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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* DAVID ALLEN DORE, ROBERT C. TUCKER, and CHAD  
A. GRAND

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Appeal 2019-003171  
Application 14/580,323  
Technology Center 2600

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Before CARL W. WHITEHEAD JR., DAVID M. KOHUT, and IRVIN  
E. BRANCH, *Administrative Patent Judges*.

KOHUT, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the  
Examiner’s decision to reject claims 1–42. We have jurisdiction under  
35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> We use “Appellant” to reference the applicant as defined in  
37 C.F.R. § 1.42. Appellant identifies the real party in interest as  
“Safezone Safety Systems, LLC.” Appeal Br. 2.

STATEMENT OF THE CASE

*Appellant's Invention*

Appellant's invention relates to a "hotwork enclosure" that isolates welding therein from combustible gas outside (e.g., from fumes of an oil drill platform). Spec. 10, l. 18–11, l. 13. Claims 1 and 32, reproduced below with emphasis, are illustrative of argued subject matter.

1. An apparatus for conducting hot work comprising:
  - a. an enclosure;
  - b. a hot work apparatus operable within said enclosure; and
  - c. a detector located exterior of said enclosure, said detector being in detecting communication with an interior of said enclosure, such that said detector detects the presence of a condition within said enclosure.**
  
32. An apparatus for conducting hot work comprising:
  - a. an enclosure;
  - b. a welding apparatus operable at least partially within said enclosure;
  - c. a blower assembly in fluid communication with an interior of said enclosure;
  - d. a manual shutdown switch in communication with said welding apparatus;
  - e. an oxygen detector fluidly connected to the interior of said enclosure and in communication with said welding apparatus;
  - f. a pressure detector fluidly connected to the interior of said enclosure and in communication with said welding apparatus; and

***g. a combustible gas detector located exterior of said enclosure, said combustible gas detector being fluidly connected to the interior of said enclosure such that said combustible gas detector detects the presence of a combustible gas within said enclosure, said combustible gas detector being in communication with said welding apparatus.***

Appeal Br., Claims Appendix.

*Rejections*

Claims 1–3 and 9–42 are rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–8 of Dore (US 8,947,249 B1; Feb. 3, 2015) and Pregeant (US 6,783,054 B1; Aug. 31, 2004). Non-Final Act. 3–5.

Claims 4, 5, and 7 are rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–8 of Dore, Pregeant, and Fenwal (Kidden Fenwal, Analaser, HSSD®-L TT (*High Sensitivity Smoke Detection System Laser Technology Type*), June 1992, 89.58.2). Non-Final Act. 5–6.

Claim 6 is rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–8 of Dore, Pregeant, and Maskell (US 7,094,142 B1; Aug. 22, 2006). Non-Final Act. 6–7.

Claim 8 is rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–8 of Dore, Pregeant, and Ouellette (US 7,135,332 B2; Nov. 14, 2006). Non-Final Act. 6–7.

Claims 1–5, 7, and 9–42 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Pregeant and Fenwal. Non-Final Act. 9–16.

Claim 6 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Pregeant, Fenwal, and Maskell. Non-Final Act. 16–17.

Claim 8 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Pregeant, Fenwal, and Ouellette. Non-Final Act. 17.

#### RELATED APPEALS

The present application is a related application of US 14/579,780 (Appeal Br. 2), which had a pending appeal (2019-002952). We have addressed that appeal in another decision.

#### DOUBLE PATENTING REJECTIONS

For the double patenting rejections, Appellant contests the rejections of: independent claim 32 and its dependent claim 33 by contending a limitation of claim 32 is not taught by Dore's claims (Appeal Br. 6–9); and the remaining claims 1–31 and 34–42 by contending the Examiner does not address their limitations with specificity (*id.* at 9–10). For the below reasons, we are unpersuaded of error and accordingly sustain the double patenting rejections of claims 1–42.

#### *Claims 32 and 33*

Appellant contends Dore's claims do not teach or suggest claim 32's "detector [that is] located exterior of said enclosure . . . [and] detects the presence of a combustible gas within said enclosure." Appeal Br. 6–9. The Examiner responds that Dore's claimed gas detector, though separated from the hotwork enclosure (Ans. 3), is "in fluid communication" with the enclosure by way of being located in the air intake of the enclosure's blower (*id.* at 4). *See also* Non-Final Act. 8 (table). Appellant replies that Dore's claimed gas detector cannot detect gas originating from equipment within the enclosure and, thus, does not teach or suggest the claimed "detect[ing] the presence of a combustible gas within said enclosure." Reply Br. 5–6.

