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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GUY DERRIEU and
NATHALIE DELHOM

Appeal 2015-006436
Application 10/541,217¹
Technology Center 1600

Before RICHARD M. LEOVITZ, TAWEN CHANG, and
RYAN H. FLAX, *Administrative Patent Judges*.

LEOVITZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal involves claims directed to an edible chewable object for pets. The Examiner finally rejected the claims as obvious under 35 U.S.C. § 103(a). We have jurisdiction under 35 U.S.C. § 134. The Examiner's decision is reversed.

STATEMENT OF CASE

Claims 1–3, 6–17, and 22–25 stand rejected by the Examiner as follows:

1. Claims 1–3, 6–17, 22, and 23 under 35 U.S.C. § 103(a) as obvious

¹ The real party in interest is VIRBAC. App. Br. 1.

in view of Wang (US 6,379,725 B1, patented Apr. 30, 2002) and Dawson (GB 2,321,383 A, publ. Jul. 29, 1998). Final Rej. 3.

2. Claims 1–3, 6–17, and 22–25 under 35 U.S.C. § 103(a) as obvious in view of Wang and Lawrenson (US D 492,836 S, patented Jul. 13, 2004). Final Rej. 7.

3. Claims 24 and 25 under 35 U.S.C. § 103(a) as obvious in view of Wang, Lawrenson, and Axelrod (US 5,263,436, patented Nov. 23, 1993). Final Rej. 11.

Claim 1, the only independent claim on appeal, is reproduced below:

1. Edible chewable object for pets, this object (1) – being elongated along a longitudinal axis and composed of a chewable, edible and digestive matrix, characterised in that the shape of the object (1) is that of a polygon in transverse cross section formed by at least two and no more than twelve dihedrons (d_1, d_2) extending between first and second ends of said object, each said dihedron being formed by two sides oriented to intersect in a substantially straight line parallel to the longitudinal axis and at a dihedral angle α of between 0.5° and 70° , said two sides forming a longitudinal edge (a_1, a_2) that extends approximately along the entire length of the object between said first and second ends of the object, the entire length of the object measured in the direction of the longitudinal axis being greater than its width measured in a direction transverse to the longitudinal axis, said sides of each dihedron being positioned so that said dihedral angles project away from a central portion of said object and the longitudinal edges form peripheral corners of the object, and in that the composition of the matrix contains at least one active constituent, being a chemical or biological agent with either a local or systemic therapeutic, remedial or preventive activity, or an anti-tartar activity acting against caries, dental plaque, calcareous deposits, or an activity reinforcing the dental structure, and in that the content of each active constituent in

the composition of the matrix is between 0.01 and 5% by weight of the matrix.

CLAIM INTERPRETATION

The claimed invention is directed to an edible object for pets in the shape of a polygon comprising “a chemical or biological agent with either a local or systemic therapeutic, remedial or preventive activity, or an anti-tartar activity acting against caries, dental plaque, calcareous deposits, or an activity reinforcing the dental structure.” (*Id.*) According to Appellants, “[t]he purpose of the claimed object is not merely to be chewed, but also to reach all parts of the oral cavity as it is chewed.” Appeal Br. 1. This purpose is achieved, according to Appellants, by an object with the claimed features. *Id.* at 2. Specifically, Appellants describe the claimed object as “elongated and configured to form dihedrons, two to twelve in number that extend along the length of the object.” *Id.* at 1. Appellants state that these features “provide an object whose shape ensures that the object will treat all parts of the oral cavity of the pet while chewing.” *Id.* at 2. Appellants further state that “it is important that the edges of the dihedrons will penetrate the spaces between the pet’s teeth to treat them with therapeutic, remedial, or preventive activity.” *Id.*

Claim 1 recites the following features:

- “the shape of the object is that of a polygon in transverse cross section formed by at least two and no more than twelve dihedrons (d_1 , d_2) extending between first and second ends of said object”;
- “each said dihedron being formed by two sides oriented to intersect in a substantially straight line parallel to the longitudinal axis and at a dihedral angle α of between 0.5° and 70° ”; and

- “said two sides forming a longitudinal edge (a1, a2) that extends approximately along the entire length of the object between said first and second ends of the object

Because claim 1 references d_1 , d_2 , a_1 , a_2 , and α , we look to the drawings in the Specification to understand how these features of the claimed invention are configured with respect to each other. There are thirteen illustrative embodiments. Fig. 1 is reproduced below:

