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MACMILLAN SOBANSKI & TODD, LLC ONE MARITIME PLAZA FIFTH FLOOR 720 WATER STREET TOLEDO, OH 43604-1619			ARCE, MARLON ALEXANDER	
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The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte TODD BERNATSKY, PHILIP SCHREIBER,
THOMAS J. WHELAN, WAYNE HANSON, STEVEN L. LINDQUIST,
JERRY HOUTART, RICHARD SCHNEIDER, ALLEN B. KILLEBREW,
and MIKE NORDQUIST

Appeal 2010-002763
Application 10/913,005
Technology Center 3600

Before MICHAEL C. ASTORINO, MICHAEL L. HOELTER and
SCOTT A. DANIELS, *Administrative Patent Judges*.

ASTORINO, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellants appeal under 35 U.S.C. § 134 from the Examiner's decision finally rejecting claims 1, 4-10, 13-17, 19-23, 26, 29, 31, 32, 42, and 44-46. Claims 2, 3, 30, 33-41, 43, and 48-52 have been cancelled. Claims 11, 12, 18, 24, 25, 27, 28, and 47 are objected to as being dependent upon a rejected base claim. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We REVERSE and ENTER A NEW GROUND OF REJECTION PURSUANT TO OUR AUTHORITY UNDER 37 C.F.R. § 41.50(b) (2011).

Claimed Subject Matter

Claims 1, 4, 13, and 31 are the independent claims on appeal. Claim 1, reproduced below, is illustrative of the subject matter on appeal.

1. A personal mobility vehicle comprising:

a base; and

a seat moveable relative to the base along a curve having a focal point, the vehicle being adjustable to position the center of gravity of an occupant substantially coincident with the focal point of the curve, the center of gravity of the occupant remaining substantially coincident with the focal point as the seat is moved along the curve.

Rejections

The following Examiner's rejections are before us for review.¹

Claims 1, 4, 5, 8-10, 42, and 44 are rejected under 35 U.S.C. § 102(b) as anticipated by Torras (US 4,515,337, iss. May 7, 1985).²

¹ The Answer incorrectly rejects cancelled claims under both grounds of rejection. Ans. 3-4.

² Contrary to the Appellants' listing of the grounds of rejections (Br. 6), the Examiner does not reject independent claim 13 under this ground of rejection. Ans. 6.

Claims 1, 4, 6, 7, 13-17, 19-23, 26, 29, 31, 32, 42, and 44-46 are rejected under 35 U.S.C. § 102(b) as anticipated by Maxwell (US 4,957,302, iss. Sep. 18, 1990).

OPINION

Anticipation by Torras

Independent claim 1 is directed to a personal mobility vehicle and recites:

a seat moveable relative to the base along *a curve having a focal point*, the vehicle being adjustable to position the center of gravity of an occupant *substantially coincident* with the focal point of the curve, the center of gravity of the occupant remaining *substantially coincident* with the focal point as the seat is moved along the curve.

Br., Claims Appendix (italics added). Independent Claim 4 recites similar limitations to claim 1, for example, “. . . the center of gravity of the occupant remaining substantially coincident with the center of curvature as the seat is moved along the curve.” *Id.*

At the outset it is notable that the Appellants contend the term “substantially” refers to “a tolerance band where the CG [(i.e., center of gravity)] may be effectively coincident with the focal point to account for factors such as, for example, the seated or shifted posture of an occupant or the weight of an occupant sinking into the seat cushions.” Br. 10. Since the Specification lacks an explicit definition of the term “substantially” or “substantially coincident” the Appellants’ definition of “substantially”, being consistent with the Specification, is understood to be the broadest reasonable interpretation of the term. It is also notable that the term “substantially coincident,” as used in claim 1, characterizes the relationship

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between an occupant's center of gravity and the focal point of a curve. Additionally, it is notable that an occupant's center of gravity varies based on various factors, including the weight of the occupant (Spec. 19, para. [0069], ll. 1-3). For example, an occupant in a personal mobility vehicle may be a forty pound child or a three hundred pound adult.

Turning to the Examiner's rejection, the Examiner finds that Torras' seat 20 is "supported for movement relative to a radial curve having a center of curvature [(i.e., focal point)]." Ans. 3. However, as pointed out by the Appellants, Torras' figures and specification are not instructive to determine the location of the center of curvature (focal point). *See* Br. 8-9, 22 (citing *Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956 (Fed. Cir. 2000)). We agree. Although Torras' rollers 42 travel on arcuate cam tracks 32', 33' and the arcuate cam tracks 32', 33' have a focal point, Torras gave no indication that the drawings were drawn to scale such that the position or location of the focal point of the arcuate cam tracks can be determined. *See* Torras col. 2, ll. 49-56, col. 4, 25-29, figs 1, 2. And, "it is well established that patent drawings do not define the precise proportions of the elements." *Hockerson-Halberstadt* at 222 F.3d 951, 956. Accordingly, Torras does not provide sufficient disclosure to identify the focal point, i.e., the center of curvature, of the arcuate cam tracks. Hence, Torras cannot be relied upon to disclose a particular location of a focal point of the arcuate cam tracks 32', 33'. As such, the Examiner's finding that Torras discloses a particular relationship between a focal point of the arcuate cam tracks 32', 33' and an occupant's center of gravity is necessarily based on speculation and is not adequately supported.

