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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOHN RUDSER

Appeal 2019-002467
Application 15/224,744
Technology Center 1700

Before CATHERINE Q. TIMM, MICHAEL G. McMANUS, and
JANE E. INGLESE, *Administrative Patent Judges*.

TIMM, *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 1–7, 11–14, and 23–25. *See* Final Act.

1. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE and ENTER A NEW GROUND OF REJECTION.

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 HeartWare,
Inc., a subsidiary of Medtronic, Inc., whose parent is Medtronic Pk. Appeal
Br. 1.

CLAIMED SUBJECT MATTER

The claims are directed to a connector cleaning system (*see, e.g.*, claim 1) and a device implantation kit (*see, e.g.*, claim 23).

According to the Specification, the cleaning system is particularly useful when implanting ventricular assist devices (VADs). Spec. ¶ 2. VADs are electrically powered pumps implanted into the body to assist the heart in pumping blood. Spec. ¶ 3. A control device transmits electrical power to the VAD through mating connectors. Spec. ¶ 4. The connectors transmit electricity through contacts within the connectors. Spec. ¶ 5. During surgery to install or replace the VAD, the contacts may become contaminated with interstitial fluid or blood. Spec. ¶ 6. The cleaning system removes the contaminants from such implantable connectors, male or female, during an implantation procedure. Spec. ¶ 10.

Figure 6 depicts a connector cleaning system encompassed by the claims and is reproduced below:

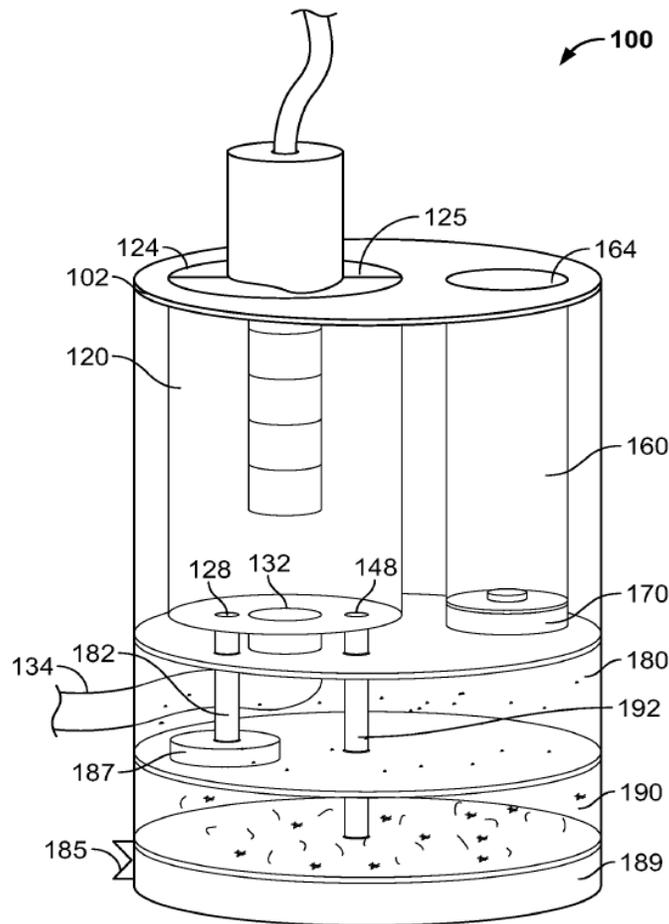


Figure 6 is a perspective view of an embodiment of the cleaning system that includes cleaning-drying chamber 120 and verification chamber 160. Spec. ¶¶ 20, 45. The two chambers reside in exterior housing 102. Spec. ¶ 45. Cleaning-drying chamber 120 has entry port 128 for cleaning medium, entry port 148 for drying agent, and exit port 132 for waste removal. *Id.* Verification chamber 160 includes imaging processing device 170. *Id.* After cleaning, the connector, shown inserted into cleaning-drying chamber 120 through sealing element 125,² may be moved from cleaning-

² The Specification does not identify reference numeral 125, but the text associated with the embodiment of Figure 1, describes a sealing element 25 and the text associated with Figure 7 describes a sealing element 225.

drying chamber 120 to verification chamber 160 and an image captured to verify that the contaminants have been removed. Spec. ¶ 41.