We are unpersuaded of error. The Examiner finds Dore’s claimed gas detector can be located in the blower intake of the hotwork enclosure and, therefore, would expectedly detect gas traveling into the enclosure. Ans. 3–4; Non-Final Act. 8; Dore, claims 1 (“blower assembly in fluid communication with an interior of said enclosure”), 7 (“gas detector located . . . in or near to an air intake of said blower assembly”). Appellant fails to explain why such a detection of gas flowing into an enclosure would not also “detect[] the presence of . . . gas within said enclosure,” as is claimed. *See In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (affirming because appellant “merely argued that the claims differed from [the prior art], and chose not to proffer a serious explanation of this difference.”). Appellant explains that such a detection of gas flowing into an enclosure would not detect gas that originates from equipment within the enclosure; however, this is not claimed. *See In re Hiniker Co.*, 150 F.3d 1362, 1369 (Fed. Cir. 1998) (“[The] proffered facts . . . are not commensurate with the claim scope and are therefore unpersuasive.”).

Appellant also contends that, even assuming (*arguendo*) Dore’s claimed blower intake is in fluid communication with the hotwork enclosure, a gas detector in the blower intake may nonetheless not be in fluid communication with the enclosure. Reply Br. 7. We are unpersuaded for two reasons. First, because the Examiner’s finding of “fluid communication” is apparent from the rejection (Non-Final Act. 8), Appellant’s argument could have been raised by the Appeal Brief and is therefore waived. *See* 37 C.F.R. § 41.37(c)(1)(iv) (waiver of untimely arguments). Second, even assuming (*arguendo*) the argument was not waived, Dore’s Figure 1 shows that a detector (e.g., 86) located in the

blower intake (26) of a hotwork enclosure is in fluid communication with the enclosure.

*Claims 1–31 and 34–42*

Appellant summarily contends the double patenting rejections lack a sufficient comparison of all but claim 32 against Dore’s claims.

Appeal Br. 9–10.

We are unpersuaded of error. The Examiner identifies Appellant’s claim limitations that are taught by Dore’s claims (Non-Final Act. 3–7), which comprise only 47 lines of Dore. The Examiner also maps Appellant’s claim 32 to Dore’s claims with specificity. *Id.* at 8–9 (table). In light of the above, the rejection is clear enough for Appellant to counter it—e.g., by identifying limitations of claims 1–31 and 34–42 that are not shared by claim 32 or not disclosed by the 47 lines of Dore’s claims. In other words, Appellant was presented a *prima facie* case to address. *See Jung*, 637 F.3d at 1362 (A *prima facie* case is achieved if the rejection is clear enough for the applicant to counter it.). Appellant fails to do so by *merely alleging* the Examiner did not bridge claims 1–31 and 34–42 to Dore’s claims. *See e.g., Jung*, 637 F.3d at 1363 (“[The] assertion that the examiner must bridge the facial differences between the claims and the prior art begs the substantive question of whether there are facial differences to be bridged.” (internal quotation marks and brackets omitted)).

OBVIOUSNESS REJECTIONS

For all obviousness rejections, Appellant contends the record does not support the Examiner’s proposed modification of Pregeant in view of Fenwal—that is, does not support relocating Pregeant’s pressure, gas, and oxygen sensors 53–55 from inside of the monitored enclosure to outside of

the enclosure. Appeal Br. 11–17. For the below reasons, we are unpersuaded of error and accordingly sustain the obviousness rejections of claims 1–42.

Specifically, Appellant contends the combination of Pregeant and Fenwal would render Pregeant’s invention unsatisfactory for its intended purpose because:

[I]f for any . . . reason there was not a flow of air into [Pregeant’s] chamber 13 and then out of the chamber 13 and to the . . . relocated exterior gas detector 54, . . . it would be impossible for the modified gas detector 54 (which is now exterior of the chamber 13) to detect . . . combustible gas that is in the interior space 16 of the chamber 13.

Appeal Br. 12. We are unpersuaded because this possibility of an air-flow failure does not show the combination of Pregeant and Fenwal would have lacked a reasonable expectation of success in the art. *See In re O’Farrell*, 853 F.2d 894, 904 (Fed. Cir. 1988) (“For obviousness under § 103, all that is required is a reasonable expectation of success.”); *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (“An assertion of what seems to follow from common experience is just attorney argument and not the kind of factual evidence that is required to rebut a *prima facie* case of obviousness.”); *see also Medichem, S.A. v. Rolabo, S.L.*, 437 F.3d 1157, 1165 (Fed. Cir. 2006) (“[A] given course of action often has simultaneous advantages disadvantages[. This] does not necessarily obviate motivation to combine.”).

Appellant also contends:

Fenwal teaches that “[t]he AnaLASER detector . . . should be positioned as close as possible to the protected area to minimize the air transport time.” *See Fenwal*, pg. 3, lines 7–9. . . . If

the[] sensors of Pregeant, [e.g.,] combustible gas sensor 54, are moved from the interior space 16 of the chamber 13 to the exterior of the chamber 13 . . . , the sensors would then be positioned further away from the protected area of Pregeant, which Fenwal explicitly teaches away from.

