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BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte PAUL ALPER, JOHN HINES,
DEAN PHILIP LIMBERT, and
BRYAN GEORGE FRANK ANDERSON

Appeal 2018-002452
Application 13/926,864
Technology Center 2400

Before JEREMY J. CURCURI, JUSTIN BUSCH, and
PHILLIP A. BENNETT, *Administrative Patent Judges*.

CURCURI, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1–15. Final Act. 1. We have jurisdiction under 35 U.S.C. § 6(b).

Claims 1–3, 7, 8, 11, 12, 14, and 15 are rejected under 35 U.S.C. § 102 as anticipated by Dolan (US 2010/0173581 A1; July 8, 2010). Final Act. 3–8.

Claims 4, 10, and 13 are rejected under 35 U.S.C. § 103 as obvious over Dolan and Marley (US 6,062,421; May 16, 2000). Final Act. 9–11.

Claims 5 and 9 are rejected under 35 U.S.C. § 103 as obvious over Dolan and LeBlond (US 2010/0153374 A1; June 17, 2010). Final Act. 11–12.

Claim 6 is rejected under 35 U.S.C. § 103 as obvious over Dolan and Patterson (US 2007/0083385 A1; Apr. 12, 2007). Final Act. 12–13.

We reverse.

STATEMENT OF THE CASE

Appellants’ invention relates to “determining the compliance by workers with best practices for hand product use.” Spec. ¶ 2. Claims 1 and 11 are illustrative and reproduced below, with key disputed limitations emphasized:

1. A method for predetermining the benchmark number of hand product uses for a target facility comprising:
 - identifying best practice recommendations for use of a hand product within a studied facility based on workers’ activity within the studied facility;
 - determining a study benchmark number of hand product uses for compliance in the studied facility during an observation period with the identified best practice recommendations;
 - identifying studied facility characteristics of the studied facility during the observation period;
 - identifying study relationships between studied facility characteristics and the study benchmark number of hand product uses;
 - determining target facility characteristics for the target facility; and
 - determining a benchmark number of hand product uses for the target facility for compliance with the identified best practice recommendations based on study relationships and target facility characteristics.*

11. A method for monitoring compliance with best practice recommendations for use of a hand product within a target facility comprising:

identifying best practice recommendations for use of a hand product that are based on workers' activity within a target facility;

monitoring occurrences within the target facility for which use of the hand product is recommended by the identified best practice recommendations;

determining a benchmark use of the hand product based at least in part on the monitored occurrences;

monitoring use of the hand product in the target facility;
and

comparing the use of the hand product in the target facility to the benchmark use in the target facility.

PRINCIPLES OF LAW

We review the appealed rejections for error based upon the issues identified by Appellants, and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential).

ANALYSIS

THE ANTICIPATION REJECTION OF CLAIMS 1–3, 7, 8, 11, 12, 14, AND 15 BY
DOLAN

Claim 1- Contentions

The Examiner finds Dolan describes all limitations of claim 1. Final Act. 3–5. In particular, the Examiner finds Dolan’s locating and positioning hand hygiene dispensers for optimized usage teaches “determining a benchmark number of hand product uses for the target facility for compliance with the identified best practice recommendations based on study relationships and target facility characteristics” as recited in claim 1. Final Act. 4–5 (citing Dolan ¶ 8); *see also* Ans. 15 (citing Dolan ¶ 10).

Among other arguments, Appellants present the following principal argument:

As set out above, claim 1 recites determining relationships between facility characteristics and a benchmark number of hand product uses in one facility, a studied facility, and, in the sixth step of claim 1, using those relationships to determine a benchmark number of hand product uses in another facility, a target facility. The Final Action asserts that that step is disclosed by Dolan at paragraph 8, stating “e.g. hand hygiene dispensers are located and positioned in an environment in manners that are conducive to and consistent with optimize usage of such dispensers. Final Action at 6. As set out above, Dolan does not disclose determining a benchmark at all. But further and specific to this claim step, Dolan does not disclose use of any relationship determined in one facility for hand product use in a different facility. Dolan does not anticipate claim 1 for failure to disclose use of a relationship determined in one facility to identify a benchmark for a different facility.

App. Br. 16.

Claim 1- Our Review

Appellants' arguments persuade us that the Examiner erred in finding Dolan teaches the key disputed limitation recited in claim 1.

Dolan discloses “[y]et another aspect of the invention is the provision of a method and apparatus for analysis and improvement of hand hygiene practices wherein hand hygiene dispensers are located and positioned in an environment in manners that are conducive to and consistent with optimized usage of such dispensers.” Dolan ¶ 8.

Dolan further discloses “[s]till a further aspect of the invention is the provision of a method and apparatus for analysis and improvement of hand hygiene practices in which the physical positioning of hand hygiene dispensers is determined by data correlating the usage of hand hygiene dispensers with their position and location.” Dolan ¶ 10.

