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AMSTER, ROTHSTEIN & EBENSTEIN LLP 90 PARK AVENUE NEW YORK, NY 10016			GORMAN, DARREN W	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CARL L.C. KAH JR. and CARL L.C. KAH III

Appeal 2019-002156
Application 14/551,881
Technology Center 3700

Before DANIEL S. SONG, MICHAEL J. FITZPATRICK, and
JEREMY M. PLENZLER, *Administrative Patent Judges*.

PLENZLER, *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 28 and 29. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word Appellant to refer to "applicant" as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Carl L.C. Kah, Jr. Appeal Br. 3.

CLAIMED SUBJECT MATTER

The claims are directed to a spray nozzle. Claim 28, reproduced below, is illustrative of the claimed subject matter:

28. An adjustable spray nozzle assembly for an irrigation system comprising:

a body having an inlet configured and operable for attachment to a source of pressurized water and an outlet opening configured and operable for emitting a stream of water; and

an adjustable deflector element mounted in a center of the nozzle assembly such that a stream of water from the outlet deflects off the deflector element at a desired elevation angle out of the nozzle assembly;

the deflector element further comprising a mechanism extending axially along a central axis of the nozzle assembly and configured and operable for axial movement such that the elevation angle of the stream of water leaving the spray nozzle is adjusted.

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Grundy	US 5,031,840	July 16, 1991
Kah '081	US 7,232,081	June 19, 2007
Kah '456	US 8,047,456	Nov. 1, 2011
Kah '986	US 8,893,986	Nov. 25, 2014

REJECTIONS

Claims 28 and 29 are rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–20 of Kah '081.

Claims 28 and 29 are rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–13 of Kah '456.

Claims 28 and 29 are rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–9 of Kah '986.

Claims 28 and 29 are rejected under 35 U.S.C. §102(b) as being anticipated by Grundy.

OPINION

Double Patenting

The Final Action includes three separate double patenting rejections for claims 28 and 29. Final Act. 4–5. Although the Examiner’s Answer does not list the doubling patenting rejections, it states that “[e]very ground of rejection set forth in the Office action dated December 22, 2017 from which the appeal is taken is being maintained by the examiner except for the grounds of rejection (if any) listed under the subheading ‘WITHDRAWN REJECTIONS.’” Ans. 3. There are no rejections listed as withdrawn in the Examiner’s Answer. Further, our review of the Advisory Action entered June 11, 2018 does not indicate that the double patenting rejections have been withdrawn. Accordingly, we understand those double patenting rejections to be pending.

Our rules state that Appellant’s “arguments shall explain why the examiner erred as to each ground of rejection contested by appellant.” *See* 37 C.F.R. § 41.37(c)(1)(iv). “When the appellant fails to contest a ground of rejection to the Board . . . the PTO may affirm the rejection of the group of claims that the examiner rejected on that ground without considering the merits of those rejections.” *Hyatt v. Dudas*, 551 F.3d 1307, 1314 (Fed. Cir. 2008). Accordingly, because there is no assertion of error by Appellant, we summarily affirm the Examiner’s double patenting rejections.

Anticipation

The Examiner finds that Grundy's upper nozzle piece 6, deflecting ring 50, and adjusting member 70 form the recited deflector, with deflecting ring 50 and adjusting member 70 forming the deflector's "mechanism extending axially along a central axis of the nozzle assembly and configured and operable for axial movement such that the elevation angle of the stream of water leaving the spray nozzle is adjusted," as recited in claim 28. Final Act. 5–6. In response, "Applicant respectfully submits that elements 6, 50 and 70 are not a 'deflector element' as is required by claim 28" because "[t]he elements . . . merely form an outlet as part of the nozzle through which water exits the sprinkler." Appeal Br. 6. Appellant further contends that "[e]lements 50 and 70 . . . do not extend 'axially along a central axis of the nozzle assembly'" because "[b]oth of these elements . . . are ring shaped." *Id.* The Examiner has the better position.

Grundy's Figure 1 is reproduced below, annotated to depict its central axis.