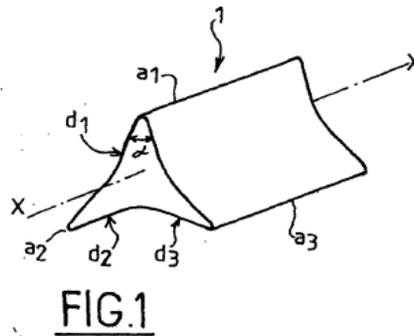


Fig. 1 is illustrative of the configuration of an object within the scope of claim 1. Fig. 1 shows an elongated object with a polygon shape (as required by claim 1) having an X-labeled longitudinal axis. The object has three dihedrons, d_1 , d_2 , and d_3 . Dihedron d_1 has an angle α , which is formed by two sides that “intersect in a substantially straight line [labeled as “ a_1 ”] parallel to the longitudinal axis.” The object has three longitudinal edges, a_1 , a_2 , and a_3 , each of which are required by the claim to be “a substantially straight line parallel to the longitudinal axis [labeled X in Fig. 1].” We interpret the claims as defining an object with these features, as configured in the drawings.

The edible chewable object is required by the claim to be “composed of a chewable, edible and digestive matrix” which comprises “a chemical or biological agent.” The “matrix” is described in the Specification as the composition which forms the object. Spec. 14: 16–19; 18:5–13; 22: 17–26. The Specification defines the matrix as one which “is sufficiently hard so that it is not crushed or fragmented when the pet begins to chew the object, and secondly to obtain progressive softening of the edges such that the abrasive effect on the teeth is sufficient.”² *Id.* at 12; 24–28. The claim requires that “each active constituent in the composition of the matrix is between 0.01 and 5% by weight of the matrix.”

1. OBVIOUSNESS IN VIEW OF WANG AND DAWSON

The Examiner found that Wang describes an edible and chewable toy made from a composition (*i.e.*, the claimed “matrix”) comprising “a chemical or biological agent” as required by rejected claim 1. Final Rej. 3. The Examiner acknowledged that Wang’s pet toy is not “in the shape of a polygon” with dihedrons formed by substantially parallel lines. *Id.* at 3–4. However, the Examiner found that Dawson “discloses an edible toy or

² During patent examination:

[T]he PTO applies to the verbiage of the proposed claims the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant’s specification.

In re Morris, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

plaything for an animal comprising at least one edible article at least partially encased in ice.” *Id.* at 4. The Examiner found that Dawson shows embodiments where the “ice casing” form a trapezoid with dihedral angles as required by claim 1. *Id.* at 4 (*see* Figs. 3 and 4 of Dawson). The Examiner also found that Dawson teaches that the ice can contain medicaments for the animal. *Id.* The Examiner found that Dawson differs from the claimed subject matter “in not disclosing the amount of medicaments in the edible article and/or the ice.” *Id.* at 5. However, the Examiner determined it would have been obvious to one of ordinary skill in the art “to have made the edible chewable pet toy of Wang et al. into the shape of the trapezoid embodiment disclosed by Dawson motivated by the desire to use a suitable shape for an edible chewable toy that contains medicaments/additives.” *Id.*

We begin our discussion with Dawson. Dawson describes an edible toy for an animal that “comprises at least one edible article at least partially encased in ice.” Dawson, Abstract. Figures 2–4 of Dawson, as found by the Examiner, show the ice casing formed into a trapezoidal shape. The ice has a shape, which comprises dihedral angles formed by substantially straight lines parallel to the longitudinal axis of the toy. However, we agree with Appellants that “ice” is not a “matrix” as that term is defined in the ’217 Application. See *Claim Interpretation*, above. While we must be careful not to import limitations from a specification into the claims, the claims must be read in light of the specification. *Superguide Corp. v. DirecTV Enterprises, Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004). Here, the Specification explains that the matrix must be one which “is sufficiently hard so that it is not crushed or fragmented when the pet begins to chew the object, and secondly to obtain progressive softening of the edges such that

the abrasive effect on the teeth is sufficient.” Spec. 12: 24–28. The Examiner did not provide adequate evidence that the ice casing of Dawson meets this definition.

