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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* N. ERIC KNUDSEN

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Appeal 2018-007896  
Application 12/727,063  
Technology Center 1700

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Before ADRIENE LEPIANE HANLON, JEFFREY B. ROBERTSON, and  
MICHAEL G. McMANUS, *Administrative Patent Judges*.

HANLON, *Administrative Patent Judge*.

DECISION ON APPEAL

A. STATEMENT OF THE CASE

The Appellant<sup>1</sup> filed an appeal under 35 U.S.C. § 134(a) from an Examiner's decision rejecting claims 30–47. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

The claims on appeal are directed to a method of preparing a foundation for a fence or a rail comprising forming first and second post sleeves in first and second footings of concrete, respectively, in respective post holes in the ground.

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<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as N. Eric Knudsen. Appeal Brief dated December 19, 2017 (“App. Br.”), at 1.

Each of the post sleeves is formed by (1) holding a post sleeve core in the respective post hole; (2) depositing concrete into the respective post hole to contact the exterior surface of the post sleeve core; (3) allowing the concrete to at least partially harden; and (4) removing the post sleeve core from the at least partially hardened concrete to expose a post receiving cavity. Each post sleeve core includes an exterior surface sized and shaped to define at least a portion of the post receiving cavity which insertably receives and supports a post. App. Br. 16.

Representative claim 30 is reproduced below from the Claims Appendix to the Appeal Brief. The limitations at issue are italicized.

30. A method of preparing a foundation for a fence or a rail, the method comprising:

*forming a first post sleeve in a first footing of concrete within a first post hole in the ground; and*

*forming a second post sleeve in a second footing of concrete within a second post hole in the ground;*

wherein forming each of the first and second post sleeves includes:

holding a post sleeve core in the respective post hole at a selected position, the post sleeve core including an exterior surface sized and shaped to define at least a portion of a post receiving cavity in the respective footing of concrete to insertably receive and support a post,

depositing the concrete of the respective footing into the respective post hole around the post sleeve core to contact the exterior surface of the post sleeve core,

allowing the concrete of the respective footing to at least partially harden while the post sleeve core is held in position within the respective post hole with the exterior surface of the post sleeve core in contact with the concrete, and

removing the post sleeve core from the at least partially hardened concrete of the respective footing to expose the post

receiving cavity to receive and support the post, the post receiving cavity having been formed in the at least partially hardened concrete of the respective footing by the exterior surface of the post sleeve core such that the post receiving cavity has a shape that corresponds to the exterior surface of the post sleeve core.

App. Br. 16.

The claims on appeal stand rejected as follows:

- (1) claims 30, 39, 40, 43, 44, and 46 under 35 U.S.C. § 103(a) as unpatentable over Van Rijn<sup>2</sup> in view of Hodges;<sup>3</sup>
- (2) claim 31 under 35 U.S.C. § 103(a) as unpatentable over Van Rijn in view of Hodges and further in view of Hanford;<sup>4</sup>
- (3) claims 32 and 33 under 35 U.S.C. § 103(a) as unpatentable over Van Rijn in view of Hodges and further in view of Bauer;<sup>5</sup>
- (4) claim 34 under 35 U.S.C. § 103(a) as unpatentable over Van Rijn in view of Hodges and Bauer and further in view of McNamara et al.;<sup>6</sup>
- (5) claim 35 under 35 U.S.C. § 103(a) as unpatentable over Van Rijn in view of Hodges and Bauer and further in view of Brown;<sup>7</sup>
- (6) claims 36–38 under 35 U.S.C. § 103(a) as unpatentable over Van Rijn in view of Hodges and further in view of Worzala, Jr.;<sup>8</sup>
- (7) claims 41 and 42 under 35 U.S.C. § 103(a) as unpatentable over Van Rijn in view of Hodges and further in view of Duncan et al.;<sup>9</sup> and

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<sup>2</sup> US 2005/0241263 A1, published November 3, 2005 (“Van Rijn”).

<sup>3</sup> US 5,492,429, issued February 20, 1996 (“Hodges”).

<sup>4</sup> US 5,040,251, issued August 20, 1991 (“Hanford”).

<sup>5</sup> AT 402 310 B, issued April 25, 1997 (“Bauer”).

<sup>6</sup> WO 2008/047151 A1, published April 24, 2008 (“McNamara”).

<sup>7</sup> US 2004/0134146 A1, published July 15, 2004 (“Brown”).

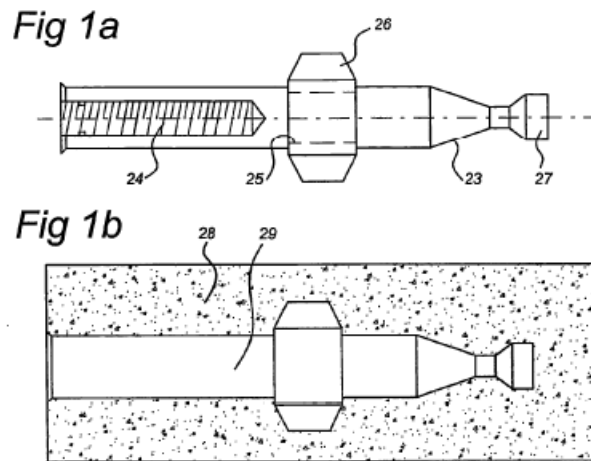
<sup>8</sup> US 4,726,561, issued February 23, 1988 (“Worzala, Jr.”).

<sup>9</sup> US 6,621,417 B2, issued September 16, 2003 (“Duncan”).

(8) claims 45 and 47 under 35 U.S.C. § 103(a) as unpatentable over Van Rijn in view of Hodges and further in view of Brown.

