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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JEAN-CLAUDE AUGUSTE and HARRY R. MA

Appeal 2019-001814
Application 13/174,997
Technology Center 1700

Before JEFFREY B. ROBERTSON, JAMES C. HOUSEL, and
BRIAN D. RANGE, *Administrative Patent Judges*.

RANGE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1, 3–10, 12, 15, 16, 18–20, and 23–26.² We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

¹ 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 Ten Cate Thiolon B.V. Appeal Br. 2.

² The Appeal Brief summary of grounds to be reviewed on appeal does not refer to claims 24 and 25 (Appeal Br. 7), but this appears to be a

CLAIMED SUBJECT MATTER³

Appellant describes the invention as relating to grass-like fibers for an artificial grass lawn. Spec. 1:7–10. The Specification describes fibers that seek to decrease risk of being worn flat due to splitting and provide an improved natural-like look. *Id.* at 2:22–25. Claim 1 is illustrative:

1. A synthetic monofilament fibre for use in an artificial lawn which synthetic fibre has a curved cross section, wherein the synthetic fibre has a centre line arc length to maximum thickness ratio of between 4.5 and 3.8 and a circumferential surface of the synthetic fibre is provided with a sine wave shaped pattern.

Appeal Br. 22.

REFERENCES

The Examiner relies upon the prior art below in rejecting the claims on appeal:

Emge et al. ("Emge")	US 2012/0114942 A1	May 10, 2012
Rossing et al. ("Rossing")	US 2012/0189785 A1	July 26, 2012
Miyake et al. ("Miyake")	JP 09-111532	April 28, 1997
Kim	KR 1019890002109 B1	June 19, 1989

typographical error because Appellant refers to claims 24 and 25 as being on appeal elsewhere (*id.* at 2, 11). We, therefore, treat claims 24 and 25 as on appeal.

³ In this Decision, we refer to the Final Office Action dated February 20, 2018 ("Final Act."), the Appeal Brief filed September 10, 2018 ("Appeal Br."), and the Examiner's Answer dated October 29, 2018 ("Ans.").

REJECTIONS

The Examiner maintains the following rejections on appeal:

- A. Claim 26 under 35 U.S.C. § 103 as obvious over Emge. Ans. 3.
- B. Claims 1, 3–8, 12, 15, 16, 18–20, and 23–26 under 35 U.S.C. § 103 as obvious over Rossing in view of Kim and/or Miyake. *Id.* at 5.
- C. Claims 9 and 10 under 35 U.S.C. § 103 as obvious over Rossing in view of Kim and/or Miyake, and further in view of Emge. *Id.* at 9.

OPINION

Appellant argues that the Examiner’s rejections are erroneous because the inventors conceived and diligently reduced to practice the subject matter of Appellant’s claims prior to the date of the Emge and Rossing references. Appeal Br. 8–11; 19–20. The Examiner disagrees. Ans. 10–15. Below, we focus on this argument because it is dispositive of this appeal.

As a threshold matter, we note that the filing date of the present application is July 1, 2011. We, therefore, apply the law concerning priority that predates the America Invents Act (AIA). Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 3(n) (2011) (amendments made by AIA apply to claims having an effective filing date on or after “the expiration of the 18-month period beginning on the date of the enactment of this act”).

Our reviewing court has explained that, under pre-AIA law, an inventor can effectively swear behind a reference by establishing (1) conception and (2) diligence in achieving reduction to practice prior to the reference’s date. *Apator Miitors ApS v. Kamstrup A/S*, 887 F.3d 1293, 1295–96 (Fed. Cir. 2018); *In re NTP, Inc.*, 654 F.3d 1279, 1291 (Fed. Cir. 2011); 37 C.F.R. §§ 1.131(a)–(b). Swearing behind requires evidence corroborating any inventor testimony. *Apator Miitors ApS*, 887 F.3d at 1295–96.

