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15/009,117	01/28/2016	Murali K. AKKAPEDDI	184569-3335	2752

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EXAMINER

JOHNSTON, BRIEANN R

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PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MURALI K. AKKAPEDDI and BRIAN A. LYNCH

Appeal 2018-005856
Application 15/009,117
Technology Center 1700

Before KAREN M. HASTINGS, MICHAEL P. COLAIANNI, and
GEORGE C. BEST, *Administrative Patent Judges*.

HASTINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant¹ appeals under 35 U.S.C. § 134 from the Examiner's final rejection under 35 U.S.C. § 103(a) of claims 1, 2, 4–22, and 24–28 as unpatentable over at least the combined prior art of Cyr (US 6,455,620 B1; iss. Sept. 24, 2002), and Stewart (US 2006/0128861 A1; publ. June 15, 2006).^{2, 3}

¹ Appellant is the Applicant, Graham Packaging Company, L.P., which is also stated to be the real party in interest (Appeal Br. 1).

² The Examiner designated the rejection as a new ground in the Answer to add additional reasoning for the rejection (Ans. 7, 8).

³ The Examiner added Studholme (US 2006/0211829 A1; publ. Sept. 21, 2006) to the rejection of claims 13 and 14 (Final Action 4, 5). We consider

We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We affirm.

Independent claim 1 is illustrative of the subject matter on appeal:

1. A wall for a package comprising at least one layer, the layer comprising a composition, the composition comprising:
 - a) a polyester base polymer;
 - b) from 0.3 to 0.7 wt.% of at least one polyether polyol;
 - c) at least one chain extending agent; and
 - d) at least one transition metal in a positive oxidation state.

Independent claim 17 is directed to a wall similar to that of claim 1.

ANALYSIS

Appellant presents arguments directed only to the claims as a group (Appeal Br. 4–7; Reply Br. 2–7). We, therefore, select claim 1 as representative and decide the rejection of all the claims on the basis of claim 1 alone. 37 C.F.R. § 41.37(c)(1)(iv).

We review the appealed rejection for error based upon the issues identified by Appellant and in light of the arguments, and evidence produced to support those arguments. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential) (cited with approval in *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (“[I]t has long been the Board’s practice to require an applicant to identify the alleged error in the examiner’s rejections.”)).

We sustain the Examiner’s rejections for essentially those reasons expressed in the Answer, including the Response to Argument section, and we add the following primarily for emphasis. We determine that, after

this as a rejection based on *Cyr, Stewart and Studholme*, even though the Examiner did not explicitly list *Stewart*. A discussion of this reference is not needed for disposition of this appeal.

consideration of all of the evidence in this appeal, including the Specification examples summarized in Table 1, that the evidence tending to establish the obviousness of the claimed subject matter outweighs any evidence of record that may tend to indicate the non-obviousness thereof.

“A recognition in the prior art that a property is affected by the variable is sufficient to find the variable result-effective.” *In re Applied Materials, Inc.*, 692 F.3d 1289, 1297 (Fed. Cir. 2012). It is well settled that it would have been obvious for an artisan with ordinary skill to develop workable or even optimum ranges for result-effective parameters. *In re Boesch*, 617 F.2d 272, 276 (CCPA 1980); *In re Woodruff*, 919 F.2d 1575, 1577–78 (Fed. Cir. 1990) (where the difference between the claimed invention and the prior art is some range, the applicant must show that the particular range is critical, generally by showing that the claimed range achieves unexpected results relative to the prior art range). *See In re Peterson*, 315 F.3d 1325, 1329 (Fed. Cir. 2003) (“In cases involving overlapping ranges, we and our predecessor court have consistently held that even a slight overlap in range establishes a *prima facie* case of obviousness.”).

Appellant has not shown reversible error in the Examiner’s determination that one of ordinary skill in the art, using no more than ordinary creativity, would have used an amount of “at least one” poly(alkylene) glycol as recited in claim 1 (or 17) to be 0.7 wt. % in the wall packaging composition of Cyr based on the disclosure of Cyr that a preferred amount was “at least about” 1 wt. % and because one of ordinary skill in the art would have appreciated that the amount used was a known result effective variable (Cyr col. 3, ll. 38–42, *also* col. 1, ll. 15–55; Ans.

7–12; Appeal Br., Reply Br. *generally*).⁴ *Cf. In re Ayers*, 154 F.2d 182, 185 (CCPA 1946) (Court found at least about 10% anticipated by about 8% because it permitted “some tolerance and the use of the words ‘at least’ before ‘about’ in the claim” was not viewed as a modification critical in character).

Appellant also states that the amount claimed is critical in combination with a chain extender to maintain a final blend IV (intrinsic viscosity) “of 0.72 to 0.835” for bottle strength and integrity (e.g., Reply Br. 7). However, the evidence depicted in Table 1 falls short of establishing unexpected results. It is well established that the burden of showing unexpected results (or criticality) rests on the person who asserts them by establishing that the difference between the claimed invention and the closest prior art was unexpectedly different. *See In re Klosak*, 455 F.2d 1077, 1080 (CCPA 1972). Further, the showing of unexpected results (or criticality) must be commensurate in scope with the claims. *See In re Peterson*, 315 F.3d at 1330–31.

Appellant has not shown reversible error in the Examiner’s findings that the Specification examples do not even use 0.7 wt. % of polyether polyol, and are not commensurate in scope with the breadth of the claims (Final Action 8, 9). Indeed, the Specification describes that it is the use of a chain extender that “beneficially increases the intrinsic viscosity” (Spec. ¶ 94). The Specification also does not ascribe any criticality to the use of no more than 0.7 wt % polyether polyol (Spec. ¶ 33 (describing preferred

⁴ Notably, claims 1 and 17 also permit more than one polyether polyol to be used, such that the total amount of polyether polyols could indeed be greater than 0.7 wt. %, and/or also permit use of other oxygen scavenging agents.

amounts include as much as about 4 weight %)). Claim 1 allows any polyester base polymer in any amount, any polyether polyol, any chain extender in any amount, and any transition metal in a positive oxidation state in any amount. Further, the claims are open-ended and permit other components. Therefore, the Specification examples summarized in Table 1 are not persuasive of the criticality of the use of 0.7% of “at least one” polyether polyol.

Thus, Appellant has not persuasively argued that the facts and reasons relied on by the Examiner are insufficient to establish a prima facie case of obviousness. In light of these circumstances, the preponderance of the evidence supports the Examiner’s rejections. Accordingly, we sustain the rejections of the claims on appeal.

DECISION

The decision of the Examiner is affirmed.

DECISION SUMMARY

Claims Rejected	Basis	Affirmed	Reversed
1, 2, 4–12, 15–22, and 24–28	§ 103 Cyr and Steward	1, 2, 4–12, 15–22, and 24–28	
13 and 14	§ 103 Cyr, Steward, and Studholme	13 and 14	
Outcome		1, 2, 4–22, and 24–28	

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

AFFIRMED