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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* KENT ROESSLER

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Appeal 2015-000913  
Application 13/955,766  
Technology Center 3600

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Before EDWARD A. BROWN, GEORGE R. HOSKINS, and  
LEE L. STEPINA, *Administrative Patent Judges*.

HOSKINS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Kent Roessler (“Appellant”)<sup>1</sup> appeals under 35 U.S.C. § 134 from the Examiner’s decision rejecting claims 1–5, 7, 8, and 10–15 under 35 U.S.C. § 103(a) as unpatentable over Hamlett (US 2,533,793, iss. Dec. 12, 1950) and Johansson (US 5,002,656, iss. Mar. 26, 1991). The Board has jurisdiction over the appeal under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

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<sup>1</sup> The Appeal Brief identifies Appellant as the real party in interest. Appeal Br. 3.

### CLAIMED SUBJECT MATTER

The independent claims are claims 1 and 10. Claim 1 illustrates the subject matter on appeal, and it recites (with line breaks added):

1. A front end loader attachment attachable to a front end loader that operates on a surface, the attachment comprising a rotatable drum having a longitudinal axis and a mount for mounting the attachment to the front end loader, with the drum having a right circular cylindrical shape comprising a circular base and an opposing circular opening, the drum comprising sidewalls connected to the base and extending to the opening, wherein the sidewalls comprise a plurality of openings sized to prevent passage of materials exceeding a gauge, with the circular opening being the only opening of the drum that allows passage of the materials exceeding the gauge out of the drum, and the drum is rotatable about the longitudinal axis, wherein the drum is mounted to the attachment only at the base and is movable to engage the surface.

Appeal Br. 20 (Claims App.).

### ANALYSIS

*Claims 1–3, 5, 7, 8, 10, 14, and 15*

Appellant argues for the patentability of these claims together as a group. *See* Appeal Br. 6–18. We select claim 1 to decide the appeal as to these claims, with the other claims standing or falling with claim 1.

37 C.F.R. § 41.37(c)(1)(iv).

In rejecting claim 1, the Examiner finds Hamlett discloses rotatable drum 3 having a right circular cylindrical shape, and comprising circular base 12 and an opposing circular opening (at ring 9). Final Act. 2; *see* Hamlett, Fig. 1, 3:16–20. The Examiner finds Hamlett’s drum 3 has

sidewalls 13 comprising a plurality of openings sized to prevent passage of materials exceeding a gauge. Final Act. 2; *see* Hamlett, Fig. 3, 1:35–42, 5:35–53. The Examiner finds Hamlett’s drum 3 is not disclosed to be “mounted via a base at one end to a front end loader.” Final Act. 2.

The Examiner finds Johansson discloses rotatable drum 3 “for separating ground elements from dirt and debris,” by mounting the drum “via a base plate [7], and only at the base plate, at one end to a front end loader.” Final Act. 2; *see* Johansson, Fig. 4, 2:35–51. The Examiner finds large gauge material that enters Johansson’s drum can only exit the drum via a front, circular opening. Final Act. 2. The Examiner determines it would have been obvious “to mount the right circular drum of Hamlett to the front of a front end loader via a base plate to use the drum as a rock separator,” as the application of a known technique to a known device ready for improvement to yield predictable results, thereby “mak[ing] the separating drum of Hamlett more compact and more mobile.” *Id.* at 2–3 (citing *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007)); *see also id.* at 4–5 (expounding on obviousness rationale). In particular, the Examiner finds Hamlett’s rear product delivery gap 20 in right circular cylindrical drum 3, and Hamlett’s augur 4, would no longer be needed in light of Johansson’s teaching of a drum having closed back 7 and open front 8 for emptying of material from the drum. *Id.* at 5. The Examiner similarly finds Hamlett’s conveyor (Fig. 1, elements 5–7) would not be necessary in the modified device, which would advantageously be more compact and mobile without them. *Id.*

Appellant argues Johansson does not allow for, teaches away from, and plainly excludes a right circular cylindrical shape drum, such as

disclosed in Hamlett, because Johansson requires an “angle” or “bend” at its open front end 8. Appeal Br. 9–11, 12; *see* Johansson, Fig. 4 (illustrating angle or bend between separating part 9 (line H) and front part 25 (line U)). Such an angle or bend is necessary in Johansson, according to Appellant, to contain the larger gauge materials within drum 3 as the drum rotates to separate out the smaller gauge material through separating part 9, while the bottom wall of separating part 9 remains parallel to the ground (line H) to increase separation efficiency. Appeal Br. 9–11.

