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Whirlpool Corporation / McGarry Bair PC 2000 North M63 Benton Harbor, MI 49022			LEE, DOUGLAS	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RODNEY M. WELCH

Appeal 2019-000712
Application 13/928,787
Technology Center 1700

Before KAREN M. HASTINGS, JAMES C. HOUSEL, and
LILAN REN, *Administrative Patent Judges*.

HASTINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant¹ seeks our review under 35 U.S.C. § 134(a) of the Examiner's Final Rejection of claims 1–13 and 20–25 under 35 U.S.C. § 103 as being unpatentable over at least the basic combination of Michael (US 5,464,482, issued November 7, 1995) with Favaro (EP 1 050 263 A2, published November 8, 2000).²

¹ Appellant is the Applicant, Whirlpool Corporation, which is also stated to be the real party in interest (Appeal Br. 2).

² The Examiner applied additional prior art of Feddema (US 2013/0074887 A1, published March 28, 2013) in a separate rejection of dependent claims 11 and 25, as well as Haegermarck (WO 2011/147716 A1, published

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

We REVERSE.

Claim 1 is illustrative of the claimed subject matter (emphasis added to highlight a key disputed limitation):

1. A dishwasher for treating dishes according to an automatic cycle of operation, comprising:
 - a tub at least partially defining a treating chamber with four corners and a sidewall;
 - a recirculation system fluidly coupling at least two portions of the tub; and
 - a sprayer fluidly coupled to the recirculation system and located within the treating chamber, with the sprayer comprising at least three rotatable sections, which are rotatable about separate axes:
 - a first rotatable section formed by a first conduit segment rotationally mounted relative to the tub for rotation about a first axis;
 - a second rotatable section formed by a second conduit segment rotationally mounted to the first conduit segment at a location radially spaced from the first axis for rotation about a second axis; and
 - a third rotatable section formed by a spray head rotationally mounted to the second conduit segment at a location radially spaced from the second axis for rotation about a third axis;
- wherein the first conduit segment, the second conduit segment, and the spray head are operably coupled such that the first conduit and second conduit are axially aligned and the sprayer has an extended length when the spray head is at one of the four corners and the second conduit overlaps the first conduit and the sprayer has a retracted length when the spray head is adjacent the sidewall of the treating chamber such that

December 1, 2011) in a separate rejection of independent claim 21 with its dependent claim 23, and Yura (US 5,477,874, issued December 26, 1995) for its dependent claim 22 (Final Action 9–13). A discussion of these rejections is not necessary for the disposition of this appeal.

the spray head traverses a path having an outer boundary defining a square with four rounded corners corresponding to the four corners of the treating chamber.

Independent claims 20 and 21 are each directed to a similar dishwasher as that of claim 1 (Claims Appendix 47–50).

ANALYSIS

The Examiner bears the initial burden of presenting a prima facie case of obviousness. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

“[R]ejections 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.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006), *quoted with approval in KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

After review of the respective positions provided by Appellant and the Examiner, we conclude that the preponderance of the evidence supports Appellant’s position that the Examiner has not established a prima facie case of obviousness for substantially the reasons set forth by Appellant in the Briefs. Accordingly, we reverse the Examiner’s § 103 rejections of all the claims on appeal.

Specifically, a preponderance of the evidence supports Appellant’s position that the proposed modification of Michael to add a spray head as shown in Favaro onto Michael’s second spray arm would be based on improper hindsight reconstruction for the reasons discussed by Appellant in the Briefs (Appeal Br. 18, 23–25; Reply Br. 2–6). The fact finder must be aware “of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning.” *KSR*, 550 U.S. at 421 (citing

Graham v. John Deere Co., 383 U.S. 1, 36 (1966) (warning against a “temptation to read into the prior art the teachings of the invention in issue”). At best, one of ordinary skill would have replaced the second spray arm of Michael with an off center spray head as taught in Favaro, such that it is only with the use of impermissible hindsight to add Favaro’s spray head onto the second spray arm of Michael such that there are three rotatable sections as required in each independent claims 1, 20, and 21. The Examiner has not adequately explained why the skilled artisan’s knowledge or inferences and creativity would have supported the obviousness determination based on the teachings of the applied references without an improper hindsight reconstruction.

The Examiner does not establish that any of the additional references as applied in the § 103 rejections of claims 11, 21–23, and 25 cures these deficiencies and/or otherwise provides another rationale that cures these deficiencies.

Accordingly, we reverse the § 103 rejections of claims 1–13 and 20–25 which all rely upon an impermissible hindsight reconstruction of Michael based on Favaro.

DECISION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–10, 12, 13, 20, 24	103	Michael, Favaro		1–10, 12, 13, 20, 24

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
11, 25	103	Michael, Favaro, Feddema		11, 25
21, 23	103	Michael, Favaro, Haegermarck		21, 23
22	103	Michael, Favaro, Haegermarck, Yura		22
Overall Outcome				1-13, 20-25

The Examiner's § 103 rejections of all the claims on appeal are reversed.

REVERSED