Here, the Examiner agrees that the relevant date of Emge is November 9, 2010, and that the relevant date of Rossing is July 13, 2010. Ans. 10. Appellant argues conception and reduction to practice of the invention of the three independent claims (claims 1, 19, and 26) as of February 2010. Appeal Br. 8–11, 19.

Appellant provides a November 9, 2015, Declaration under 37 C.F.R. § 1.131 of named inventor Jean-Claude Auguste (“the Auguste Declaration”) and a September 12, 2016, Declaration under 37 C.F.R. § 1.131 of named inventor Harry R. Ma (“the Ma Declaration”) to support their argument. Of most relevance, the Ma Declaration⁴ states that prototype synthetic fibers were produced in February 2010 for testing purposes, that Exhibit A to the Ma Declaration includes detailed die manufacturing drawings from the run, that Exhibit B is a picture of fibers produced in the run, and Exhibit C is an enlarged view of a fiber from Exhibit B. Ma Declaration ¶ 3; *see also* Auguste Declaration ¶ 3. The Ma Declaration explains that Exhibit B demonstrates, for example, “centre line arc length to maximum thickness ratio of between 4.5 and 3.8” recited by all independent claims now on appeal. Ma Declaration, Section II.

The Examiner determines that the embodiment of Exhibits B and C is not “commensurate in scope with the disclosed invention.” Ans. 10. As a threshold matter, we note that the Examiner does not cite authority for the notion that swear behind evidence must be “commensurate in scope” in, for example, the same way that phrase is used in the context of evidence of

⁴ The Auguste Declaration provides a great deal of overlapping content, and we focus on the Ma Declaration for brevity.

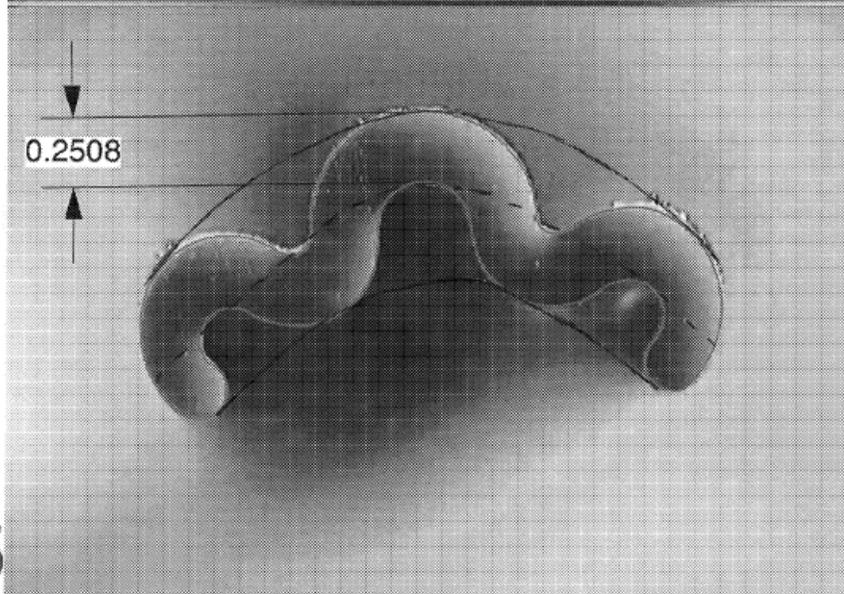
unexpected results. Rather, as Appellant highlights (Appeal Br. 10), our reviewing court has stated, for example, that “[a] specification may describe an actual reduction to practice by showing that the inventor constructed **an** embodiment or performed a process that met all the limitations of the claim” (Appellant’s emphasis) *Cooper v. Goldfarb*, 154 F.3d 1321, 1327 (Fed. Cir. 1998); *see also e.g., Corregge v. Murphy*, 705 F.2d 1326, 1329 (Fed. Cir. 1983); Manual of Patent Examining Procedure (“MPEP”) § 715.02 (“The 37 CFR 1.131(a) affidavit or declaration must establish possession of either the whole invention claimed or something falling within the claim (such as a species of a claimed genus), in the sense that the claim as a whole reads on it.”).

