaped recess formed therein. The examiner has cited Cone for teaching a T shaped recess which in the examiner's opinion comprises shank 44 and cross portion with elements 52 and 54 as shown in figure 5. We agree with the appellant that Cone does not disclose a T shaped recess as recited in claims 6 and 21. In contrast Cone discloses rectangular slots 72 and 74 and handle 44 (See Figures 4 and 5). As such, we will not sustain the rejection of claims 6 and 21 as unpatentable over Turner and Quinton and further in view of Cone.

We turn next to the examiner's rejection of claims 7, 8, 10, 15, 16 and 18 under 35 U.S.C. § 103 as being unpatentable over Turner and Quinton as applied to claim 1 above, and further in view of Greenbaum.

Initially, we note that our decision as it relates to the rejections of claims 7 and 16 is based upon our interpretation of the claim language in view of the disclosure in appellant's specification. In this regard, we interpret

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the language of these claims to recite a first pair of chair leg extensions for selective connection to the pair of first chair legs and a second pair of chair leg extensions for selective connection to the pair of second chair legs.

The examiner has cited the Greenbaum reference for teaching a pair of U-shaped leg extensions which provide needed height for Greenbaum's child seat. In the examiner's opinion:

It would have been obvious to have provided the removable extensions of Greenbaum on the child seat of Turner, because doing so would have provided the advantage of enabling the person attending the child to choose a high or low configuration . . .
[Examiner's Answer, page 9]

We agree with the analysis of the examiner, and thus we will sustain this rejection as it relates to claim 7.

Appellant argues that Greenbaum discloses table leg 11 and chair leg 16 as to opposed to chair leg extensions and chair legs as recited in claim 7. However, as the seat in Greenbaum is disposed to be placed on top of the table, the table legs 11 form an extension for the chair legs and can be broadly considered to be chair leg extensions. Therefore, we do not find this argument persuasive.

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In regard to the recitation in claim 8 that the lengths for each of said extensions are generally twice as long as said first and second pairs of chair legs, the examiner is of the opinion that the length of the table legs appears to be greater than the length of the chair legs as depicted in Figure 2 and that in any case it would have been a matter of design choice to modify the length of table legs to be twice the length of the chair legs, since the appellant has not disclosed that providing leg extensions of generally twice the length of said front and rear chair legs solves any stated problem not solved by the leg extensions that are disclosed by Greenbaum. (Examiner's Answer at page 10). We agree with the analysis of the examiner, and thus we will sustain this rejection as it relates to claim 8.

In regard to the recitation in claim 10 that there is a means for attaching the foot rest for selective interposition between the first pair of chair legs. The examiner relies on the disclosure of Turner for teaching a selective interposition of a foot rest between front chair legs. Appellant's argument that brace 17 of Greenbaum's chair is not a footrest is not persuasive in view of the disclosure

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of Turner of a footrest. Therefore, we will also sustain this rejection as it relates to claim 10.

We will also sustain this rejection as it relates to claim 15 because we find unpersuasive appellant's argument that the back 14 and seat 13 of Greenbaum are supported by side arms 15 rather than being supported by the second chair legs as recited in claim 15 because Turner discloses chair legs 14 which support the backrest and the seat (See Figure 1).

The appellant also argues that the table and chair legs 11 and 16 in Greenbaum are not attachable to each other but rather stacked together and therefore do not meet the limitations recited in claim 16 that the first and second pair of chair legs be selectively attachable to first and second pair of chair leg extensions. We do not find this argument persuasive because we find the recitation in claim 16 of selectively attachable first and second chair leg extensions to be broad enough to include chair legs and chair leg extensions which are stacked on each other. We note that Webster's II New Riverside University Dictionary (Riverside Publishing Company 1984) defines the word "attach" as to

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connect or to join. Therefore, we will sustain this rejection as it relates to claim 16.

We will sustain the rejection as it relates to claim 18 for the same reasons as given above for claim 10.