Thus, for the reasons provided above the Examiner's rejection of independent claims 1 and 4 and their dependent claims 5, 8-10, 42, and 44, as anticipated by Torras, is not sustained.

Anticipation by Maxwell

Turning to the Examiner's rejection of claims 1, 4, 6, 7, 13-17, 19-23, 26, 29, 31, 32, 42, and 44-46 as anticipated by Maxwell the Examiner's factual findings suffer from the same problem as discussed above with regard to the Examiner's anticipation rejection of Torras. The Examiner relies on Maxwell's disclosure to find that guide tracks 82, 84 have a focal point or center of curvature. *See* Ans. 4, 7. However, Maxwell does not disclose that the drawings were to scale and, as discussed above, "it is well established that patent drawings do not define the precise proportions of the elements." *Hockerson-Halberstadt* at 222 F.3d 951, 956. As such, Maxwell does not provide sufficient disclosure to identify the location of the focal point, i.e., the center of curvature, of the arcuate guide tracks 82, 84. *See* Br. 11. Accordingly, the Examiner's finding that Maxwell discloses a particular relationship between the focal point, i.e., the center of curvature, of the guide tracks 82, 84 and an occupant's center of gravity is necessarily based on speculation and is not adequately supported. The Examiner's rejection of independent claims 1, 4, 13, and 31 requires this finding to be adequately supported to be sustained. Thus, for the reasons provided above the Examiner's rejection of independent claims 1, 4, 13, and 31 and their dependent claims 6, 7, 14-17, 19-23, 26, 29, 32, 42, and 44-46, as anticipated by Maxwell, is not sustained.

NEW GROUND OF REJECTION

The language of a claim satisfies § 112, second paragraph, only if "one skilled in the art would understand the bounds of the claim when read

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in light of the specification.” *Exxon Research & Eng’g Co. v. United States*, 265 F.3d 1371, 1375 (Fed. Cir. 2001). A claim is indefinite if the language of the claim is susceptible of no reasonable interpretation. *Id.*

Independent claim 31 recites:

one or more tracks supporting the seat . . . the one or more tracks having a constant or substantially constant radius arc with a focal point that is substantially fixed in space, whereby the vehicle is adjustable so that the location of the center of gravity of the occupant can be adjusted to be *coincident* or *near coincident* with the focal point, the center of gravity of the occupant *remaining substantially coincident* with the focal point as the seat is moved along the arc.

Br., Claims Appendix (italics added). The foregoing recitation of claim 31 offers that the relationship between an occupant’s center of gravity as compared to the focal point can be “coincident” or “near coincident” and when a seat is moved the relationship between the occupant’s center of gravity and the focal point *remains* substantially coincident. For the relationship between the occupant’s center of gravity and the focal point to *remain* substantially coincident, the relationship prior to moving must be at least substantially coincident. Since the term “coincident” is more narrow than the term “substantially coincident,” a coincident relationship remaining substantially coincident between the occupant’s center of gravity and the focal point is understandable.

However, it is unclear whether something that is “near coincident” may be able to *remain* “substantially coincident.” More specifically, the term “substantially coincident” refers to “a tolerance band where the CG [(i.e., center of gravity)] may be effectively coincident with the focal point” Br. 10. The claimed term “near coincident” is not explicitly defined in the Specification, but the Specification does state at paragraph [0069] that:

[t]he relative position of the center of gravity of the vehicle occupant and the center of curvature or focal point obviously depends on the weight of the user, and possibly the physical abilities of the attendant. For example, a *near coincident* relationship between the center of gravity of the vehicle occupant and the focal point P that requires 50 pounds of force to tilt the seat frame and occupant may be a suitable relationship for some attendants but not others.

Spec. 19, para. [0069] (italics added). Additionally, the plain and ordinary meaning of the term “near” is “at, within, or to a short distance.”³ The foregoing disclosure from the Specification and the dictionary definition of the term “near,” as well as the term “near coincident” in claim 31, is indicative of a broader range or band as compared to “substantially coincident.” As such, logic dictates that the phrase “remaining substantially coincident” as recited in claim 31 is indefinite.

Thus, for the foregoing reasons, independent claim 31 is rejected under 35 U.S.C. § 112, second paragraph, as indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

DECISION

We REVERSE the Examiner’s decision to reject claims 1, 4-10, 13-17, 19-23, 26, 29, 31, 32, 42, and 44-46.

We enter a NEW GROUND OF REJECTION of claim 31 under 35 U.S.C. § 112, second paragraph, as indefinite pursuant to our authority under 37 C.F.R. § 41.50(b) (2011).

³ (DICTIONARY.COM UNABRIDGED, <http://dictionary.reference.com/browse/near> (last visited Jan. 28, 2013)(“near,” def. 2)).

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37 C.F.R. § 41.50(b) provides “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.” 37 C.F.R. § 41.50(b) also provides that Appellants, 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 the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the Examiner, in which event the proceeding will be remanded to the Examiner. . . .

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

REVERSED; 37 C.F.R. § 41.50(b)

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