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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte STEPHEN D. HORTON and BRENT CASSATA

Appeal 2011-013458
Application 12/088,149
Technology Center 1700

Before TERRY J. OWENS, PETER F. KRATZ, and DEBORAH KATZ,
Administrative Patent Judges.

OWENS, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1-7 and 10, which are all of the pending claims. We have jurisdiction under 35 U.S.C. § 6(b).

The Invention

The Appellants claim a thermoplastic powder composition. Claim 1 is illustrative:

1. A thermoplastic powder composition comprising:
at least one thermoplastic polyurethane having a melt flow index of at least about 8 g/10 min when tested according to ASTM D1238 at 190°C and a weight of 2.16 kg;
an internal lubricant of about 0.01 to about 1.0 weight % mono- and di-stearyl acid phosphate based on total weight of the composition; and
optionally, at least one flow agent,
wherein the powder has a uni-modal particle size distribution; and
wherein plasticizers are excluded from the composition.

The References

Kaufhold	US 6,166,135	Dec. 26, 2000
Weaver	US 2005/0176892 A1	Aug. 11, 2005

The Rejection

Claims 1-7 and 10 stand rejected under 35 U.S.C. § 103 over Kaufhold in view of Weaver.

OPINION

We affirm the rejection.

The Appellants argue the claims as a group (Br. 5-9). We therefore limit our discussion to one claim, i.e., claim 1, which is the sole independent claim. Claims 2-7 and 10 stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2007).

Kaufhold discloses a thermoplastic polyurethane molding composition which is useful for making a motor vehicle instrument panel surface lining (col. 1, ll. 6-12; col. 7, ll. 8-11).¹ The composition can be free of plasticizer and can contain a small amount of a mold release aid (col. 2, ll. 41-47; col. 5, ll. 4-6). The exemplified mold release aid is Loxiol[®] C78, the composition of which is not disclosed (Examples 1-5).

Weaver discloses a thermoplastic olefinic composition which comprises at least one ethylene/alpha-olefin interpolymer and at least one polypropylene polymer and is advantageous for high temperature processes such as calendaring, extrusion, foaming, blow molding and thermoforming to make products including automotive instrument panel skins (¶¶ 0002, 0032, 0061). The composition can contain a mold release agent, the exemplified mold release agents including AX-71 in an amount of 0.3 wt% of the polypropylene and elastomer total weight (¶¶ 0076, 0078). AX-71 is the Appellants' exemplified internal lubricant (Spec. ¶ 00059, Examples 1-4).

The Appellants argue that Kaufhold's thermoplastic polyurethane and Weaver's thermoplastic olefinic composition are not analogous art because their polymers have dissimilar chemical structures (Br. 8). The Appellants appear to be arguing that due to the difference in Kaufhold's and Weaver's polymers, those references are not combinable.²

¹ Vehicle instrument panel manufacture is one of the uses of the Appellants' thermoplastic powder composition (Spec. ¶ 00019).

² The test of whether a reference is nonanalogous art which is first, whether it is within the field of the inventor's endeavor, and second, if it is not,

Kaufhold does not indicate that the presence of a polyurethane in the thermoplastic molding composition limits the suitable mold release aids to those having a particular composition but, rather, broadly discloses that the composition can contain mold release aids (col. 5, ll. 4-8).³ Thus, Kaufhold would have motivated one of ordinary skill in the art to use as the mold release aid any mold release aid such as Weaver's AX-71 which was known in the art to be suitable for processing a thermoplastic polymer molding composition to make the same type of product as Kaufhold, e.g., a motor vehicle instrument panel surface lining, and would have provided such a person with a reasonable expectation of success in doing so. *See In re O'Farrell*, 853 F.2d 894, 903-04 (Fed. Cir. 1988) ("Obviousness does not require absolute predictability of success For obviousness under § 103, all that is required is a reasonable expectation of success").

The Appellants argue that the Appellants unexpectedly found that AX-71 functions not only as a mold release agent but also an internal lubricant, and that one of ordinary skill in the art would have been surprised that AX-71 performs both of those functions (Br. 6-7).

The Appellants' mere recognition of an additional benefit of Weaver's AX-71 mold release agent is not sufficient to render patentable a composition containing that material even if that recognition would have been surprising to one of ordinary skill in the art (which the Appellants have

whether it is reasonably pertinent to the particular problem with which the inventor was involved. *See In re Wood*, 599 F.2d 1032, 1036 (CCPA 1979).

³ Similarly, Weaver does not indicate that the mold release agent composition is limited due to the thermoplastic polymer being an ethylene/alpha-olefin interpolymer/polypropylene polymer (¶ 0055).

not established).⁴ *See In re Spada*, 911 F.2d 705, 708 (Fed. Cir. 1990) (“The discovery of a new property or use of a previously known composition, even when that property and use are unobvious from the prior art, can not impart patentability to claims to the known composition”).

The Appellants argue that Kaufhold and Weaver “promote the use of plasticizers by the extent of their respective disclosures about plasticizers” (Br. 9).

That argument is not well taken in view of Kaufhold’s disclosure that the composition can contain no plasticizer (col. 2, l. 47) and Weaver’s disclosure that a plasticizer is optional (¶ 0055).

For the above reasons we are not persuaded of reversible error in the Examiner’s rejection.

DECISION/ORDER

The rejection of claims 1-7 and 10 under 35 U.S.C. § 103 over Kaufhold in view of Weaver is affirmed.

It is ordered that the Examiner’s decision is affirmed.

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

AFFIRMED

sld

⁴ The Appellants have provided mere attorney argument that one of ordinary skill in the art would not have expected AX-71 to function as an internal lubricant, and such argument of counsel cannot take the place of evidence. *See In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984); *In re Payne*, 606 F.2d 303, 315 (CCPA 1979); *In re Greenfield*, 571 F.2d 1185, 1189 (CCPA 1978); *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974).