Consistent with the Examiner’s position (Ans. 13), we note that the MPEP also states that where a swear behind affidavit “is not fully commensurate with the rejected claim, the applicant can still overcome the rejection by showing that difference between the claimed invention and [the affidavit’s showing] would have been obvious to one of ordinary skill in the art.” MPEP § 715.02. As explained below, however, we agree with Appellant, under the circumstances presented here, that Appellant’s evidence adequately corresponds to the recitations of independent claims 1, 19, and 26 to effectively antedate the Emge and Rossing references. Appeal Br. 9; Ma Declaration, Section II.

The Examiner determines that the Exhibit B and C embodiment does not have “a curved cross section” as defined within the context of the Specification. Ans. 10. The Examiner construes “curved cross section” as requiring that the cross section of the fiber be non-uniform. *Id.* at 10–11. In contrast to a “curved cross section” under this claim construction, the

Examiner finds that the cross-sectional shape of the Exhibit B and C embodiment is uniform. We reproduce the picture of the fiber cross sectional shape from Exhibit C is reproduced below for reference.

3D Bracket 2000 Undrawn, Denier 6,450



The picture above is reproduced from Exhibit C of the Ma Declaration and depicts an annotated picture of the cross section of a fiber. Ma Declaration ¶ 3.

The Examiner supports the Examiner’s claim construction of “curved cross section” by citing, for example, Appellant’s Specification at Figures 1a–11 (all of which show curved fibers with cross-sectional shape having a non-uniform thickness). The Examiner also cites page 3, lines 25 to 27 of the Specification which states, “[f]or curved cross section fibres, this thickness is the maximum thickness, and is located at the central portion of the fibre.”

We agree with Appellant (Appeal Br. 8–9) that the Examiner’s construction of “curved cross section” is too narrow. The Specification does not indicate that a “curved cross section” must have a non-uniform thickness. Rather, the Specification indicates, at most, that the curved cross

section must have a maximum thickness at the central portion of the fiber. A fiber could be uniform in cross section yet still have a maximum thickness (i.e., the same thickness as everywhere else) at the central portion of the fiber. The Specification does not provide reason, under a broadest reasonable construction, to further narrow the meaning of “curved cross section,” and we, therefore, do not agree with the Examiner (Ans. 10–11) that the fiber depicted in Appellant’s Exhibits B and C lacks a curved cross section.

The Examiner also finds that Exhibits B and C do not possess a “sine wave shaped pattern” (claims 1 and 19) or “wave shaped pattern” (claim 26). Ans. 11. Appellant, however, maintains that the Exhibits do possess such a pattern. *See, e.g.*, Appeal Br. 9. The preponderance of the evidence better supports the Appellant’s position. Appellant’s Specification cites Figure 2 of the Specification as depicting a sine wave shaped pattern. Figure 2 is reproduced below for reference.

