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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DONALD A. PILZ, RAYMOND E. POLIQUIN, and
FERNANDO HERNANDEZ SESMA

Appeal 2014-008029
Application 13/691,595
Technology Center 3600

Before LINDA E. HORNER, CHARLES N. GREENHUT, and GORDON
D. KINDER, *Administrative Patent Judges*.

GREENHUT, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134 from a rejection of claims 1–
19. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

CLAIMED SUBJECT MATTER

The claims are directed to a fire-rated wall and ceiling system. Claim 1, reproduced below, is illustrative of the claimed subject matter.

1. A fire rated metal stud framing wall and ceiling system, comprising:

a metal bottom track comprising a web, a first flange and a second flange, the first and second flanges extending in an upward direction from opposing side edges of the web, the bottom track defining an interior space between the web and the inwardly-facing surfaces of the first and second flanges;

a plurality of metal studs that are spaced from one another along the bottom track, each of the plurality of studs having a bottom end received within the interior space of the bottom track, each of the plurality of studs extending in a generally vertical direction from the bottom track;

a metal top track comprising a web, a first flange and a second flange, the first and second flanges extending in a downward direction from opposing side edges of the web, the top track defining an interior space between the web and the inwardly-facing surfaces of the first and second flanges, wherein upper ends of each of the plurality of studs are received within the interior space of the top track, further comprising at least one heat-expandable, intumescent material strip extending along a length of the top track, the intumescent material strip attached to the top track and having at least a first surface facing the top track and a second surface; and

a ceiling;

wherein the top track is secured to the ceiling and the at least one intumescent material strip is located on the top track such that the second surface of the at least one intumescent material strip contacts the ceiling and wherein the second surface of the at least one intumescent material strip defines a width that is less than the width of the web of the metal top track.

REJECTION

Claims 1–19 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Surowiecki (US 6,854,237 B2, iss. Feb. 15, 2005) in view of Egri (CA 2,234,347 A1, pub. Aug. 10, 1999).

OPINION

The Examiner’s rejection is premised, in part, on the disputed finding that “the at least one intumescent strip [38, 40 of Egri] is located on the top track such that the second surface of the at least one intumescent material strip contacts the ceiling.” Final Act. 5 (citing Egri 3 (Field of the Invention (page 1 of the Egri Specification))). The Examiner finds “Figure 2 [of Egri] displays that the intumescent coating, caulk, or tape material [38, 40] is shown flush with the upper web of the header track (12).” *Id.* at 2. Appellants correctly point out that Figure 1 of Egri appears to instead show the upper surface of intumescent strips 38, 40 slightly below top wall 12 and that Egri is silent regarding whether the upper surface of the intumescent strips are actually flush with wall 12. App. Br. 9–10.

Although arrangements depicted in prior-art figures may be relied upon to support a rejection (*In re Seid* 161 F.2d 229, 231 (CCPA 1947)), “it is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue” (*Hockerson-Halberstadt, Inc. v. Avia Group Int’l, Inc.*, 222 F.3d 951, 956 (Fed. Cir. 2000)). Here, Egri’s drawings appear to conflict with one another regarding the relationship between the top of the intumescent strips 38, 40 and the wall 12. Thus, these drawings are not particularly informative as to the relationship in question.

The Examiner reasons that Egri's stated desire to provide a "seal" to prevent the spread of fire, which the Examiner determines also means preventing the spread of smoke, implies that the "seal" should be "interpreted as a seal between the top surface of the *intumescent material* and the room ceiling." Ans. 3 (emphasis added). A critical flaw in the Examiner's reasoning is that Egri attributes the "seal" to the *wall assembly*, and not necessarily any portion thereof. Egri, p. 1, ll. 4-9. So, we do not know, for example, if side walls 14, 16, and top wall 12 sufficiently contribute to the seal, so that the intumescent strips 38, 40 need not contact the ceiling in order to achieve Egri's stated purpose. Appellants and the Examiner both provide speculative reasoning regarding this relationship, but based on the express or implicit disclosures of Egri, we must conclude that the Examiner has not shown by a preponderance of the evidence that Egri teaches the claimed relationship between the intumescent strips and the ceiling. "[L]egal determinations of obviousness, as with such determinations generally, should be based on evidence rather than on mere speculation or conjecture." *Alza Corp. v. Mylan Labs., Inc.*, 464 F.3d 1286, 1290 (Fed. Cir. 2006). "The familiar rule that any doubt which exists should be resolved in favor of the applicant is here applicable." *In re Kirschbraun*, 44 F.2d 675, 677 (CCPA 1930).

DECISION

The Examiner's rejection is reversed.

REVERSED