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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* RALPH NORFLEET and JASON NORFLEET

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Appeal 2019-004391  
Application 15/678,600  
Technology Center 3600

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Before JAMES P. CALVE, ANNETTE R. REIMERS, and  
WILLIAM A. CAPP, *Administrative Patent Judges*.

CAPP, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant<sup>1</sup> seeks our review under 35 U.S.C. § 134(a) of the final rejection of claims 1–20. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

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<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies Backsaver International, Inc. as the Applicant and real party in interest. Appeal Br. 2.

### THE INVENTION

Appellant's invention relates to safety bumpers for vehicle tailgates. Spec. ¶ 1. Claim 1, reproduced below, is illustrative of the subject matter on appeal.

1. An apparatus, comprising:  
a tailgate for being raised and lowered, the tailgate including a first corner; and  
a first bumper for covering the first corner.

### THE REJECTIONS

The Examiner relies upon the following as evidence in support of the rejections:

<b>NAME</b>	<b>REFERENCE</b>	<b>DATE</b>
Barrett	US 1,883,473	Oct. 18, 1932
Mullens	US 2,139,312	Dec. 6, 1938
Ward	US 7,168,208 B2	Jan. 30, 2007
Kobelman	US 2008/0217948 A1	Sept. 11, 2008
Jones	US 9,180,825 B1	Nov. 10, 2015
Bales	US 2016/0023691 A1	Jan. 28, 2016
Kindig	US 9,434,524 B2	Sept. 6, 2016
Miyamoto	JP 2007002507 A	Jan. 11, 2007

The following rejections are before us for review:

1. Claims 1–6 and 9 are rejected under 35 U.S.C. § 103 as being unpatentable over Bales and Jones.
2. Claim 7 is rejected under 35 U.S.C. § 103 as being unpatentable over Bales, Jones, and either Mullens or Miyamoto.
3. Claim 8 is rejected under 35 U.S.C. § 103 as being unpatentable over Bales, Jones, and Kindig.

4. Claim 10 is rejected under 35 U.S.C. § 103 as being unpatentable over Bales, Jones, and Ward.

5. Claims 11–15 are rejected under 35 U.S.C. § 103 as being unpatentable over Barrett and either Ward or Mullens.

6. Claims 16–20 are rejected under 35 U.S.C. § 103 as being unpatentable over Kobelman and Barrett and either Ward or Mullens.

## OPINION

### *Unpatentability of Claims 1–6 and 9 over Bales and Jones*

#### *Claim 1*

The Examiner finds that Bales discloses a vehicle tailgate with corners that are capable of causing personal injury. Final Action 3. The Examiner finds that Jones discloses a bumper and protector for use on the corner of a vehicle door. *Id.* The Examiner concludes that it would have been obvious to a person of ordinary skill in the art at the time of the invention to provide a bumper as taught by Jones on the vehicle tailgate of Bales to achieve the claimed invention. *Id.* According to the Examiner, a person of ordinary skill in the art would have done this to provide protection. *Id.*

Appellant argues that the Examiner fails to provide a reason as to why a person of ordinary skill in the art would have been motivated to modify the prior art in the manner proposed in the rejection. Appeal Br. 5. In response, the Examiner reiterates that the reason would have been to protect the corners. Ans. 3, 6. In reply, Appellant criticizes the Examiner's stated reason as inadequate. Reply Br. 1–2.

Appellant's argument is unpersuasive. The use of a known technique to improve similar devices in the same way is obvious unless its actual application is beyond the level of skill in the art. *See KSR Int'l Co. v.*

*Teleflex Inc.*, 550 U.S. 398, 417 (2007). Here, even lay persons can readily appreciate that placing padding on the corner of a door or tailgate will protect persons from personal injury and protect the door or tailgate from damage due to inadvertent impact with another structure. The Examiner's findings in this regard, albeit brief, are sufficient to support the rejection under applicable law. *See In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (requiring an obviousness conclusion to be based on explicit articulated reasoning with rational underpinning) cited with approval in *KSR*, 550 U.S. at 418.

We sustain the Examiner's unpatentability rejection of claim 1.

*Claims 2, 4–6, and 9*

Appellant does not argue for the patentability of claims 2, 4–6, and 9 apart from arguments presented with respect to claim 1, which we have previously considered. Accordingly, we sustain the Examiner's rejection of claims 2, 4–6, and 9. *See* 37 C.F.R. § 41.37(c)(1)(iv) (failure to separately argue claims constitutes a waiver of arguments for separate patentability).

*Claim 3*

Claim 3 depends from claim 1 and adds the limitation: “wherein the first corner comprises an upstanding flange and the first bumper is adapted for receiving the flange.” Claims App.

