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MUETING, RAASCH & GEBHARDT, P.A.			CLAYTOR, DEIRDRE RENEE	
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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JOHN G. SEIFERT and LINDA M. SHECTERLE

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Appeal 2011-006319  
Application 10/147,100  
Technology Center 1600

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Before LORA M. GREEN, JEFFREY N. FREDMAN, and  
SHERIDAN K. SNEDDEN, *Administrative Patent Judges*.

SNEDDEN, *Administrative Patent Judge*.

#### DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a method to treat plants. The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We reverse.

## STATEMENT OF THE CASE

Claims 24-25, 27, 29-30, 32-33, 35-36, and 40-42 are on appeal.

Claim 24 is representative and reads as follows:

24. A method to treat plants consisting of the topical application of a solution of a pentose comprising 1.25 to 5 grams of the pentose dissolved in 250 milliliters of water to the roots of the plants, wherein the pentose is D-ribose, and whereby the hardiness and growth of the plants is enhanced.

The sole rejection<sup>1</sup> before us for review is the Examiner's rejection of claims 24-25, 27, 29-30, 32-33, 35-36, and 40-42<sup>2</sup> under 35 U.S.C. § 103(a) as unpatentable over Shin et al. (US 5,459,121, issued Oct. 17, 1995).

### I.

#### *Issue*

The Examiner finds that Shin discloses a method of treating a plant with xylitol (Ans. 4), where "it is clear that administration of xylitol converts to D-ribose *in vivo* making it obvious that the method of treating a plant with xylitol will readily convert to D-ribose *in vivo* and ribose is providing the treatment to the plant" (*id.* at 7.)

Appellants contend that the passage in the Specification cited by the Examiner "fails to establish any predictability for using ribose as an osmo-adjusting solute for reducing plant water loss" (App. Br. 6).

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<sup>1</sup> The rejection of claims 26, 31, 34, 37 and 43 under 35 U.S.C. § 112, first paragraph is withdrawn due to cancellation of the claims (Ans. 3).

<sup>2</sup> Claims 1-23, 26, 28, 31, 34, 37-39 and 43 are canceled (App. Br. 2 and Ans. 2).

The issue presented is: Does the evidence of record support the Examiner's conclusion that Shin renders obvious the claimed use of D-ribose?

*Findings of Fact*

The following findings of fact ("FF") are supported by a preponderance of the evidence of record.

FF1. Shin discloses "[a] method for reducing plant water loss by closing stomatal openings and reducing the transpiration rate" using "a water loss reducing composition made of an osmo-adjusting solute such as *sorbitol or xylitol* is applied to plants" that is "applied to the root zone" (Shin, abstract) (emphasis added).

*Analysis*

The initial burden of presenting a prima facie case of obviousness rests on the examiner. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). On the record before us, we find that the Examiner has failed to point to those facts or provide evidence which would reasonably support a prima facie case of obviousness within the meaning of 35 U.S.C. § 103 as to the claimed subject matter. The claims are limited to the use of a specific compound, D-ribose, which is not described in Shin (*see, e.g.*, FF1). Further, there is no disclosure in Shin which would establish that xylitol metabolites were known to be active for any purpose. The general statements by the Examiner relating to the activity of xylitol metabolites do not rise to the level of evidence necessary to establish that a person of ordinary skill in the art would have known to substitute D-ribose for xylitol in a method for treating plants.

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*Conclusion of Law*

The preponderance of evidence on this record does not support the Examiner's conclusion that Shin renders the claims on appeal obvious.

SUMMARY

We reverse the rejection of claims 24-25, 27, 29-30, 32-33, 35-36, and 40-42 under 35 U.S.C. § 103(a) as unpatentable over Shin.

REVERSED

cdc