Claim 1, reproduced below with reference numerals from Figure 6 and the limitation most at issue highlighted, is illustrative of the claimed subject matter:

1. A connector cleaning system [100] comprising:

one or more cleaning elements adapted to engage a connector and remove contaminants from a contact portion of the connector;

an image processing device [170] adapted to capture an image of the contact portion after removal of contaminants; and

an exterior housing [102] including the one or more cleaning elements and the image processing device [170] being mounted thereto, *the exterior housing [102] having a first chamber [120] and a second chamber [160]*, wherein the one [sic, or] more cleaning elements are disposed within the first chamber [120] and the image processing device [170] is disposed within the second chamber [160].

Appeal Br. 11 (Claims Appendix) (emphasis added).

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Vazales	US 2011/0023885 A1	Feb. 3, 2011
Wilson	US 2013/0229650 A1	Sept. 5, 2013
Ma	US 2013/0323117 A1	Dec. 5, 2013
Alwan	US 2013/0323119 A1	Dec. 5, 2013

Spec. ¶¶ 27, 46. Given the similarity of the structure labeled 125 to the sealing elements 25 and 225, we determine reference numeral 125 also refers to a sealing element.

REJECTIONS

The Examiner maintains the following rejections.

Claims 1–4, 7, 11–14, 23, and 24 are rejected under 35 U.S.C. § 103 as being unpatentable over Vazales. Ans. 3.

Claims 5 and 6 are rejected under 35 U.S.C. § 103 as being unpatentable over Vazales in view of Ma. Ans. 5.

Claim 25 is rejected under 35 U.S.C. § 103 as being unpatentable over Vazales in view of Alwan. Ans. 6.

OPINION

New Ground of Rejection: Indefiniteness

We reject claims 1–7, 11–14, and 23–25 under 35 U.S.C. § 112(b) as failing to particularly point out and distinctly claim the subject matter which the inventor or a joint inventor regards as their invention.

The structures intended to be encompassed by “cleaning elements” is unclear. Claim 1 requires “one or more cleaning elements adapted to engage a connector and remove contaminants from a contact portion of the connector.” Claim 1 further requires that the “one [or] more cleaning elements [be] disposed within the first chamber.” To be disposed within the first chamber, the cleaning elements must be separate elements from the first chamber.

The Specification does not describe any cleaning elements as apparatus structures separate from the first chamber. The Specification states that “[c]leaning chamber 20 is a cleaning element,” Spec. ¶ 26, but the cleaning element cannot be both the chamber and disposed within the chamber. Thus, claim 1 excludes interpreting the cleaning element as the first chamber.

The Specification describes a cleaning medium and a drying agent as “among the one or more cleaning elements” and that “[e]ach of these cleaning elements is preferably distributed about the connector within one or more chambers formed in the device.” Spec. ¶ 10. Cleaning mediums and drying agents are, however, described as chemical compositions, not structures of the apparatus. *See, e.g.*, Spec. ¶ 28 (describing spraying a cleaning medium into chamber 20 through nozzle 86); Spec. ¶ 31 (describing removing the cleaning medium and contaminants from chamber 20 through exit ports 32); Spec. ¶ 35 (describing air as a drying agent); Spec. ¶ 62 (describing supplying cleaning cartridges 310 with harsh cleaner, alcohol-based cleaner, or water-based cleaner). Although the nozzles, entry ports, exit ports, and cartridges are apparatus structures, the cleaning medium and drying agent chemical compositions are not apparatus structures.

