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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DAVID A. CLEMENS, JOHN C. DUNNE, MICHAEL S. BECK,
WENDELL H. CHUN and JON T. STINCHCOMB

Appeal 2011-000282
Application 12/207,210
Technology Center 3600

Before MICHAEL L. HOELTER, JOHN W. MORRISON and
RICHARD E. RICE, *Administrative Patent Judges*.

RICE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

David A. Clemens, et al. (Appellants) seek our review under
35 U.S.C. § 134 of the Examiner's rejection of claims 1, 6-10, 13, 17-19, 21,
22, 24 and 29-41. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

The Claimed Subject Matter

The claimed subject matter relates “to ground vehicles and, more particularly, to a payload module for mobility assist for a ground vehicle.” Spec. 2, ll. 10-11. Claims 1, 17, 24, 29, 34 and 39 are independent. Claim 1, reproduced below, is illustrative of the subject matter on appeal:

1. A ground vehicle, comprising:
a chassis, the chassis defining a payload bay; and
a payload module capable of articulating into and out of the payload bay and relative to the chassis to assist mobility of the ground vehicle.

The Rejections

The following Examiner’s rejections are before us for review:

- (1) claim 24 stands rejected on the ground of nonstatutory obviousness-type double patenting as unpatentable over claim 7 of Clemens (US 7,464,775 B2; iss. Dec. 16, 2008);¹
- (2) claims 29-33 stand rejected under 35 U.S.C. § 112, second paragraph, as indefinite for failing to particularly point out and distinctly claim the subject matter which Appellants regard as the invention;
- (3) claims 1, 6-10, 13, 17-19, 21, 22, 29, 30 and 34-41 stand rejected under 35 U.S.C. § 102(b) as anticipated by Soyland (US 4,049,070; iss. Sep. 20, 1977); and
- (4) claim 24 stands rejected under 35 U.S.C. § 102(b) as anticipated by Watkins (US 5,405,181; iss. Apr. 11, 1995).

¹ The Appeal Brief states that the Examiner rejected claims 1, 6-10, 13, 17-19, 21, 22, 24 and 29-41 for obvious-type double patenting. App. Br. 2. However, the Examiner rejected only claim 24 on that ground. Ans. 4.

OPINION

Rejection (1) – Double Patenting

Appellants acquiesce in the Examiner’s nonstatutory obviousness-type double patenting (ODP) rejection of claim 24 over claim 7 of Clemens. App. Br. 2. Accordingly, Appellants have waived any appeal of the rejection.

Rejection (2) – Indefiniteness

The Examiner’s position is that the claim term “articulable payload module coupling” as used in independent claim 29 is “*structurally indefinite* because it fails to contain *sufficient structural limitations* that are necessary for one to properly and clearly understand the *structure* of the apparatus that is intended to be claimed.” Ans. 5.² However, a claim is not indefinite if “one skilled in the art would understand the bounds of the claim when read in light of the specification.” *Exxon Research & Eng'g Co. v. United States*, 265 F.3d 1371, 1375 (Fed. Cir. 2001). Here, the Specification discloses an embodiment in which payload module 112 is mounted to chassis 105 by joint 600 via a coupling such that that the payload module can be articulated through 180° of motion. Spec. 8, ll. 20-24 12, ll. 23-25, fig. 9. A skilled person would understand from this disclosure that an “articulable payload module coupling” is an articulable coupling capable of being used to connect a payload module with another structure. *See* Reply Br. 2. This claim construction is consistent with the usage of “articulable coupling” in

² The Examiner rejects claims 30-33 under 35 U.S.C. § 112, second paragraph, as dependent upon rejected claim 29. *Id.* at 5.

claim 24 (“a vertically articulable coupling between the payload module and the chassis”) and claim 38 (an articulable coupling between the payload module and the chassis”).

Accordingly, we do not sustain the rejection of claim 29, and claims 30-33 dependent therefrom, under 35 U.S.C. § 112, second paragraph, as indefinite for failing to particularly point out and distinctly claim the subject matter which Appellants regard as the invention.

Rejection (3) – Anticipation by Soyland

Appellants argue claims 1, 6-10, 13, 17-19, 21, 22, 29, 30 and 34-41 as a group.³ App. Br. 10-13; Reply Br. 4-5. We select claim 1 as representative; thus, claims 6-10, 13, 17-19, 21-22, 29-30 and 34-41 stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2011).