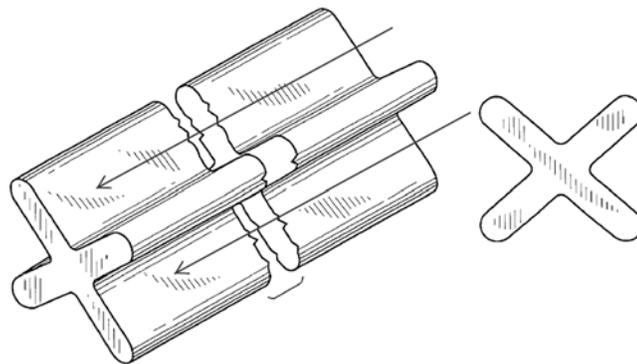
Next, we turn to Wang. Wang describes “edible chewable pet toys, such as artificial dog bones.” Wang, Abstract. Wang discloses that chewable toys “are preferably made from protein-based thermoplastic composition containing plant and animal derived proteinic material and various additive and nutrient ingredients.” *Id.* at col. 1, l. 65 to col. 2, l. 2. The Examiner did not adequately explain why the skilled worker would have sought to shape Wang’s chewable toy into the trapezoidal shape of the ice-casing of Dawson’s animal toy. The ice is a casing for an edible or chewable article. Dawson 1: 15–26. The edible or chewable article in Dawson corresponds to Wang’s chewable pet toy. The Examiner did not establish why the skilled worker would have had reason to modify Wang’s pet chewable toy into the shape of the ice-casing utilized by Dawson when it is the article inside the ice of Dawson which is the same type of chewable toy described by Wang. The Examiner finds the skilled worker would be “motivated by the desire to use a suitable shape for an edible chewable toy that contains medicaments/additives.” Ans. 4. However, we find the Examiner did not meet the burden of showing that the skilled worker would have been motivated to form a chewable toy into the shape of Dawson’s ice-casing which is used to encase a chewable toy. Dawson’s ice is not a chewable toy. The rejection of claim 1 is reversed, and also of dependent claims 2, 3, 6–17, 22, and 23.

2. OBVIOUSNESS IN VIEW OF WANG AND LAWRENSON

The Examiner made the same findings with respect to Wang as in Rejection 1. Final Rej. 7. The Examiner acknowledged that Wang does not describe the claimed shape having a dihedral of “angle α of between 0.5° and 70° ” formed “by two sides oriented to intersect in a substantially straight line parallel to the longitudinal axis.” The Examiner found that this shape is described by Lawrenson, a design patent which depicts an X-shaped chewable toy for a pet. *Id.* at 8. The Examiner determined that it would have been obvious to one of ordinary skill in the art to have shaped Wang’s chewable toy “into the X-shaped animal chew disclosed by Lawrenson motivated by the desire to use a suitable shape for a chewable pet toy.” *Id.*

We agree with Appellants that the Examiner’s determination of obviousness is founded on erroneous findings of fact.

Lawrenson is a design patent. The design drawing is reproduced below with arrows added by annotation to show the orientation of the two sides found by the Examiner to form the claimed “dihedron being formed by two sides oriented to intersect in a substantially straight line parallel to the longitudinal axis,” and at a dihedral angle α of between 0.5° and 70° .”



As shown in the drawing, Lawrenson's X-shaped animal chew comprises four arms, where each arm is formed by two sides projecting upwards. The sides – indicated by the arrows – do not “*intersect* in a substantially straight line parallel to the longitudinal axis and at a dihedral angle α of between 0.5° and 70° ,” as required by claim 1. Rather, the sides of the dihedral angles formed by the component parts of the Lawrenson object are parallel to each other and do not form an angle α . Moreover, they do not intersect at what can be discerned as any angle whatsoever, but are linked by an arcing, curved surface. We cannot find a basis in the drawing for the Examiner's finding that the parallel sides of each arm are “oriented to intersect in a substantially straight line parallel to the longitudinal axis and at a dihedral angle α of between 0.5° and 70° .”

The rejection of claim 1 is reversed, and also of dependent claims 2, 3, 6–17, and 22–25.

3. OBVIOUSNESS IN VIEW OF WANG, DAWSON, AND AXELROD

Axelrod is further cited by the Examiner for the specific limitations recited in dependent claims 24 and 25. Final Rej. 11. The Examiner did not explain how the sharp conical spikes distributed over the surface of a chew toy device for a dog as disclosed in Axelrod would suggested the claimed polygon-shaped edible chewable object comprising a dihedron being formed by two sides oriented to intersect in a substantially straight line parallel to the longitudinal axis and at a dihedral angle α of between 0.5° and 70° ”. The rejection of claims 24 and 25 is reversed.

SUMMARY

Appeal 2015-006436
Application 10/541,217

The rejection of claims 1–3, 6–17, 22, and 23 under 35 U.S.C. § 103(a) over Wang and Dawson is reversed.

The rejection of claims 1–3, 6–17, and 22–25 under 35 U.S.C. § 103(a) over Wang and Lawrenson is reversed.

The rejection of claims 24 and 25 under 35 U.S.C. § 103(a) over Wang, Lawrenson, and Axelrod is reversed.

REVERSED