Thus, according to Dolan, there is a correlation between usage of dispensers and location/position of dispensers. Dolan ¶ 10. Further, according to Dolan, dispensers are located/positioned to optimize usage. Dolan ¶ 8.

Turning to claim 1, claim 1 requires “a studied facility.” Claim 1 further requires “a target facility.” Thus, the language of claim 1 requires two different facilities. Appellants' Specification also supports this interpretation of the language of claim 1. *See Spec.* ¶ 47 (emphases added) (“Benchmark relationships are determined between the benchmarks determined by observation and characteristics and activity of *the facility*. Based on these benchmark relationships, benchmarks may be predetermined for *other facilities* in which activities occur for which the guidelines apply based on the characteristics and activity of the *other facility* for which benchmark relationships have been determined.”).

The key disputed limitation of claim 1 requires “a benchmark number... *for the target facility...* based on *study relationships* [between *studied facility* characteristics and the study benchmark number of hand product uses for compliance in the *studied facility*] and *target facility* characteristics.”

We find Dolan’s single facility does not teach a studied facility and a target facility as recited in claim 1, and in particular, does not teach the key disputed limitation of claim 1 which requires “a benchmark number... *for the target facility...* based on *study relationships* [between *studied facility* characteristics and the study benchmark number of hand product uses for compliance in the *studied facility*] and *target facility* characteristics.”

We, therefore, do not sustain the Examiner’s rejection of claim 1.

We also do not sustain the Examiner’s rejection of claims 2, 3, 7, and 8, which depend from claim 1.

Claim 11- Contentions

The Examiner finds Dolan describes all limitations of claim 11. Final Act. 6–7. In particular, the Examiner finds Dolan’s disclosure of correlation between usage of dispensers and location/position of dispensers teaches “comparing the use of the hand product in the target facility to the benchmark use in the target facility” as recited in claim 11. Final Act. 7 (citing Dolan Abstract); *see also* Ans. 13 (citing Dolan ¶¶ 8–12).

Among other arguments, Appellants present the following principal argument:

The correlation described by Dolan’s Abstract, and elsewhere (e.g. ¶¶ 34 – 38), is between use of the dispenser and dispenser characteristics including dispenser position, location, and orientation. Dolan does not disclose a benchmark at all, but further and specific to this claim step, Dolan does not disclose

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comparing dispenser use to a benchmark or any other desired use. Dolan also does not anticipate claim 11 for failure to disclose comparing dispenser use of [*sic*] a benchmark.

App. Br. 17.

Claim 11- Our Review

Appellants' arguments persuade us that the Examiner erred in finding Dolan teaches the key disputed limitation recited in claim 11.

According to Dolan, there is a correlation between usage of dispensers and location/position of dispensers. Dolan ¶ 10. Further, according to Dolan, dispensers are located/positioned to optimize usage. Dolan ¶ 8.

The key disputed limitation of claim 11 requires “comparing the use of the hand product in the target facility to the benchmark use in the target facility.”

Dolan discloses monitoring hand product use. *See* Dolan ¶ 36 (“monitoring may take place and continual data may be obtained, assessed and quantified in order to continually improve upon the placement of dispensers in order to facilitate their use”).

However, we find Dolan does not teach *comparing* the data obtained from the monitoring *to a benchmark* as required by claim 11. Instead, Dolan teaches that use is correlated to dispenser location/position. Such correlation involves no benchmark and, therefore, is not the same thing as the claimed “comparing” limitation.

We, therefore, do not sustain the Examiner's rejection of claim 11.

We also do not sustain the Examiner's rejection of claims 12, 14, and 15.

THE REMAINING REJECTIONS

The Examiner does not find that any of the additional references cure the deficiencies of Dolan discussed above.

We, therefore, do not sustain:

the Examiner's rejection of claims 4, 10, and 13 as obvious over Dolan and Marley;

the Examiner's rejection of claims 5 and 9 as obvious over Dolan and LeBlond;

the Examiner's rejection of claim 6 as obvious over Dolan and Patterson.

DECISION

The Examiner's decision rejecting claims 1–15 is reversed.¹

REVERSED

¹ That we do not sustain the Examiner's rejection of claims 1 and 11 should not be viewed as an indication that the claims are patentable. Rather, our decision is based only on the Examiner's improper reliance on Dolan. The Patent Trial and Appeal Board is a review body, rather than a place of initial examination. Therefore, we leave to the Examiner to determine whether claims 1 and 11 are ineligible as directed to merely a mental process without adding significantly more. *See* 35 U.S.C. § 101. We leave it to the Examiner to ascertain the appropriateness of any further rejections, including under 35 U.S.C. § 101. Our decision not to enter a new ground of rejection should not be considered an indication regarding the appropriateness of further rejection or allowance of the non-rejected claims. *See* MPEP § 1213.03.