We now address the rejection of claim 11 under 35 U.S.C. § 103, as being unpatentable over Turner and Quinton, as applied to claim 1 above and further in view of the French Patent. The examiner cited the French Patent for showing arcuate rungs 40 with a lower arcuate surface and means 41 provided on the upper surface for attaching each respective rung to a front chair leg 7 and a rear chair leg 3 (Examiner's Answer at pages 10-11). It is the examiner's opinion, and we agree, that it would have been obvious to provide the child's seat disclosed by Turner with the rungs taught by French Patent to provide a rocking chair means which is easy to connect and disconnect. In view of the foregoing, we will sustain the examiner's rejection of claim 11 under 35 U.S.C. § 103 as being unpatentable over Turner and Quinton and further in view of the French patent.

The appellant has not argued the propriety of this rejection as it related to the French Patent but rather

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restates that the French Patent fails to suggest the lumbar support for a high chair and to that extent the French Patent is merely cumulative of all the references considered thus far. We find this argument unpersuasive as we find ample suggestion for placing a lumbar support as taught by Quinton in a high chair as disclosed by Turner as we detailed above.

We turn next to the rejection of claim 17 as unpatentable under 35 U.S.C. § 103 over Turner in view of Quinton, Greenbaum and the French Patent. We agree with the examiner's analysis as it relates to the application of rungs as taught by the French patent and thus we will sustain this rejection for the reasons stated above with respect to claim 7, which was rejected over Turner, Quinton and Greenbaum. As with the rejection of claim 11, the appellant has not directed attention to the application of the French Patent but rather repeats his assertion as discussed above, that there is no suggestion for placing a lumbar support in a high chair. Therefore, we will sustain the rejection of claim 17 as unpatentable 35 U.S.C. § 103 over Turner in view of Quinton, Greenbaum and the French Patent.

We turn next to the rejections of claim 23 under 35

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U.S.C. § 103 as being unpatentable over (1) Turner in view of Quinton, Bougher, Greenbaum, the French Patent and Cone and (2) Turner in view of Quinton, Bougher, Greenbaum, the French Patent and Giambrone. We have sustained the examiner's rejection of claim 23 under 35 U.S.C. § 112, second paragraph, because in our view it is uncertain what is meant by the term "average." While we might speculate as to what is meant by the claim language, uncertainty does not provide a proper basis for making the comparison between that which is claimed and the prior art, as we are obligated to do. Rejections under on 35 U.S.C. § 103 should not be based upon "considerable speculation as to the meaning of the terms employed and assumptions as to the scope of the claims." In re Steele, 305 F.2d at 862, 134 USPQ at 295 (CCPA 1962). When no reasonably definite meaning can be ascribed to certain terms in a claim, the subject matter does not become obvious, but rather the claim becomes indefinite. In re Wilson, 424 F.2d at 1385, 165 USPQ at 496 (CCPA 1970). Accordingly, we are constrained to reverse the examiner's rejections of claim 23 under 35 U.S.C. § 103. We hasten to add that this reversal is not based upon any evaluation of the merits thereof and

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does not preclude the examiner's advancement of a rejection predicated upon the art against a definite claim.

We now direct our attention to rejection of claims 6 and 21 under 35 U.S.C. § 103 as being unpatentable over Turner and Quinton and further in view of Giambrone. We will not sustain this rejection because we agree with the appellant that Giambrone discloses a tray with a T shaped housing thereon (See Figure 1) and not a tray having a "T shaped recess formed therein" as recited in claims 6 and 21.

Under the provisions of 37 CFR § 1.196 (b) we make the following new rejections:

Claim 12 is rejected under 35 U.S. C. § 103 as being unpatentable over Cerf. Cerf discloses an article of furniture for a child having a seat 10 and a backrest 11 and a lumbar support 24 on the backrest which has a surface that protrudes arcuately from the backrest. (See Figures 1, 3, and 6). Cerf also discloses that the article of furniture has a back with a contour which may be conformed exactly to the posterior and spinal curvature of a particular user, whereby the seated individual is properly supported in a comfortable and orthopedically approved posture. (Column 1, lines 38-42).

