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Row 2: 23122, 7590, 02/01/2019, RATNERPRESTIA, 2200 Renaissance Blvd, Suite 350, King of Prussia, PA 19406, EXAMINER HANDVILLE, BRIAN, ART UNIT 1783, PAPER NUMBER, NOTIFICATION DATE 02/01/2019, DELIVERY MODE ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MOHAMMED SANA OBAR,
JÜRGEN BEZLER, and HERMANN LUTZ

Appeal 2017-003165
Application 13/807,528¹
Technology Center 1700

Before JEFFREY T. SMITH, CHRISTOPHER C. KENNEDY, and
MONTÉ T. SQUIRE, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134(a) from the final rejection of claims 1–10, 12, and 13.² We have jurisdiction under 35 U.S.C. § 6(b).

The claimed invention relates to coating systems comprising three layers based on mineral binders, fillers, polymers wherein the middle layer contains additionally light weight aggregates as well as processes for the

¹ According to Appellants, the real party in interest is Wacker Chemie AG. *See App. Br. 2.*

² The Examiner has indicated that the subject matter of claim 11 is allowable. Final Act. 1.

preparation of such coating systems. (Spec 2). Independent claim 1 is representative of the subject matter on appeal and reproduced below:

1. A coating system comprising an underlying surface including at least

one of concrete, screed, rock, and boulders, a) a base layer on top of the underlying surface, b) a middle layer on top of the layer a), and c) a top layer on top of layer b),

wherein each of the layers a), b) and c) contains one or more mineral binders selected from the group consisting of cement, gypsum, waterglass and lime hydrate;

one or more fillers selected from the group consisting of carbonates, silicates, quartz flour, quartz sand, highly disperse silica, feldspar, heavy spar, light spar, fillers having a pozzolanic reaction, rubber shreds and fibrous fillers;

one or more polymers of one or more ethylenically unsaturated

monomers selected from the group consisting of vinyl esters of carboxylic acids having from 1 to 15 carbon atoms, methacrylic esters or acrylic esters of carboxylic acids with unbranched or branched alcohols having from 1 to 15 carbon atoms, olefins, dienes, vinylaromatics and vinyl halides; and

optional further additives;

wherein the middle layer additionally contains one or more light weight aggregates selected from the group consisting of vermiculite, perlite, poraver glass beads, hollow glass spheres, pumice, expanded clays, shales and sintered pulverized fuel ash, and

wherein layers a), b), and c) are configured to set sequentially from bottom to top and the coating system is configured to set in 10 days or less after the application of the layer a) to the underlying surface.

Claims Appendix to App. Br.

Appellants (*see* App. Br., *generally*) request review of the rejection of claims 1–10, 12, and 13 as being unpatentable over the combination of Haberle (US 2003/0088045 A1), in view of Weitzel (US 2010/0041796 A1) and Bellamy (US 2010/0143696 A1). The complete statement of the rejection on appeal appears in the Final Office Action. (Final Act. 2–11).

OPINION³

After consideration of Appellants' arguments and evidence and the Examiner's position in the Final Office Action and Answer, we REVERSE the appealed prior art rejection. Our reasons follow.

The Examiner finds Haberle discloses a three-layer coating system comprising a first cover layer (base layer), a second cover layer (middle layer) on top of the first cover layer, and a sealing (top layer) on top of the second cover layer, wherein the layers are set sequentially from bottom to top. (Final Act. 3). The Examiner finds Haberle does not teach the emulsion polymers comprising one or more protective colloid stabilized polymer of one or more ethylenically unsaturated monomers as required by the claimed invention. The Examiner relies on Weitzel to address this difference. The Examiner finds Haberle does not teach the middle layer additionally containing one or more light weight aggregates as required by the claimed invention. The Examiner finds Bellamy describes the use of particles made from one or more of pumice, expanded glass, perlite, vermiculite,

³ Our discussion applies to both independent claims 1 and 12.

polystyrene, stabilized foam and plastic fibers provides a cementitious body with improved thermal and acoustic insulating properties. The Examiner relies upon this motivation to modify the base, middle, and top layers from Haberle with the particles disclosed by Bellamy. (Final Act. 5; Bellamy ¶ 57). The Examiner concludes it would have been obvious to modify each of Haberle’s layers with the relative thicknesses where the middle contains light weight aggregates of Bellamy to improve thermal and acoustic insulating properties of the coating system. (Final Act. 6–7).

Appellants argue a person of ordinary skill in the art would not have been motivated to modify the multi-layer system of Haberle because Bellamy teaches compositions that are intended to form a cementitious body in single pour systems, not multi-layered systems. (App. Br. 3–5).

During examination, the Examiner bears the initial burden of establishing a prima facie case of obviousness. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). “Rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR Int’l v. Teleflex, Inc.*, 550 U.S. 398, 418 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)); *see also*, *Ball Aerosol and Specialty Container, Inc. v. Ltd. Brands, Inc.*, 555 F.3d 984, 993 (Fed. Cir. 2009) (“[T]he analysis that ‘should be made explicit’ refers not to the teachings in the prior art of a motivation to combine, but to the court’s analysis.”).

Haberle is directed to aqueous polyurethane dispersions in formulations for crack-sealing coating systems. (Haberle ¶ 1). Haberle discloses the crack-sealing formulations have a variety of utilities such as

coatings for floors of parking areas, bridge crown ceilings, balcony coatings and flat roof coatings. (Haberle ¶¶ 185–192). Haberle discloses the inventive crack-sealing formulations exhibited good tensile strength, elongation at tensile strength, elongated in at break that were at least equal to, in general even clearly better than in conventional isocyanate-containing systems. (Haberle ¶ 262). Bellamy teaches stratified cementitious body formed in a single pour from a cementitious slurry comprising a cementitious binder which have been poured into a cast of mould. (Bellamy ¶¶ 7–8, 51). Bellamy teaches stratified cementitious body can comprise an insulating layer having a less dense aggregate material that provides improved thermal and acoustic insulating properties. (Bellamy ¶ 54). The Examiner contends it would have been obvious to modify Haberle to incorporate the less dense aggregate described by Bellamy to obtain improved thermal and acoustic insulating properties. (Final Act. 6–7). However, the Examiner has failed to provide a reason supported by evidence why this arrangement would have been obvious. The Examiner has not adequately explained why a person of ordinary skill in the art would have sought to provide thermal and acoustic insulation to crack sealing formulations.

Since we reverse because the Examiner has not established that the relied-upon disclosures are sufficient to support obviousness, we need not reach the issue of the sufficiency of the evidence of unexpected results presented by Appellants. *Cf. In re Geiger*, 815 F.2d 686, 688 (Fed. Cir. 1987).

For the foregoing reasons, we determine that the Examiner’s conclusion of obviousness is not supported by facts. “Where the legal

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conclusion [of obviousness] is not supported by facts it cannot stand.” *In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967). Accordingly, we cannot sustain the Examiner’s decision to reject claims 1–10, 12, and 13.

DECISION

The rejection under 35 U.S.C. §103(a) of claims 1–10, 12, and 13 is reversed.

REVERSED