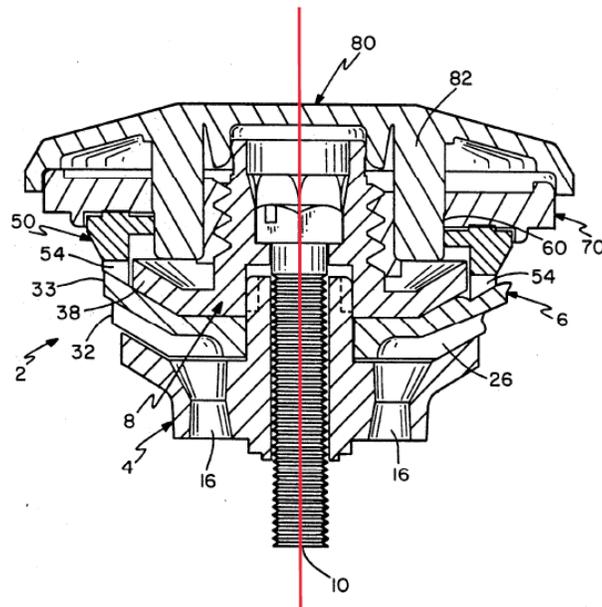


FIG. 1

Figure 1 depicts “a cross-sectional side elevation view of [Grundy’s] sprinkler nozzle,” and includes our annotation (red line) indicating the central axis of the sprinkler nozzle. Grundy 2:37–38. Grundy explains that its nozzle 2 can be manipulated to control flow via “deflecting means . . . compressing upper nozzle piece 6 against lower nozzle piece 4 to deform or compress channels 26.” *Id.* at 2:60–63. “The deflecting means comprises an annular deflecting ring 50 and a selectively rotatable adjusting member 70.” *Id.* at 2:63–65. Grundy explains, for example, that “[d]ownward movement of adjusting member 70 . . . forces deflecting ring 50 downwardly to compress upper nozzle piece 6 against lower nozzle piece 4.” *Id.* at 5:26–29.

We are apprised of no reason why Grundy’s nozzle piece 6 does not have the structure required to be a deflector, as recited in claim 28. Appellant does not allege any missing structure, but, rather, simply alleges that Grundy labels element 6 as a nozzle piece. Appeal Br. 6. Indeed,

Grundy's nozzle piece 6 is strikingly similar to what Appellant calls its deflector. *See* Appeal Br. 5 (referring to element 17E in Figure 8A, for example, as the deflector). Appellant's Figure 8A is reproduced below.

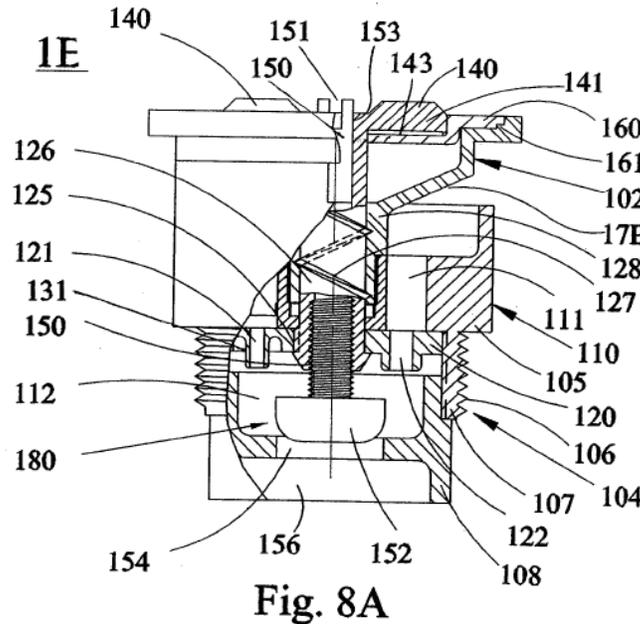


Figure 8A is a side elevation view of Appellant's spray nozzle and illustrates the deflector 17E.

We are also not apprised of error in the Examiner's finding that Grundy's deflecting ring 50 and adjusting member 70 "extend[] axially along a central axis of the nozzle assembly." We see no requirement in this claim language that a solid mass intersect the central axis of the spray nozzle, as Appellant appears to contend. Rather, because deflecting ring 50 and adjusting member 70 each have a central axis that is the same as the central axis of the sprinkler nozzle, and have an axial extent, deflecting ring 50 and adjusting member 70 "extend[] axially along a central axis of the nozzle assembly."

For at least the reasons set forth above, we are not apprised of error in the Examiner's rejection of claim 28, or dependent claim 29, which Appellant does not argue separately.

CONCLUSION

The Examiner's rejections are affirmed.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
28, 29	n/a	double patenting– Kah '081	28, 29	
28, 29	n/a	double patenting– Kah '456	28, 29	
28, 29	n/a	double patenting– Kah '986	28, 29	
28, 29	102(b)	Grundy	28, 29	
Overall Outcome			28, 29	

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED