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ip-patent@williamskastner.com
mlorbiecki@williamskastner.com
mpatton@williamskastner.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DAVID DEWAARD

Appeal 2019-002274
Application 14/703,585
Technology Center 1700

Before CATHERINE Q. TIMM, JEFFREY T. SMITH, and
BEVERLY A. FRANKLIN, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner's final decision rejecting claims 8–20.^{2,3} 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 DARI-TECH, INC. as the real party in interest. (Appeal Br. 1.)

² Appellant's principal brief is unnumbered. We will refer to the Appeal Brief as though it were consecutively numbered beginning with page entitled “Real Party in Interest” as page 1 as indicated in the table of contents.

³ Claims 1–7 are withdrawn from consideration. (Appeal Br. 3.)

STATEMENT OF THE CASE

Claim 8 is illustrative of the subject matter on appeal and is reproduced below:

8. An apparatus for buffering a flow of a heavy manure to a separator and receiving a flow of light manure the separator produces, the apparatus comprising:

a first tank for receiving the flow of heavy manure to retain a volume of heavy manure, the first tank being defined by a first tank wall extending upward to a first tank wall height;

a second tank for receiving the flow of light manure to retain a volume of light manure, the second tank being defined by a second tank wall extending upward to a second tank wall height;

a channel defined between each of the first tank wall and the second tank wall;

a weir situated within the channel to regulate flow along the channel between the first tank and the second tank, the weir extending upward to a weir height lower than either of the first tank wall height and the second tank wall height, whereby the weir is configured to facilitate, alternatively, each of a pair of flows over the weir, the pair of flows consisting of:

a first flow occasioned by the receiving, in the first tank an additional volume of heavy manure to buoy a layer containing manure; comprising a lesser density of particulate than is present in the volume of heavy manure, such that the

upper surface of the layer exceeds a height of a weir, the weir;
and

a second flow occasioned by receiving in the second tank, a volume of light manure sufficient to overflow the weir and, thereby to allow light manure to flow into the first tank.

Appeal Br. 25–26, Appendix.

The Examiner maintains and Appellant requests request review of the following rejections from the Examiner’s Final Action⁴:

I. Claims 8, 9, 11, and 13 rejected under 35 U.S.C. § 102(a)(1) as anticipated by Frederick (US 6,860,997 B1, issued Mar. 1, 2005).

II. Claims 10, 14–16, and 18–20 rejected under 35 U.S.C. § 103(a) as unpatentable over Frederick and Houle (US 6,531,057 B1, issued Mar. 11, 2003).

III. Claim 12 rejected under 35 U.S.C. § 103(a) as unpatentable over Frederick and Delsalle (US 5,840,195, Nov. 24, 1998).

IV. Claim 17 rejected under 35 U.S.C. § 103(a) as unpatentable over Frederick, Houle, and Delsalle.

OPINION⁵

Having considered the respective positions the Examiner and Appellant advance in light of this appeal record, we affirm the Examiner’s rejections based on the fact-finding and reasoning set forth in the Answer

⁴ The complete statement of the rejections on appeal appears in the Final Action. (Final Act. 2–7.)

⁵ In response to the Examiner’s rejections, Appellant presents argument for the patentability of independent claims 8 and 15 together but does not present separate argument for the patentability of claims 9–14 and 16–20. (Appeal Br. 11.) We select claim 8 as representative and claims 9–20 stand or fall with claim 8. 37 C.F.R. § 41.37(c)(1)(iv).

and Final Office Action, which we adopt as our own. We add the following primarily for emphasis.

As a preliminary matter, our review of the Examiner's analysis requires that the claims must first be construed to define the scope and meaning of the subject matter before us on appeal. *See Gechter v. Davidson*, 116 F.3d 1454, 1457 (Fed. Cir. 1997). During prosecution before the Examiner, the claim language should be given its broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account any definitions or enlightenment contained in the written description of Appellant's Specification. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

According to claim 8, the apparatus comprises a first tank, a second tank, a channel and "a weir situated within the channel to regulate flow along the channel between the first tank and the second tank." Further, the claim language describes the purpose and function of the weir is to regulate flow between the first tank and a second tank. Therefore, we determine that the subject matter of independent claim 8 is directed to an apparatus comprising a first tank, a second tank, a channel, and a weir.