The Examiner finds that Soyland discloses a ground vehicle (excavator) with all the limitations of claim 1, including “a payload bay” and “a payload module.” Ans. 6-10. More particularly, the Examiner finds that “the excavator’s bucket (13) is certainly capable of housing a payload (something of value that the excavator moves or transports) [i.e. dirt, rocks, sand {earth}, etc.], thus the payload module [part of which is bucket (13)] may house such a payload during operation of the excavator.” *Id.* at 7. The

³ Appellants argue that Soyland fails to anticipate “any” of the claims. App. Br. 13. This vague statement does not constitute a separate argument for patentability of the claims pursuant to 37 C.F.R. § 41.37(c)(1)(vii) (2011). *See In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) (holding that the Board reasonably interpreted its rule as requiring “more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art”).

Examiner elaborates that “[t]he excavator is designed for scooping and moving earth, which IS the payload,” and that “[t]he earth is certainly something of value that the excavator must move.” *Id.* at 8.

Appellants’ position is that “Soyland fails to disclose a ‘payload,’ a ‘payload module,’ or a ‘payload bay.’” App. Br. 10. Appellants first argue that the Examiner’s construction of “payload” is overly broad, that “the earth materials that might be moved using the scoop of Soyland are not a ‘payload’” and that “[n]obody in the art” would consider such earth materials to be a “payload.” *Id.* at 10 and 11. Appellants contend that “[o]n the evidence of record, the definition of ‘payload’ is much narrower than that accorded by the Office” and that the dictionary definitions on which the Examiner relies do “not constitute any evidence of the terms[’] usage in the art.” *Id.* at 12 (italics omitted). Appellants also contend that although “[t]here may be some few, rare applications, in which the dirt may be valuable,” “by far the largest use of backhoes is to move excavated dirt in situations where the excavator *must actually pay to have the dirt removed.*” *Id.* Appellants also challenge the Examiner’s application of the term “payload module” as construed by the Examiner to the bucket of Soyland’s excavator, arguing that “[w]hile . . . the backhoe is for scooping and moving earth, it is not for housing the dirt” (App. Br. 12) and “Soyland’s bucket just holds the dirt temporarily while it moves it from one place to another nearby place” (Reply Br. 5).

Appellants have not persuaded us of error in the Examiner’s construction or application of “payload,” “payload module” or “payload bay.” While an applicant is entitled to be his or her own lexicographer and may rebut the presumption that a claim term is to be given its ordinary and

customary meaning by clearly setting forth a definition of the term that is different from its ordinary and customary meaning(s) (*see, e.g., In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994)), Appellants have not pointed us to such a definition in their Specification, and we have found none. Nor have Appellants persuaded us that the Examiner's claim construction is inconsistent with the Specification. *See In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989) (the words of the claim must be given their plain meaning unless the plain meaning is inconsistent with the specification). While the Specification describes various payloads (including a telescoping mast with a sensor pod, unmanned ground sensors, a marsupial robot and weapons), the Specification also discloses that "the ground vehicle 100 is intended for military applications" and "the payload module 112 provides flexibility to exchange and alternate payloads depending upon mission goals." Spec. 8, ll. 6-11. Such mission goals might reasonably involve excavating and transporting earth materials or dirt, for example, in war zones or extraterrestrial locations.

Where, as here, the Specification does not assign or suggest a specific definition to a claim term, it is appropriate to consult a general dictionary definition of the term for guidance in determining its ordinary and customary meaning to one having ordinary skill in the art. *See Comaper Corp. v. Antec., Inc.*, 596 F.3d 1343, 1348 (Fed. Cir. 2010). We thus agree with the Examiner that the broadest reasonable construction of "payload" consistent with the Specification encompasses earth materials and dirt. *See WEBSTER'S THIRD NEW INT'L DICTIONARY, UNABRIDGED* ("payload," entry 1, def. 2, "the revenue-producing or useful load that a vehicle of transport can carry: net load"), accessed at <http://lionreference.chadwyck.com> (last visited Feb.

28, 2013); *In re Am.Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004) (during examination of a patent application, pending claims are given their broadest reasonable construction consistent with the specification).

We agree with the Examiner that the “payload module” limitation reads on the bucket of Soyland’s excavator. First, the materials moved or transported in the bucket are the excavator’s useful load and thus satisfy the “payload” limitation as properly construed. Appellants’ argument that such earth materials and dirt ordinarily do not have positive value or use (App. Br. 12-13) overlooks the many applications, such as grading, horticulture and mining, in which earth materials and dirt moved by an excavator clearly do have positive value or use. Second, we do not perceive any error in the Examiner’s finding that Soyland’s bucket is capable of housing the materials moved by the excavator. *See Ans. 7*. Appellants’ argument that the bucket provides only intermediate or temporary housing for such materials is unavailing. *See, e.g., In re Mullin*, 481 F.2d 1333, 1335-36 (CCPA 1973) (an article is no less anticipatory because it only anticipates for a limited period of time).

Accordingly, we sustain the rejection of claim 1 under 35 U.S.C. § 102(b) as anticipated by Soyland. Claims 6-10, 13, 17-19, 21, 22, 29, 30 and 34-41 fall with claim 1.

Rejection (4) – Anticipation by Watkins

The Examiner’s position is that Watkins discloses all of the limitations of claim 24. *Ans. 10-11*. With respect to the limitation “a payload module,” the Examiner finds that Watkins “discloses an apparatus [dump vehicle structure] (Figs. 1, 3 and 4) comprising at least: a payload module [dump body inherently capable of hauling or dumping a material of

value, i.e. ‘payload’] (12).” Ans. 15. With respect to the limitations “a rotating joint housed in and affixed to the chassis” and “an enclosure pivot coupled to the rotating joint,” the Examiner finds that, in Watkins,

[t]he rotating joint solely consists of the wheel (22) rotating around an axle (24), whereas the enclosure pivot consists of left and right rectangular bars (enclosures that form safety prop (18)), which are connected by axle (24), which also happens to be coupled to the wheel (22), thus forming the rotating joint. The enclosure pivot and rotating joint may share the axle (24) as a common horizontal axis, but the rotating joint concerns the wheel (22) rotating relative to the axle (24), whereas the enclosure pivot concerns the wheel (22) and axle (24) together being enclosed between the left and right rectangular bars that form an enclosure that encloses the rotating joint pivoting as a whole.

Id. at 16-17.

Appellants challenge the Examiner’s interpretation of the claim terms “payload” and “payload module” and argue that Watkins fails to teach those limitations under a proper claim construction. App. Br. 13. For the reasons discussed *supra* with respect to claim 1, we are not persuaded of error in the Examiner’s interpretation or application of the claim terms “payload” and “payload module.”

Appellants also challenge the Examiner’s construction and application of the “rotating joint” and “enclosure pivot” limitations. *Id.*; Reply Br. 5-6. Appellants argue that these are separately-recited limitations and that the Examiner errs in applying both limitations against the same structure. App. Br. 13; Reply Br. 6. This argument, however, is not responsive to the rejection as articulated by the Examiner. Under the rejection, the “rotating joint” (wheel 22 and axle 24) and the “enclosure pivot” (safety prop 18 and axle 24) are separate and distinct structures. *See* Ans. 10-11 and 16-17.

That the safety prop, the axle and the wheel may be characterized as interrelated components of “a single joint,” as Appellants contend, does not persuade us of error in the Examiner’s analysis. *See* Reply Br. 6 (quoting the Watkins abstract).

Appellants’ additional arguments are also unresponsive to the rejection as articulated by the Examiner. Appellants argue that Watkins does not disclose the “enclosure” aspect of the claimed “enclosure pivot;” however, Appellants do not address the Examiner’s analysis that the left and right rectangular bars of the safety prop 18 enclose the wheel 22 on both its sides. *See* Ans. 10-11. We therefore are not persuaded by Appellants’ argument that “[t]here is no ‘enclosure’ in [Watkins.]” Reply Br. 6. Appellants also argue that Watkins does not disclose a rotating joint “housed” in the chassis, but do not address the Examiner’s analysis that wheel 22 is housed within side walls of the “H-shape” of longitudinal member 16 of chassis 10. *See* Ans. 10. We therefore are not persuaded by Appellants’ argument that “there is not even any structure to the chassis that could actually house the ‘rotating joint.’” Reply Br. 6. Further, we find that the ordinary and customary meanings of “enclosure” and “housing” support the Examiner’s analyses.⁴

Accordingly, we sustain the rejection of claim 24 under 35 U.S.C. § 102(b) as anticipated by Watkins.

⁴ *See* WEBSTER’S THIRD NEW INT’L DICTIONARY, UNABRIDGED (“enclosure,” entry 1, def. 3, “something that encloses (as a barrier)” and “house,” vb, def. 5, “to fit (as machinery or gears) with shrouds or protective walls or housings”), accessed at <http://lionreference.chadwyck.com> (last visited Feb. 28, 2013).

DECISION

We reverse the rejection of claims 29-33 under 35 U.S.C. § 112, second paragraph, as indefinite for failing to particularly point out and distinctly claim the subject matter which Appellants regard as the invention.

We affirm the rejection of claims 1, 6-10, 13, 17-19, 21, 22, 29, 30 and 34-41 under 35 U.S.C. § 102(b) as anticipated by Soyland.

We affirm the rejection of claim 24 under 35 U.S.C. § 102(b) as anticipated by Watkins.

Appellants have waived any appeal of the rejection of claim 24 on the ground of nonstatutory obviousness-type double patenting as unpatentable over claim 7 of Clemens.

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-IN-PART

JRG