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In our view, patentability cannot be found in the numerical ranges and recitations in claim 12 for the width of the lumbar support and/or the distance the lumbar support is spaced from the seat. As our reviewing in Court said in In re Woodruff, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990):

the law is complete with cases in which the difference between the claimed invention and the prior art is some range and other variable within the claim ... these cases have consistency held that such a situation, the applicant must show that the particular range is critical, generally by showing the claim range achieves unexpected results relative to the prior art range.

Appellant has made no such showing in the instant case and such we conclude that patentability can not rest on the recited ranges and dimensions.

Claims 1-5, 10, 13, 15, 19 and 20 are rejected under 35 U.S. C. § 103 as being unpatentable over Turner in view of Quinton and Cerf. Turner discloses the article of furniture as claimed, except Turner does not disclose a lumbar support nor a safety strap. Quinton discloses a lumbar support which promotes comfort and avoids and alleviates backache. Cerf discloses that:

It is desirable from the

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orthopedic standpoint, for the child to maintain an erect posture within the chair, for prolonged slumping may lead to deformity. But the spine of a baby is so flexible and almost rubber-like that he literally collapses in an unsupported chair of ordinary design, and all that restrains him from sliding completely out of his seat is the safety belt. This problem is encountered not merely in very young infants, but also in babies up to the age of twenty-four months." (Column 1, pages 14-22).

Quinton discloses a convex lumbar support to promote comfort. Cerf is evidence that it was known in the art to provide a lumbar support for a child. Cerf also teaches that there is a need to provide a safety strap in a child's chair (Column 2, lines 9-11). As such, it would have been obvious to provide the chair disclosed in Turner with a lumbar support as taught by Quinton and Cerf in order to aid a child in maintaining correct posture.

Claim 11 is rejected under 35 U.S.C. § 103 over Turner in view of Quinton and Cerf as applied to claim 1 and further in view of French Patent. The French Patent is cited for teaching rungs. It would have been obvious to provide the

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Turner chair with rungs as taught by French Patent to obtain a chair that rocks.

In summary, the examiner's rejections of: claims 22 and 23 under 35 U.S.C. § 112, second paragraph and of claims 1-5, and 7-20 under 35 U.S.C. § 103 are affirmed. The examiner's rejections under 35 U.S.C. § 103 of claims 6, 21-23 are not sustained. Claims 1-5, 10-13, 15, 19 and 20 are rejected pursuant to 37 CFR 1.196(b).

In addition to affirming the examiner's rejection of one or more claims, this decision contains new grounds of rejection pursuant to 37 CFR § 1.196(b) (amended effective Dec. 1, 1997, by final rule notice, 62 Fed. Reg. 53,131, 53,197 (Oct. 10, 1997), 1203 Off. Gaz. Pat. & Trademark Office 63, 122 (Oct. 21, 1997)). 37 CFR § 1.196(b) provides, "A new ground of rejection shall not be considered final for purposes of judicial review."

Regarding any affirmed rejection, 37 CFR § 1.197(b) provides:

(b) Appellant may file a single request for rehearing within two months from the date of the original

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decision

37 CFR § 1.196(b) also provides that the appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new grounds of rejection to avoid termination of proceedings (37 CFR § 1.197(c)) as to the rejected claims:

(1) Submit an appropriate amendment of the claims so rejected or a showing of facts relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the application will be remanded to the examiner. . . .

(2) Request that the application be reheard under § 1.197(b) by the Board of Patent Appeals and Interferences upon the same record. . . .

Should the appellant elect to prosecute further before the Primary Examiner pursuant to 37 CFR § 1.196(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejections, the effective date of the affirmance is deferred until conclusion of the prosecution before the examiner unless, as a mere incident to the limited prosecution, the affirmed rejections are overcome.

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If the appellant elects prosecution before the examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejections, including any timely request for reconsideration thereof.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART 1.196(b)

IAN A. CALVERT)
Administrative Patent Judge)
)
)
) BOARD OF PATENT

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Administrative Patent Judge)	APPEALS AND
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