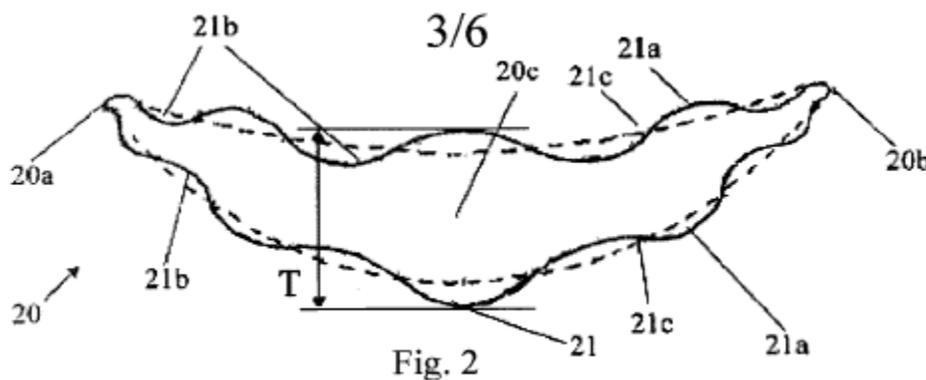


Figure 2 depicts an embodiment of Appellant’s fiber “wherein a fibre 20 is provided with a wave shaped pattern” where the pattern “has even smoother transitions in-between the positive 21a and negative antinodes 21b.” Spec. 5:19–21. On this record, the Examiner has not adequately explained why the

curvature of the fiber depicted in, for example, Exhibit C as reproduced above, does not also possess a sine wave shaped pattern.

The Examiner also finds that Exhibits B and C lack a “center line arc” as recited in claims 1, 19, and 26. Ans. 12–13. The Examiner finds that the center line of the Exhibit C cross section would have a sine wave shape rather than an arc shape. Ans. 12. In other words, the Examiner appears to construe “center line arc” as meaning an arc formed by connecting points at the center *of the mass* of the fiber cross section. The Examiner supports the Examiner’s construction of “center line arc” by citing the Specification which explains Figure 1a by stating, “[t]he centre line arc length 10a6 is determined by, and defined as, the length of dotted line Rc 10a6 from one end of the fiber 10a1a to the other 10a1b.” Spec. 9:2–4. The dotted line Rc of Figure 1a, in turn, runs through the center of the depicted fiber cross section.

Mr. Auguste and Mr. Ma, however, testify that Exhibit C has a center arc line and measure the line as 14 cm. Ma Declaration, Section II; Auguste Declaration, Section II. The two inventors appear to define center line arc by first drawing the outermost curves of the Exhibit C shape (the solid lines along the top and bottom of the shape in Exhibit C) and then connecting points that are centrally between those curves (the central dotted line of Exhibit C).

We determine that the inventors’ approach to identifying a “center line arc” for Exhibit C is appropriate in view of the Specification. In particular, Figures 1a through 1d each depict dotted lines along the outermost curves of the cross section, and the center line arc appears to be between those dotted lines. This is most evident in, for example, Figure 1d

where the outer curves of the cross section are not perfectly symmetrical such that, if the Examiner's theory of center line were the only possibility the Specification could permit, the center line of Figure 1d would have a wave shape rather than being a single smooth arc.

We, therefore, determine that the Examiner errs in the Examiner's stated reasoning as to why Appellant's evidence does not establish conception and diligent reduction to practice predating the cited Emge and Rossing references. The Examiner, therefore, errs in relying on those references to reject Appellant's claims at issue,⁵ and we do not sustain the Examiner's rejections.⁶

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
26	103	Emge		26
1, 3-8, 12, 15,	103	Rossing, Kim, Miyake		1, 3-8, 12, 15,

⁵ The Examiner does not address whether or not Appellant's evidence is sufficient to establish February 2010 conception of each of the dependent claims on appeal. We, therefore, also do not address this issue.

35 U.S.C. § 134 ("An applicant for a patent . . . may appeal from the decision of the primary examiner to the Patent Trial and Appeal Board."). We leave evaluation of Appellant's evidence as it relates to dependent claims to the Examiner in the event of further prosecution.

⁶ Because the Examiner errs in relying on Rossing because of the priority issue we address herein, we do not need to address the Examiner and Appellant's differing positions as to whether the recitations of Appellant's claims would have been obvious in view of Rossing combined with the other references.

Appeal 2019-001814
Application 13/174,997

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
16, 18– 20, 23–26				16, 18– 20, 23–26
9, 10	103	Rossing, Kim, Miyake		9, 10
Overall Outcome				1, 3–10, 12, 15, 16, 18– 20, 23–26

REVERSED