Appellant appears to argue claim 3 separately at the bottom of page 3 of the Appeal Brief, although Appellant fails to comply with our rules requiring such arguments to be set forth under an appropriate sub-heading. *See* 37 C.F.R. § 41.37(c)(1)(iv);<sup>2</sup> Appeal Br. 3. Appellant argues, among

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<sup>2</sup> [A]ny claim(s) argued separately . . . shall be argued under a separate subheading that identifies the claim(s) by number.” *Id.*

other things, that Jones' bumper is not adapted to receive a flange as claimed. Appeal Br. 5. The Examiner's abbreviated response does not mention, discuss, or otherwise dispute Appellant's position that Jones' bumper is not adapted to receive a flange. Ans. 6.

Jones is directed to a cushion to protect the corner of a passenger vehicle door. Jones, Abstract. The corner of the door depicted in Jones' Figure 6 appears to be substantially planar and two-dimensional, although it may be somewhat arcuate in shape, which arcuate shape does not change our analysis. Jones, Fig. 6. There is no structure at or near the corner of Jones' door that can properly be considered as a flange, even under the broadest reasonable construction of flange. *Id.* Receiving groove 20 of Jones is configured to accommodate the corner of a substantially planar structure. Thus, we agree with Appellant that Jones is not adapted to accommodate a door or tailgate that has a flange. *See* Jones, Figs. 1–9.

The Examiner's findings of fact and conclusions of law are not supported by the record before us. Consequently, we do not sustain the Examiner's unpatentability rejection of claim 3.

*Unpatentability of Claims 7, 8, and 10  
over Combinations Based on Bales and Jones*

Appellant does not argue for the patentability of claims 7, 8, and 10. We sustain the Examiner's rejections thereof. 37 C.F.R. § 41.37(c)(1)(iv).

*Unpatentability of Claims 11–15  
over Barrett and either Ward or Mullens*

*Claim 11*

Claim 11 is an independent claim that recites as follows:

11. An apparatus, comprising:

a tailgate for being raising and lowered, the tailgate including a flat portion defining a plane and an upstanding flange extending transversely from the plane, the upstanding flange defining a first corner; and  
a first bumper covering the first corner.

Claims App. The Examiner relies on Barrett as disclosing a tailgate with corners that pose an injury threat. Final Action 4. The Examiner finds that Barrett has upstanding flanges comprising L-shapes with a vertex of the L at the corner. *Id.* at 5. The Examiner finds that either of Ward or Mullens discloses corner protectors as claimed. *Id.* The Examiner concludes that it would have been obvious to a person of ordinary skill in the art at the time the invention was made to provide Barrett with a corner protector as taught by either Ward or Mullens. *Id.* According to the Examiner, a person of ordinary skill in the art would have done this to protect the corner. *Id.*

Appellant challenges the Examiner's finding that Barrett discloses a flange as claimed. Appeal Br. 6. Appellant argues that element 12 of Barrett extends "downwardly" and, therefore, is not an "upstanding flange" as claimed. *Id.* Appellant argues that the fact that such flange extends downwardly means that there is no corner that needs the protection of a bumper. *Id.*

Barrett discloses an adjustable tailgate. Barrett, p. 1, ll. 1–4. At least portions of Barrett's tailgate rotate about each of two pivot points. One such pivot point is cross-shaft 21 disposed toward the top of the tailgate in Figure 4. *Id.* Fig. 4. The second such pivot point is pivot stud 15. *Id.* Fig. 1. The portion of Barrett's tailgate that pivots about cross-shaft 21 is comprised of a metal plate 22 that is surrounded by bars 23 on each side and angle bar 24 that extends across the bottom of plate 22. *Id.* The portion of

Barrett's tailgate that pivots about stud 15 is surrounded by sidebars 18 on each side and cross-bar 19 extending across the top of the tailgate between the two sidebars 18. *Id.* A person of ordinary skill in the art would recognize sidebars 18, cross-bar 19, sidebars 23, and angle bar 24 as having an L-shaped structure defining a corner at the apex of the "L." A person of ordinary skill in the art would similarly recognize such L-shaped bars as a commonly used structural material known as "angle iron."

Contrary to the position taken by Appellant, element 12 does not extend vertically downwardly. Instead, element 12 is identified as a "horizontal flange" that is integrally cast together with vertical flange 11 and with vertical part 13 that extends downwardly adjacent the rear edge of flange 12. *Id.* p. 2, ll. 10–17. We further note that Appellant arbitrarily selected element 12 as a straw man to attack the Examiner's rejection, the Examiner having never identified explicitly element 12 as satisfying the flange limitation. *See* Final Action 5.

Appellant's Specification fails to provide an operational definition as to what it means for a flange to be "upstanding." *See generally* Spec. The word "flange" appears in the Specification only in paragraph 10, which is in the Summary section of the Specification. Spec. ¶ 10. There is no mention of an "upstanding flange" in the Detailed Description of the Specification, neither is there any description from which a precise meaning of the word "upstanding" can be derived. Nor do the drawings illustrate an upstanding flange as required. 37 C.F.R. § 1.83(a) ("The drawing in a nonprovisional application must show every feature of the invention specified in the claims."). Furthermore, it is understood that tailgates are designed to rotate through ninety degrees or more from an open to a closed position, so

whether an element is in a position that may be considered “upstanding” may depend on whether the tailgate is opened or closed. Moreover, it is understood that tailgates have frames that are comprised of both rails and stiles, each of which can dispose the orientation of L-shaped angle iron in different directions.