As stated in *In re Nuijten*, 500 F.3d 1346, 1355 (Fed. Cir. 2007), “[t]he Supreme Court has defined the term ‘machine’ as ‘a concrete thing, consisting of parts, or of certain devices and combination of devices.’” (quoting *Burr v. Duryee*, 68 U.S. (1 Wall.) 531, 570 (1863)). Interpreting “cleaning element” as encompassing the cleaning medium or drying agent would result in infringement turning on the use of the apparatus. “Construing a non-functional term in an apparatus claim in a way that makes direct infringement turn on the use to which an accused apparatus is later put confuses rather than clarifies, frustrates the ability of both the patentee and potential infringers to ascertain the propriety of particular activities, and is inconsistent with the notice function central to the patent system.” *Paragon Solutions, LLC v. Timex Corp.*, 566 F.3d 1075, 1091 (Fed. Cir. 2009).

Also, claim 11 depends from claim 1 and further requires a nozzle adapted to apply “a cleaning medium.” Thus, claim 11 introduces a cleaning medium as something different than the cleaning element recited in claim 1. This seems to indicate that the cleaning element is the chamber, but as explained above, the cleaning element is recited as a separate element “disposed within” the chamber. The two cannot be the same.

Claim 23, like claim 1, recites a cleaning element disposed within the first chamber. Thus, claim 23 is indefinite for the reasons explained above.

We reject claims 1–7, 11–14, and 23–25 as indefinite.

Obviousness

We agree with Appellant that the Examiner reversibly erred in finding that Vazales suggests a cleaning apparatus with an “exterior housing having a first chamber and a second chamber” as required by claims 1 and 23.

The Examiner finds that Vazales’s adapter 340A shown in Figure 24A, with its device insertion port 344 is a first chamber with one or more cleaning elements disposed within. Ans. 3. The Examiner acknowledges that Vazales does not disclose an exterior housing having a second chamber with the image processing device disposed within. *Id.* But the Examiner concludes that it would have been obvious to one of ordinary skill in the art “to modify the exterior housing of [Vazales] to have a second chamber in which the image processing device is disposed within, *as suggested by [Vazales]*, with reasonable expectation of success to allow the image processing device to be inserted into the system.” *Id.* (emphasis added).

It is not entirely clear whether the Examiner is relying on adapter 340A or the device insertion port 344 as the first chamber. In either case, Vazales fails to provide a suggestion of providing a second adapter or device insertion port. Vazales suggests using one adapter with one insertion port to

insert all the tools. Vazales ¶ 316 (“The device insertion port 344 can be used to insert the endotracheal tube cleaning device 120 and/or other devices (e.g., catheters, probes, scopes).”). Moreover, as pointed out by Appellant, a port is not a chamber. Reply Br. 2–3. Chambers are spaces or cavities while ports are small openings, such as the openings in Appellant’s chambers (e.g., entry ports 128, 148 and exit port 132 in Figure 6). Thus, to the extent the Examiner is relying on the port 344 as a chamber, the Examiner erred as a matter of claim interpretation.

The Examiner does not apply Ma or Alwan in a manner that cures the defect discussed above. We, thus, do not sustain any of the obviousness rejections.

CONCLUSION

The Examiner’s decision to reject claims 1–7, 11–14, and 23–25 is reversed and a new ground of rejection under 37 C.F.R. § 41.50(b) entered.

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). 37 C.F.R. § 41.50(b) provides “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.”

37 C.F.R. § 41.50(b) also provides that the Appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new Evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the prosecution will be remanded to the examiner. . . .

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same Record. . . .

Further guidance on responding to a new ground of rejection can be found in the Manual of Patent Examining Procedure § 1214.01.

DECISION SUMMARY

Claim(s) Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed	New Grounds
1-4, 7, 11-14, 23, 24	103	Vazales		1-4, 7, 11-14, 23, 24	
5, 6	103	Vazales, Ma		5, 6	
25	103	Vazales, Alwan		25	
1-7, 11- 14, 23-25	112(b)	Indefiniteness			1-7, 11- 14, 23-25
Overall Outcome				1-7, 11- 14, 23-25	1-7, 11- 14, 23-25

REVERSED; 37 C.F.R. § 41.50(b)