Appellant also argues the Examiner’s proposal to mount Hamlett’s drum 3 on a front end loader “requires a dramatic redesign” of Hamlett’s apparatus. Appeal Br. 12–13, Ex. 3 (Fig. A), Ex. 4 (Fig. B). In particular, according to Appellant, the Examiner’s proposal would require removing the “important aspect” of Hamlett’s suspension mechanism which “is not a throw-away feature to be ignored when considering” Hamlett; removing Hamlett’s cleaning roller 80; removing Hamlett’s front height adjustability mechanism 45, 48; removing Hamlett’s augur 4; and closing up Hamlett’s delivery opening 20 in drum 3. *Id.* at 8, 12–14. Based on these considerations, Appellant further contends the Examiner’s compact mobility rationale for mounting Hamlett’s drum 3 on a front end loader is merely conclusory, and does not explain or provide a rational basis for why one would have redesigned Hamlett as proposed by the Examiner. *Id.* at 13–14.

Appellant also submits an Inventor Declaration,<sup>2</sup> in support of the proposition that the claimed invention “was not predictable and has unexpected results,” and in the alternative, as secondary evidence of non-

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<sup>2</sup> *See* Appeal Br., Ex. 1, Declaration of Kent Roessler (executed Dec. 2, 2013).

obviousness based on unexpected results. Appeal Br. 15–17. The alleged unexpected results include the usefulness of a “single step process” (Decl. ¶ 9a); operability in various field conditions as provided by the “round shape” of the “curved drum” versus a “flat/rectangular shape” (*id.* ¶ 9c); cleaning the rocks as picking takes place “because the drum is spinning and dirt is passing out through the bars” (*id.* ¶ 9d); versatility provided by “the curvature that allows the operat[or] to pick-and-choose the particular spot or item that needs to be ‘picked’” (*id.* ¶ 9e); and elimination of plugging (*id.* ¶ 9f).

The Examiner answers that, when modifying Hamlett’s drum 3 to be mounted on a front end loader, Hamlett’s suspension system would not be needed because “the front end loader of the combination would be able to maintain the desired height/angle of the drum.” Ans. 5. The Examiner further maintains the “comprising” transition in claim 1 leaves the claim open to using Hamlett’s other devices such as cleaning roller 80 and height adjustability mechanism 45, 48. *Id.*

In considering the arguments and evidence presented, including the Inventor Declaration, we sustain the Examiner’s determination that claim 1 would have been obvious over Hamlett and Johansson. Appellant’s arguments and evidence overlook that Hamlett teaches the usefulness of a right circular cylindrical shape drum 3 with rods 13 to dig into the ground, and separate materials found in the ground from the soil in the ground. Hamlett, Fig. 1, 1:2–8, 5:35–53. The Examiner’s determination that it would have been obvious to mount Hamlett’s drum 3 to a front end loader, in light of Johansson’s teachings of mounting a separation drum on a front end loader, to provide a more compact and more mobile separation

apparatus, is supported by rational underpinnings for the proposed modification and by a preponderance of the evidence. Final Act. 2–3, 4–5.

Johansson does not teach away from the Examiner’s modification. Johansson may arguably teach away from modifying its drum 3 to remove the angle to provide a right circular cylindrical shape, but that is not the basis for the Examiner’s rejection. Further, the prior art as a whole—that is, Hamlett and Johansson—teaches that right circular cylindrical separating drums may be used to dig into and separate materials in the ground (Hamlett, Fig. 1), and angled separating drums may be used to separate materials above the ground (Johansson, Figs. 1–6). Thus, a person of ordinary skill in the art would have been motivated to pursue the desirable properties of Hamlett’s right circular cylindrical drum being mounted on a front end loader for digging into the ground, even at the expense of foregoing the benefits of an angled drum disclosed by Johansson for separation of materials above the ground. *See In re Urbanski*, 809 F.3d 1237, 1243–44 (Fed. Cir. 2016).

As to the modifications required to mount Hamlett’s drum 3 on a front end loader, we agree with the Examiner’s reasoning in these regards. That is, it would have been obvious to do away with Hamlett’s delivery opening 20 as no longer needed, based on Johansson’s teaching that separated materials may be emptied from the front opening of the drum, thereby making the drum more mobile. Final Act. 5; *see In re Keller*, 642 F.2d 413, 425 (CCPA 1981) (obviousness test is not whether the features of one reference may be bodily incorporated into the structure of the other reference, but is “what the combined teachings of the references would have suggested to those of ordinary skill in the art”). Similarly, Hamlett’s

complicated suspension mechanism for supporting drum 3 would no longer be needed, because Johansson's front end loader itself would be able to maintain the desired height and angle of the drum. *Ans. 5; In re Keller*, 642 F.2d at 425. Further, claim 1 is open to retaining Hamlett's cleaning roller 80, front height adjustability mechanism 45, 48, and augur 4, if desired. *Ans. 5.*