## B. DISCUSSION

The Examiner finds Van Rijn teaches a method of forming openings in concrete capable of holding rail posts or columns. Non-Final Act. 2.<sup>10</sup> The Examiner refers to Van Rijn Figures 1a and 1b, reproduced below, to illustrate the disclosed method. Non-Final Act. 3.



Van Rijn Figures 1a and 1b illustrate arranging a nut and a shaft in a concrete structure.

In Van Rijn's method, the Examiner finds that concrete is deposited around body 23, which corresponds to the claimed "post sleeve core." After the concrete is partially set, the Examiner finds that body 23 is removed from the concrete, thereby forming recess or cavity 29, which corresponds to the claimed "post sleeve" and "post receiving cavity." Non-Final Act. 2-3; Van Rijn ¶ 40; *see also* Ans. 2 (explaining that "[t]he cavity for a fence post is claimed as a 'post sleeve' . . . and 'post receiving cavity'").<sup>11</sup> Van Rijn discloses that nut 26 is attached to body

<sup>10</sup> Non-Final Office Action dated June 20, 2017.

<sup>11</sup> Examiner's Answer dated May 31, 2018.

23, and when body 23 is removed, nut 26 remains behind in the concrete.<sup>12</sup> Van Rijn ¶ 40.

Van Rijn discloses that the method “can be used to produce any conceivable type of cavity in a concrete material.” Van Rijn ¶ 19. Van Rijn also discloses that all kinds of structures can be coupled to the embedded screw thread (e.g., nut 26), such as safety rails, plastic posts, and columns. Van Rijn ¶¶ 12, 25.

The Examiner finds Van Rijn does not expressly teach first and second post holes in the ground for receiving respective post sleeves (i.e., cavity 29 and the surrounding concrete structure) as recited in claim 30. Non-Final Act. 4; *see also* App. Br. 10 (stating “[t]he Examiner asserts that Van Rijn teaches all of the features of independent claim 30 except for the forming of multiple post sleeves in respective post holes”). The Examiner, however, finds Hodges teaches “form[ing] bodies in holes in the ground for [receiving] fence posts and [making] a fence.” Non-Final Act. 4. The Examiner concludes that it would have been obvious to one of ordinary skill in the art to use the method disclosed in Van Rijn to form multiple post sleeves in respective post holes in the ground to make a fence based on the teachings in Hodges. Non-Final Act. 4.

The Appellant argues that embedding nut 26 in concrete cavity 29, as disclosed in Van Rijn, “is unrelated to supporting a post directly with a post receiving cavity formed in a concrete footing *within a post hole*.” App. Br. 10 (emphasis added). “Put another way,” the Appellant argues that “there is simply no teaching or suggestion in Van Rijn directed to forming any structure in a

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<sup>12</sup> The Examiner finds that nut 26 corresponds to the post sleeve top recited in claim 31. Non-Final Act. 4, 6. The Appellant does not direct us to any error in the Examiner’s finding.

concrete footing *within a post hole*, let alone forming a plurality of post sleeves to directly support posts for a fence or rail.” App. Br. 10 (emphasis added).

The Appellant’s argument fails to consider the prior art as a whole. *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981) (the test for obviousness is what the *combined* teachings of the references would have suggested to one of ordinary skill in the art). Van Rijn discloses that posts may be supported in cavity 29. *See* Van Rijn ¶ 12. The Examiner relies on Hodges to teach that, at the time of the Appellant’s invention, it was known to form a plurality of post holes in the ground to make a fence. Thus, in the modification proposed by the Examiner, a plurality of cavities 29 and the surrounding concrete structure (corresponding to the claimed “post sleeve” and “post receiving cavity”) shown in Van Rijn Figure 1b, would be formed in a plurality of respective post holes in the ground to make a fence. Notably, the Appellant does not direct us to any evidence establishing that cavities 29 are not capable of supporting a fence post. *See* Van Rijn ¶ 19.

The Appellant argues that Hodges teaches a plurality of tubular body portions 21 that are *fixedly embedded* in concrete to receive and support sign posts and the like. App. Br. 11–12. In contrast, the Appellant argues that the claimed invention is directed to forming post receiving cavities in concrete using a *removable* post sleeve core. App. Br. 12.

Again, the Appellant’s argument fails to consider the prior art as a whole. *Keller*, 642 F.2d at 425. In the rejection on appeal, the Examiner merely relies on Hodges to show that, at the time of the Appellant’s invention, it was known to form a plurality of post holes in the ground to receive respective fence posts and make a fence. *See* Non-Final Act. 4.

For the reasons set forth above, a preponderance of the evidence of record supports the Examiner’s conclusion of obviousness. Therefore, the obviousness rejection of claim 30 is sustained.

The Appellant does not present arguments in support of the separate patentability of any of claims 31–47. *See* App. Br. 14. Therefore, the obviousness rejections of claims 31–47 also are sustained.

C. CONCLUSION

The Examiner’s decision is affirmed.

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
30, 39, 40, 43, 44, 46	103(a)	Van Rijn, Hodges	30, 39, 40, 43, 44, 46	
31	103(a)	Van Rijn, Hodges, Hanford	31	
32, 33	103(a)	Van Rijn, Hodges, Bauer	32, 33	
34	103(a)	Van Rijn, Hodges, Bauer, McNamara	34	
35	103(a)	Van Rijn, Hodges, Bauer, Brown	35	
36–38	103(a)	Van Rijn, Hodges, Worzala, Jr.	36–38	
41, 42	103(a)	Van Rijn, Hodges, Duncan	41, 42	
45, 47	103(a)	Van Rijn, Hodges, Brown	45, 47	
<b>Overall Outcome</b>			<b>30–47</b>	

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).



Appeal 2018-007896  
Application 12/727,063

AFFIRMED