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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* WILLIAM L. GRILLIOT, MARY I. GRILLIOT, and  
THOMAS STACHLER

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Appeal 2011-000228  
Application 11/375,735  
Technology Center 3600

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Before LINDA E. HORNER, STEFAN STAICOVICI, and  
SCOTT A. DANIELS, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

William L. Grilliot et al. (Appellants) seek our review under 35 U.S.C. § 134 of the Examiner's decision rejecting claims 1-8 under 35 U.S.C. § 103(a) as being unpatentable over the helmet of Appellants' prior art Figures 1 and 2. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM and designate our affirmance as a NEW GROUND OF REJECTION pursuant to our authority under 37 C.F.R. § 41.50(b).

## THE INVENTION

Appellants' claimed invention "pertains to a protective helmet of a type worn by a firefighter or by an emergency worker, as equipped with a mounting device, by which a badge is mounted to the protective helmet." Spec. 1, ll. 4-6. Claims 1 and 5 are independent. Claim 5, reproduced below, is representative of the subject matter on appeal.

5. A protective helmet of a type worn by a firefighter or by an emergency worker, wherein the protective helmet is equipped with a mounting device, by which a badge having a front face bearing indicia is mounted to the protective helmet, wherein the mounting device comprises a fitment, which is mounted to the protective helmet and which has a recess opening downwardly and receiving an upper portion of the badge, the upper portion comprising an upper end of the badge, and wherein the mounting device comprises a blade, which is mounted to the protective helmet and which has a portion extending upwardly along a back face of the badge and is received in the recess.

Independent claim 1 is directed to a protective helmet substantially similar to claim 5 except that claim 1 also calls for the portion of blade extending upwardly along a back face of the badge to extend "as far as the upper edge of the badge."

## ISSUE

Appellants argue claims 1-8 as a group. App. Br. 3-6. We select claim 5 as representative, and claims 1-4 and 6-8 stand or fall with claim 5. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2011).

The Examiner found that prior art Figures 1 and 2 teach a protective helmet as called for in claim 5 except for the blade extending into the recess. Ans. 4-6. Appellants do not contest these findings by the Examiner. The Examiner determined that it would have been obvious to extend the blade as

called for in claim 5 “to provide more support for the badge by supporting a larger surface area of the back surface or the entire length of the back surface of the badge.” Ans. 5-6.

Appellants argue that the rejection should be reversed because it is “based upon a conclusory and unsupported assertion, attempt[s] to modify the prior art contrary to the principle of operation of the prior art and to render the prior art unsatisfactory for it[s] intended purpose, and ignore[s] the long felt need evidenced by the prior art cited by the Examiner.” App. Br. 3.

The issue presented by this appeal is whether the extension of the prior art blade upwardly along the back face of the badge such that the blade extends into the recess as called for in claim 5 would have been obvious to one of ordinary skill in the art in light of prior art helmet with mounting device shown in Figures 1 and 2 and the knowledge of one of ordinary skill in the art.

#### FINDINGS OF FACT

We find that the following enumerated findings are supported by at least a preponderance of the evidence.

1. Appellants’ Specification describes that “it has been known for the mounting device to comprise . . . a blade, which is mounted to the protective helmet and which has a portion extending upwardly along a back face of the badge, toward but not as far as the upper portion of the badge.” Spec. 1, ll. 12-17.
2. Appellants’ Specification describes that “[i]f the [prior art] blade is a leaf spring, as has been known, the upwardly extending portion of the blade biases the badge frontwardly.” Spec. 1, ll. 17-18. *See also*

Spec. 3, l. 25 – Spec. 4, l. 2 (front portion 62 of prior art leaf spring blade 60 biases badge 30 frontwardly).

3. Appellants' Specification describes in the Background of the Invention:

Because the blade portion extending upwardly along the back face of the badge does not extend as far as the upper portion of the badge, it has been possible for a foreign object, such as a wire, inadvertently to enter the recess from the front face of the badge, to bend the upper portion of the badge backwardly, over an upper end of the blade, and to be thus caught in the recess. It is distracting for a wearer of the protective helmet to have to dislodge a foreign object caught in the recess.

Spec. 1, ll. 19-25.

4. Prior art Figure 2 shows a recess 54 in fitment 50 which is wider than the thickness of badge 30, such that the upper portion 40 of badge 30 can be pushed rearwardly within recess 54 by wire W.
5. Appellants' leaf spring blade 70 also biases the badge 30 frontwardly. Spec. 2, 13-15; *id.* at 4, ll. 17-18.

#### ANALYSIS

One of ordinary skill in the art at the time of Appellants' invention was aware of the problem of foreign objects, such as wires, entering the recess from the front face of the badge and bending the upper portion of the badge backwardly over an upper end of the blade. Fact 3. The function of blade 60 of the prior art mounting device of Figures 1 and 2 is to bias the badge frontwardly within recess 54. Fact 2. The extension of the blade upwardly so that it extends into recess 54 does not change the function of the blade; it still biases the badge frontwardly. Fact 5.