Finally, the Inventor Declaration alleging unexpected results is not persuasive evidence of non-obviousness. When alleged unexpected results are relied upon, the results must be shown to be unexpected compared with the closest prior art, which in this case is Hamlett. *In re Baxter Travenol Labs.*, 952 F.2d 388, 392 (Fed. Cir. 1991) (citing *In re De Blauwe*, 736 F.2d 699, 795 (Fed. Cir. 1984)). The Inventor Declaration fails to direct us to any meaningful experimental evidence demonstrating that the actual differences between the claimed subject matter (a right circular cylindrical shaped separation drum attachable to a front end loader) and Hamlett (a right circular cylindrical shaped separation drum mounted on a harvesting tractor) give rise to unexpected results.

For the foregoing reasons, we sustain the rejection of claims 1–3, 5, 7, 8, 10, 14, and 15 as unpatentable over Hamlett and Johansson.

#### *Claim 4*

Claim 4 indirectly depends from claim 1, and adds “the drum further comprises an interior flute.” Appeal Br. 20 (Claims App.). Appellant argues simply that “the prior art does not teach or suggest an interior flute.” Appeal Br. 17. This does not constitute a sufficient argument for separate patentability of claim 4. *See* 37 C.F.R. § 41.37(c)(1)(iv) (“A statement which merely points out what a claim recites will not be considered an

argument for separate patentability of the claim.”); *In re Lovin*, 652 F.3d 1349, 1356–57 (Fed. Cir. 2011) (“[W]e hold that the Board reasonably interpreted Rule 41.37 to require 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.”). Thus, we sustain the rejection of claim 4 as unpatentable over Hamlett and Johansson.

*Claim 11*

Claim 11 depends from independent claim 10—which is essentially a method version of claim 1—and adds “maneuvering the front end loader and drum to contact [a] soil with the drum, rotating the drum, and forcing the rotating drum into the soil.” Appeal Br. 21–22 (Claims App.). Appellant traverses the rejection of claim 11 on the bases that “[t]he Johansson bucket cannot be rotated and forced into the soil,” and “[t]he Hamlett device relies on continuous harvesting and feeding and is not adaptable to maneuvering the front end loader and drum” as specified in claim 11. *Id.* at 17.

Appellant’s arguments are not persuasive. As discussed in detail above, the basis for the Examiner’s rejection is the obviousness of mounting Hamlett’s drum 3 on to a front end loader. Thus, whether or not Johansson’s bucket can be rotated and forced into soil is irrelevant to the rejection. Further, the Examiner’s finding that Hamlett’s drum would operate as recited in claim 11, when mounted on a front end loader, is supported by a preponderance of the evidence. *See* Final Act. 4. Thus, we sustain the rejection of claim 11 as unpatentable over Hamlett and Johansson.

*Claims 12 and 13*

Claim 12 depends from claim 11, and adds the claimed method “further compris[es] removing the drum from the soil, lifting the drum, and rotating the drum to allow materials smaller than the gauge to pass out of the plurality of openings.” Appeal Br. 22 (Claims App.). Claim 13 depends from claim 12. *Id.* Thus, when considering the dependency of claims 12 and 13 from claim 11, these claims require *both* “rotating the drum[] and forcing the rotating drum into the soil” (claim 11) *and* “removing the drum from the soil” to perform a separation rotation (claim 12).

Appellant traverses the rejection of claim 12 on the basis that Hamlett and Johansson do not teach or suggest the claimed subject matter. Appeal Br. 17–18. We are persuaded of Examiner error. While we appreciate that Hamlett discloses rotating the drum and forcing the rotating drum into the soil (Hamlett, Fig. 1), and Johansson discloses performing a separation operation with a rotating drum above the ground (Johansson, Figs. 1–6), the Examiner has not provided any reason why a person of ordinary skill in the art would have found it obvious to combine these two actions in one method, as claimed. *See* Final Act. 4. Therefore, we do not sustain the rejection of claims 12 and 13 as unpatentable over Hamlett and Johansson.

DECISION

The Examiner’s decision to reject claims 1–5, 7, 8, and 10–15 is affirmed as to claims 1–5, 7, 8, 10, 11, 14, and 15, and is reversed as to claims 12 and 13.

No time period for taking any subsequent action in connection with this appeal may be extended, under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART