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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
12/102,181	04/14/2008	Kevin W. Smith	EES/Elec Stap OTC Device	9680
27316	7590	01/28/2013	EXAMINER	
MAYBACK & HOFFMAN, P.A. 5722 S. FLAMINGO ROAD #232 FORT LAUDERDALE, FL 33330			WEEKS, GLORIA R	
			ART UNIT	PAPER NUMBER
			3721	
			MAIL DATE	DELIVERY MODE
			01/28/2013	PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KEVIN W. SMITH, THOMAS BALES,
DEREK DEE DEVILLE, CARLOS RIVERA, and
MATTHEW A. PALMER

Appeal 2011-002226
Application 12/102,181
Technology Center 3700

Before: PHILLIP J. KAUFFMAN, BRETT C. MARTIN, and
HYUN J. JUNG, *Administrative Patent Judges*.

JUNG, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Kevin W. Smith et al. (Appellants) appeal under 35 U.S.C. § 134 from a final rejection of claims 1-24. Appellants' representative presented oral argument on January 24, 2013. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

THE CLAIMED SUBJECT MATTER

Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. An optimal tissue compression surgical device, comprising:

a handle having therein a compression controller adapted to be electrically coupled to a power supply selectively supplying power therefrom; and

a surgical end effector connected to said handle and having:

an electrically controlled tissue-compressing device operable to compress tissue disposed therein, said tissue-compressing device being electrically coupled with said compression controller and being powered thereby to selectively control compression of the tissue disposed within said tissue-compressing device; and

a mechanical binary-output electrical switch disposed in line with said tissue-compressing device to place a force upon said mechanical binary-output electrical switch proportional to a compressing force directed upon the compressed tissue, said mechanical binary-output electrical switch having:

first and second electrical switching states initiated and changed solely by mechanical movements;

a biasing device retaining said switch in said first switching state with a bias force until a force imparted upon said switch overcomes said bias

force to change said switch to said second switching state; and

a switching-state-status output communicatively coupled to said compression controller and operable to provide information identifying a current one of said switching states, said compression controller being operable to selectively control compression of the tissue disposed within said tissue-compressing device based upon said information.

THE REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Hooven	US 5,383,880	Jan. 24, 1995
Whitman	US 6,533,157 B1	Mar. 18, 2003

THE REJECTIONS

Appellants seek our review of the following rejections:

Claims 1-8, 10, 12-16, 18, and 20-24 stand rejected under 35 U.S.C. § 102(b) as anticipated by Hooven.

Claims 9 and 17 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Hooven.

Claims 11 and 19 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Hooven and Whitman.

ANALYSIS

The Examiner finds that Hooven discloses the subject matter of independent claims 1, 10, and 18. Ans. 3-4. In particular, the Examiner finds that a light emitting diode (LED) 163 and a phototransistor receiver

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164 of Hooven disclose the mechanical binary-electrical switch of these claims. *Id.* at 4.

Appellants argue that Hooven does not disclose a mechanical binary-output electrical switch having first and second electrical switching states initiated and changed solely by mechanical movements, as required by the independent claims. App. Br. 19-20; Reply Br. 2. Appellants contend that the LED 163 and phototransistor receiver 164 of Hooven are not mechanical and are not described as functioning together as a mechanical switch where change between electrical states is initiated solely by mechanical movements. App. Br. 23; Reply Br. 4. In particular, Appellants argue that LED 163 is not initiated nor changes states solely in response to mechanical movement. App. Br. 24; Reply Br. 4. Appellants also argue that the responsive state of the phototransistor receiver 164 does not occur as a result of mechanical movement. App. Br. 25; Reply Br. 5.

The Examiner responds that mechanical movement of anvil 162 triggers the electrical switching states of LED 163 and phototransistor receiver 164. Ans. 6. Appellants argue that any mechanical movement that can be linked to LED 163 and phototransistor receiver 164 occurs as a result of the electrical state of these elements. Reply Br. 6-7.

Appellants' arguments are persuasive. Hooven discloses that the LED 163 and phototransistor receiver 164 can provide an indirect measurement of tissue penetration via an opto-electronic signal conversion that can be used to control operations, such as the opening and closing of an anvil member. Hooven, col. 8, ll. 24-25 and 37-42. Hooven also discloses that an electrical pulse is applied to the LED 163 to cause light to be emitted by the LED 163. *Id.* at ll. 29-30. A portion of the light is reflected from the tissue to the phototransistor receiver 164 thereby creating an electrical signal. *Id.* at ll.

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32-34. Hooven does not disclose by a preponderance of the evidence that the LED 163 and phototransistor 164 have first and second electrical switching states initiated and changed solely by mechanical movements, as required by independent claims 1, 10, and 18.

Accordingly, for the reasons *supra*, we cannot sustain the rejection of independent claims 1, 10, and 18 or claims 2-8, 12-16, and 20-24, dependent thereon, under 35 U.S.C. § 102(b) as anticipated by Hooven.

Also, because Hooven does not disclose every element of independent claims 1 and 10, we cannot sustain the rejection of claims 9 and 17, which depend from claims 1 and 10, respectively, under 35 U.S.C. § 103(a) as unpatentable over Hooven. *See* Ans. 4-5.

Finally, the Examiner does not rely on Whitman for any teaching that remedies the deficiency discussed *supra*. *See* Ans. 5. Therefore, we cannot sustain the rejection of claims 11 and 19, which depend from independent claims 10 and 18, respectively, under 35 U.S.C. § 103(a) as unpatentable over Hooven and Whitman.

DECISION

For the above reasons, the Examiner's rejections of claims 1-24 are reversed.

REVERSED

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