Prior art Figure 2 shows a recess 54 in fitment 50 which is wider than the thickness of badge 30, such that the upper portion 40 of badge 30 can be pushed rearwardly within recess 54 by wire W. Fact 4. One of ordinary skill in the art facing the known problem of the badge being bent backwardly due to foreign objects entering the recess had a finite number of predictable solutions, *viz.*, decrease the width of the recess so that it is substantially the same dimension as the thickness of the badge, fill the slack within the recess behind the badge to prevent the badge from being able to bend backwardly, or provide additional support to the back of the badge to prevent the badge from being able to bend backwardly. Appellants chose the latter of these predictable solutions.

By extending the blade upwardly along the back of the badge so that the blade extends into the recess, Appellants provided additional support to the back of the badge. Because the blade of Appellants' invention provides the same function as the blade of the prior art (Facts 2, 5), and because the provision of additional support to the back of the badge is one of a finite number of predictable solutions, we find that a person of ordinary skill in the art would have had good reason to pursue the known options within his or her technical grasp, and thus, the claimed subject matter is "the product not of innovation but of ordinary skill and common sense." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007). As such, the solution to the known problem would have been obvious to try in light of a prior art blade that already biases the badge frontwardly, and thus the subject matter of claim 5 would have been obvious to one of ordinary skill in the art at the time of Appellants' invention.

Appellants argue that it would not have been obvious to one of ordinary skill in the art to extend blade 60 into the recess 54 because such a modification would defeat the “intended purpose of allowing the element 36 of the badge to be loaded over the end of the blade with the blade assembled to the helmet.” App. Br. 4. As the Examiner noted, Appellants have not provided evidence that the prior art blade 60 is made to stop short of the recess to allow element 36 of the badge to be loaded over the end of the blade with the blade assembled to the helmet. Ans. 7. “Attorney’s argument in a brief cannot take the place of evidence.” *In re Pearson*, 494 F.3d 1399, 1405 (CCPA 1974) (citation omitted). Further, we agree with the Examiner that the fact that the badge is riveted to the helmet belies Appellants’ assertion that the prior art mounting device is designed to allow different badges to be selectively used with helmet. Ans. 7.

Further, even if extending the blade into the recess would not allow element 36 of the badge to be slid over the top of the blade with the blade assembled to the helmet, the modification does not defeat the purpose of the mounting device. We note that element 36 is attached to badge 30 by rivets. Spec. 3, ll. 13-15. If, as Appellants argue, the rivet used to attach the lower portion of the badge to the helmet “can easily be removed to allow a badge to be replaced after initial assembly of a badge to the helmet” (Reply Br. 2), then we see no reason why one of the rivets used to attach brace 36 to badge 30 could not likewise be easily removed to allow the badge to be replaced after initial assembly of the mounting device and badge to the helmet. As such, Appellants’ argument that the proposed modification would defeat the intended purpose of the prior art mounting device is not persuasive of error in the determination of obviousness of the claimed subject matter.

Appellants also argue that the rejection is in error because it ignores evidence of long-felt need, asserting:

It is telling that while the problem identified by the application is not new, the Office Action identifies eight references that are considered pertinent to Applicants' disclosure, with the earliest being dated December 28, 1875 and the latest being dated April 30, 1974, yet none of these references have proposed or shown the invention recited in the claims and which is now asserted in the Office Action to be obvious, even though 40 years have passed since the publication of the latest document cited in the Office Action. The failure of others in the last 40 years to arrive at the claimed invention is a clear indication of nonobviousness.

App. Br. 6.

The Federal Circuit has determined that its precedent requires Appellants to "submit actual evidence of long-felt need, as opposed to argument . . . because '[a]bsent a showing of long-felt need or the failure of others, the mere passage of time without the claimed invention is not evidence of nonobviousness.'" *In re Kahn*, 441 F.3d 977, 990-91 (Fed. Cir. 2006) (quoting *Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1325 (Fed. Cir. 2004)); accord *In re Wright*, 569 F.2d 1124, 1127 (CCPA 1977) ("The mere age of the references is not persuasive of the unobviousness of the combination of their teachings, absent evidence that, notwithstanding knowledge of the references, the art tried and failed to solve the problem."). Appellants have failed to provide sufficient evidence that others tried and failed to solve the problem. As such, we do not find Appellants' arguments based on the mere age of the references persuasive of nonobviousness. Accordingly, we affirm the Examiner's rejection of claim 5 under 35 U.S.C. § 103(a) as being unpatentable over Figures 1 and 2. Claims 1-4 and 6-8 fall with claim 5.

Because the reasoning relied on by the Board to sustain the rejection of claims 1-8 under 35 U.S.C. § 103(a) differs somewhat from the reasoning relied on by the Examiner, we designate our affirmance of the rejection of claims 1-8 as a **NEW GROUND OF REJECTION** so as to provide Appellants with a full and fair opportunity to respond to the thrust of the rejection.

#### CONCLUSION

The extension of the prior art blade upwardly along the back face of the badge so that the blade extends in to the recess as called for in claim 5 would have been obvious to one of ordinary skill in the art in light of prior art helmet with mounting device shown in Figures 1 and 2 and the knowledge of one of ordinary skill in the art.

#### DECISION

We **AFFIRM** the decision of the Examiner to reject claims 1-8 and designate this affirmance as a **NEW GROUND OF REJECTION**.

37 C.F.R. § 41.50(b) 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. . . .

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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).

AFFIRMED; 37 C.F.R. § 41.50(b)

Klh