Appeal Br. 13. We are unpersuaded because Fenwal’s argued teaching—to position the detector “as close as possible to the protected area to minimize the air transport time” (*id.* at 3, col. 1)—merely compromises between Fenwal’s disclosed alternative placements of a detector: (1) in the monitored space (conventional detectors); and (2) outside the monitored space but in fluid communication (Fenwal’s detector). Fenwal 1, col. 1; 2, col. 2. The argued teaching does not thereby discourage use of the second (2) placement. *See In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004) (“The prior art’s mere disclosure of more than one alternative does not constitute a teaching away from any of these alternatives because such disclosure does not criticize, discredit, or otherwise discourage the solution claimed.”).

Appellant also contends: “[T]he relocated combustible gas sensor 54 of Pregeant would be positioned much further away from the protected area (i.e. the interior space 16 of the chamber 13) as compared to what is shown in the unmodified Fig. 1 of Pregeant[.]” Appeal Br. 14. We are unpersuaded for two reasons. First, this contention is mere attorney argument that Pregeant’s relocated gas sensor 54 would be ineffective at its proposed distance from the hotwork enclosure. *See Geisler*, 116 F.3d 1465, 1470 (parenthetical at *supra* 7 (attorney argument)). Second, contrary to relocating Pregeant’s detectors “much further away” (Appeal Br. 14), the Examiner proposes to relocate the detectors “close to the chamber’s wall” (Ans. 6).

Appellant also contends that Fenwal’s invention is “nonanalogous art” because its “purpose of detecting smoke would be nonsensical in the context of Pregeant or . . . Applicant’s invention.” Appeal Br. 15. We are unpersuaded because Appellant does not address whether methods of configuring smoke detectors (i.e., their viable locations as opposed to their purpose) would have been reasonably pertinent to configuring hotwork detectors. *See In re Clay*, 966 F.2d 656, 659–60 (Fed. Cir. 1992) (“[P]rior art is analogous . . . if . . . reasonably pertinent to the particular problem with which the [applicant] inventor is involved.”). For example, Appellant does not contend the invention’s available technologies for gas detection (Spec. 16, ll. 5–17; 18, ll. 15–18) and Fenwal’s technology for smoke detection (Fenwal 2, col. 2) were dissimilar. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007) (“[I]f a technique . . . would improve similar devices in the same way, using the technique is obvious.”).

Appellant also contends that another prior art reference of record, Wardlaw, III (US 2009/0134995 A1; May 28, 2009), teaches, “it is conventional practice” to locate hotwork detectors in the monitored space and thereby shows that a person of ordinary skill in the art would not have relocated Pregeant’s detectors. Appeal Br. 17 (citing Wardlaw ¶ 28). We are unpersuaded for two reasons. First, Wardlaw at best evidences what was understood at the time of its filing in 2007; it is not persuasive evidence of what was obvious at the time of Appellant’s invention in 2014. Second, even assuming (arguendo) Wardlaw shows an artisan would have chosen Pregeant’s positioning of a detector over the Examiner’s proposed positioning, mere preference for one technique in the art does not show that other techniques were discouraged. *See DePuy Spine, Inc. v. Medtronic*

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*Sofamor Danek, Inc.*, 567 F.3d 1314, 1327 (Fed. Cir. 2009) (“A reference does not teach away . . . if it merely expresses a general preference for an alternative invention[.]”).

In addition to contesting the combination of Pregeant and Fenwal, Appellant contends:

[The Examiner] reject[s] independent claims 25, 30, and 34 by simply stating “the limitations are similarly to those in claim 1 or 32 above, the rejection would be in the same manner[.]” [This] does not satisfy MPEP 2141’s requirements that office actions “provide an explanation to support an obviousness rejection” and that “the applicant be notified of the reasons for the rejection of the claim so that he or she can decide how best to proceed.”

Appeal Br. 11 (original brackets omitted).

We are unpersuaded. The Examiner identifies how the limitations of claims 1 and 32 are taught or suggested by the combination of Pregeant and Fenwal. Non-Final Act. 10–11. The Examiner also states claims 1 and 32 are similar to claims 25, 30, and 34. *Id.* at 14–15. If Appellant cannot thereby ascertain how the Examiner reads some limitations of claim 25, 30, or 34 on the combination, then Appellant must identify those limitations that are not bridged to the combination. *See supra* 6 (similar issue for the double patenting rejections).

#### OVERALL CONCLUSION

We affirm the Examiner’s decision to reject claims 1–42.

DECISION SUMMARY

In summary:

Claims Rejected	Basis	Reference/s	Affirmed	Reversed
1-3, 9-42	nonstatutory double patenting	Dore, Pregeant	1-3, 9-42	
4, 5, 7	nonstatutory double patenting	Dore, Pregeant, Fenwal	4, 5, 7	
6	nonstatutory double patenting	Dore, Pregeant, Maskell	6	
8	nonstatutory double patenting	Dore, Pregeant, Ouellette	8	
1-5, 7, 9-42	35 U.S.C. § 103(a)	Pregeant, Fenwal	1-5, 7, 9-42	
6	35 U.S.C. § 103(a)	Pregeant, Fenwal, Maskell	6	
8	35 U.S.C. § 103(a)	Pregeant, Fenwal, Ouellette	8	
<b>Overall Outcome</b>			1-42	

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