Anticipation

The Examiner finds that Frederick describes a device disclosing each and every element of claim 8 and further finds that the Frederick anticipates the claimed invention. (Final Act. 2-4.) The Examiner specifically states "Frederick teaches an apparatus having a first tank (112), a second tank (126), a separator (140) connected to the first tank, a channel (140) with a weir (158) therein (Figs. 4-5 and 11; C7/L14-C9/L35)." (Final Act. 2.)

Appellant argues principally that the Examiner's rejection of claim 8 should be reversed because Frederick does not disclose the weir required by the claimed invention. Specifically Appellant states:

As amended, Claim 8 and Claim 15, explicitly claims a monolithic configuration comprising the communicating channel, weir, and the first and the second tanks. The first and second tanks, channel and weir are described here as functioning as a monolithic device in that the . . . Frederick tanks and weir are structured as an integral whole to exploit gravitational movement through the Frederick system. In Claims 8 and 15, the weir is specifically limited in height not to exceed the wall heights of either tank, thereby to facilitate alternate flows of water back and forth over the weir. At any one time, when there is a flow, the flow is in a single direction but the direction alternates from time to time. In contrast, as the Frederick weir is configured, there can be no second flow uphill over the weir from the lower tank to the upper tank.

(Appeal Br. 14 (footnotes and emphasis omitted).)

Appellant further argues:

Because Frederick cannot supply the limitation of the two-way flow, indeed, teaches against such a flow, Claims 8 and 15 cannot be properly rejected as anticipated by Frederick. When Frederick can only function by relying upon a one-way gravity-fed flow over the weir, it cannot anticipate a two-way weir.

(Appeal Br. 15 (emphasis omitted).)

We are unpersuaded by these arguments. To serve as an anticipatory reference, "the reference must disclose each and every element of the claimed invention." *In re Gleave*, 560 F.3d 1331, 1334 (Fed. Cir. 2009).

We initially note, Appellant has not argued that Frederick's apparatus does not contain first and second tanks, a channel, and weir as a monolithic

device. It has not been disputed Frederick describes the weir is adjustable. (Frederick col. 9, l. 33.) Appellant's arguments for patentability are premised on the operation of Frederick's device only based on gravity flow. However, Frederick Figure 9 depicts non-gravity flow operation wherein the first and second tanks including an adjustable weir disposed there between and including circulation pipes 124 and 124' that are attached to the first and second tanks respectively. (Frederick col. 9, ll. 22– 35; Figure 9.) Frederick also discloses circulation can also occur utilizing pumps. (Frederick col. 9, ll. 22–23.)

As stated above, Appellant argues Frederick can only function by relying upon a one-way gravity-fed flow over the weir, it cannot anticipate a two-way weir. (Appeal Br. 15.) Appellant's arguments are not persuasive of a patentable distinction for the reasons presented by the Examiner. (Ans. 4–5.) Application Figures 3 and 4 exhibit how Appellant asserts the claimed weir operates as a “two-way weir.” Figure 3 depicts an excess amount of fluid entering into tank number 1 and flowing over the weir into tank number 2 alternatively, Figure 4 depicts the opposite wherein the excess fluid is provided to tank number 2 and overflows the weir to tank number 1.