During examination of a patent application, pending claims are given their broadest reasonable construction consistent with the specification. *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). Under the broadest reasonable interpretation standard, claim terms are given their ordinary and customary meaning as would be understood by one of ordinary skill in the art in the context of the entire disclosure. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). Applying a broad, but reasonable, interpretation of “upstanding flange,” we are inclined to agree with the Examiner that Barrett’s tailgate has one or more L-shaped bars with upstanding flanges.

Furthermore, Appellant’s Background section of the Specification essentially concedes that “tailgate material . . . may be heavy” and that tailgates are known to have sharp corners than can cause injuries during the raising and lowering process. Spec. ¶ 3. We do not view Appellant’s Specification or claims as being directed to a new or improved tailgate that was not previously known in the prior art. As we understand and interpret Appellant’s Specification and claims, Appellant has purportedly invented a bumper that is designed to fit over an otherwise known, prior art tailgate corner. In that regard, Appellant’s attempt to distinguish Barrett’s tailgate from the otherwise known prior art tailgate with sharp corners that is alluded to in Appellant’s Background section fails to apprise us of Examiner error

with respect to the Examiner's ultimate conclusion that it would have been obvious to protect a sharp corner of a tailgate with a bumper in a similar manner as Ward and Mullens use bumpers.

In view of the foregoing discussion, we determine the Examiner's findings of fact are supported by a preponderance of the evidence and that the Examiner's legal conclusion of unpatentability is well-founded. Accordingly, we sustain the Examiner's unpatentability rejection of claim 11.

*Claims 12–15*

These claims depend, directly or indirectly, from claim 11. Claims App. Although Appellant makes passing reference to at least claims 12 and 15 in an argument section under a subheading directed to the grounds of rejection over claims 11–15, Appellant's expressed belief that these claims are allowable does not rise to the level of a separate argument for patentability. 37 C.F.R. § 41.37(c)(1)(iv); *In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) (Rule 41.37 requires more than recitation of the claim elements and a naked assertion that the elements are not found in the prior art).

In view of the foregoing, we sustain the Examiner's unpatentability rejection of claims 12–15.

*Unpatentability of Claims 16–20  
over Kobelman, Barrett, and either Ward or Mullens*

Claim 16 is an independent claim and claims 17–20 depend, directly or indirectly, therefrom. Appellant argues claims 16–20 under a single subheading. Appeal Br. 7–8. We select 16 as representative. See 37 C.F.R. § 41.37(c)(1)(iv).

Appellant argues, once again, that the Examiner fails to provide “any reason based on a rational underpinning” for combining the cited references. Appeal Br. 7. This argument, once again, is unpersuasive. Kobelman and Barrett disclose tailgates with sharp corners. Ward and Mullens disclose door guards to protect sharp corners. Ward explicitly discloses that its guard may be adapted for a trunk or hood cover of a vehicle in addition to a vehicle door. Ward, Abstract. We do not draw any patentable distinction between protecting the corner of a vehicle door, trunk, hood cover, or tailgate with a bumper. They are all movable elements of a vehicle that open and close such that their sharp corners are in motion creating a safety hazard.

Appellant’s Specification admits that it was known in the art that tailgates have sharp corners than cause injury. Spec. ¶ 3. The Examiner gives, as a rationale for the rejection, that a person of ordinary skill in the art would add a bumper to Kobelman and Barrett – “in order to protect the corner.” Final Action 5. Once again, this is sufficient rationale to support the rejection. *Kahn*, 441 F.3d at 988; *KSR*, 550 U.S. at 417.

With respect to claim 20, Appellant, once again contrary to our rules, attempts to argue a claim without providing a separate subheading. Appeal Br. 8; 37 C.F.R. § 41.37(c)(1)(iv). Appellant’s claim 20 argument is a recapitulation of the “upstanding flange” argument that we previously considered and found unpersuasive with respect to claim 11 and is equally unpersuasive here.

In view of the foregoing discussion, we determine the Examiner’s findings of fact are supported by a preponderance of the evidence and that the Examiner’s legal conclusion of unpatentability is well-founded.

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Accordingly, we sustain the Examiner's unpatentability rejection of claims 16-20.

### CONCLUSION

In summary:

<b>Claims Rejected</b>	<b>§</b>	<b>Reference(s)/Bases</b>	<b>Aff'd</b>	<b>Rev'd</b>
1-6, 9	103	Bales, Jones	1, 2, 4-6, 9	3
7	103	Bales, Jones, Mullens, Miyamoto	7	
8	103	Bales, Jones, Kindig	8	
10	103	Bales, Jones, Ward	10	
11-15	103	Kobelman, Barrett, Ward, Mullens	11-15	
16-20	103	Barrett, Ward, Mullens	16-20	
<b>Overall Outcome</b>			1, 2, 4-20	3

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)(iv).

AFFIRMED-IN-PART