The Appellant has not identified any disclosure in the Specification suggesting anything beyond a first tank, a second tank, a channel, and a weir are required to achieve the recited function. Thus, we determine that the first tank, second tank, channel, and weir of Frederick meets this recitation. Appellant has failed to adequately explain how the structure of the claimed apparatus is patently distinct from the structure of Frederick's apparatus depicted in Figure 9 which includes a means for supplying fluid to tanks 1 and 2 respectively. Claims directed to an apparatus must be distinguished

from the prior art in terms of structure. *See In re Danly*, 263 F.2d 844, 848 (CCPA 1959) (“Claims drawn to an apparatus must distinguish from the prior art in terms of structure rather than function”); *In re Gardiner*, 171 F.2d 313, 315–16 (CCPA 1948) (“It is trite to state that the patentability of apparatus claims must be shown in the structure claimed and not merely upon a use, function, or result thereof.”). Choosing to define an element functionally, i.e., by what it does, carries with it a risk: Where there is reason to conclude that the structure of the prior art is inherently capable of performing the claimed function, the burden shifts to the applicant to show that the claimed function patentably distinguishes the claimed structure from the prior art structure. *See In re Schreiber*, 128 F.3d 1473, 1478 (Fed. Cir. 1997); *In re Hallman*, 655 F.2d 212, 215 (CCPA 1981). Appellant has failed to direct us to evidence that establishes the argued function patentably distinguishes the claimed structure from the structure of Frederick.

For the foregoing reasons and those presented by the Examiner we sustain the anticipation rejection of claims 8, 9, 11, and 13.

Obviousness

The Examiner separately rejected claims 10, 12, and 14–20 under 35 U.S.C. § 103(a) as unpatentable over Frederick in view of secondary references Houle and Delsalle, alone or in combination. Final Act. 5–7. In addressing these separate rejections, Appellant’s arguments for patentability are limited to independent claims 8 and 15.⁶

⁶ We note claim 8 has not been subject to an obviousness rejection. However, because claims which depend upon claim 8 have been rejected as obvious, we will address the claims as argued by Appellant.

Appellant argues the independent claims defines a spatial relationship between the tanks and the channel due to the functional language. (Appeal Br. 17.) Appellant argues Frederick specifically teaches a distinct structure wherein the second tank is below the first and that the adjustable weir only serves to adjust the volume the first tank contains. (Appeal Br. 17–18.)

Appellant’s arguments are not persuasive of reversible error for the reasons set forth above when addressing the anticipation rejection. Appellant’s arguments are limited to Frederick’s apparatus wherein the tanks are arranged for gravitational flow operation. As stated above, Frederick Figure 9 depicts non-gravity flow operation wherein the first and second tanks including an adjustable weir disposed there between and including circulation pipes 124 and 124’ that are attached to the first and second tanks respectively. (Frederick col. 9, ll. 22– 35; Figure 9.) The tank walls of the first and second tanks depicted in Figure 9 exceed the height of the adjustable weir.

In the Reply Brief, Appellant raises, for the first time, an argument that Frederick is non-analogous art. This argument was not raised in the Appeal Brief, is not responsive to an argument raised in the Examiner’s Answer, and no good cause for raising the argument for the first time in the Reply Brief is shown. Thus, in accordance with 37 C.F.R. § 41.41 (b)(2), we will not consider this argument. *See Ex parte Borden*, 93 USPQ2d 1473, 1474–77 (BPAI 2010) (informative) (“[T]he reply brief [is not] an opportunity to make arguments that could have been made in the principal brief on appeal to rebut the Examiner’s rejections, but were not.”).

Accordingly, we affirm the Examiner's obviousness rejections of claims 10, 12, and 14–20 for the reasons presented by the Examiner and given above.

For the reasons stated above and those presented by the Examiner we sustain the appealed prior art rejections.

CONCLUSION

In summary:

| Claims Rejected | 35 U.S.C. § | Reference(s)/Basis | Affirmed | Reversed |
|------------------------|--------------------|----------------------------|------------------|-----------------|
| 8, 9, 11, 13 | 102(a)(1) | Frederick | 8, 9, 11, 13 | |
| 10, 14–16, 18–20 | 103(a) | Frederick, Houle | 10, 14–16, 18–20 | |
| 12 | 103(a) | Frederick, Delsalle | 12 | |
| 17 | 103(a) | Frederick, Houle, Delsalle | 17 | |
| Overall Outcome | | | 8–20 | |

TIME PERIOD

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).

AFFIRMED