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BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte NOBUHIRO TERAJ, MINORU SHIBATA,
YASUHIRO MARUTA, SHIZUO SANJO, HIDENORI UNO, and
NOBUYA SAKIMOTO

Appeal 2019-004541
Application 14/785,930
Technology Center 3700

Before STEFAN STAICOVICI, MICHAEL J. FITZPATRICK, and
WILLIAM A. CAPP, *Administrative Patent Judges*.

Opinion Concurring filed by *Administrative Patent Judge* FITZPATRICK.
STAICOVICI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner's decision in the Final Office Action (dated July 13, 2018) rejecting claims 1–5. We have jurisdiction over this appeal under 35 U.S.C. § 6(b).

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Toyota Gosei Co., Ltd. and Toyota Jidosha Kabushiki Kaisha are identified as the real parties in interest in Appellant's Appeal Brief (filed Feb. 21, 2019). Appeal Br. 2.

SUMMARY OF DECISION

We AFFIRM.

INVENTION

Appellant's invention is directed "to a front defroster nozzle device for a vehicle." Spec. para. 1.

Claim 1, the sole independent claim, is representative of the claimed invention and reads as follows:

1. A front defroster nozzle device including a narrow blow opening formed in an instrument panel below a windshield of a vehicle and extending in direction of vehicle width, wherein

the blow opening is divided into a plurality of sections in longitudinal direction of the vehicle, a first one of which is a front blow-opening, which is adjacent to the windshield, and a second one of which is a rear blow-opening, which is adjacent to the front blow-opening and is further inside an interior of the vehicle than the front blow-opening,

more of a current of air from the front blow-opening is sent to left and right end portions of the windshield than to a center of the windshield, and more of a current of air from the rear blow-opening is sent to a central portion of the windshield than to left and right end portions of the windshield,

a volume of air blown from the rear blow-opening per unit time is larger than a volume of air blown from the front blow-opening per unit time, and the front defroster nozzle device includes a blow outlet, which is divided into the front blow-opening and the rear blow-opening by a partition,

the rear blow-opening is configured such that air from the rear blow-opening is primarily directed to a trapezoidal area that is centrally located on the windshield, and the trapezoidal area extends from lateral ends of the rear blow-opening to upper corners of the windshield and is tapered such that a lower section of the trapezoidal area is smaller than an upper section of the trapezoidal area, in a lateral direction of the vehicle, and

the front blow-opening is configured such that air from the front blow-opening, most of which is sent to left and right end portions of the windshield, is primarily directed to areas of the windshield that are below the trapezoidal area.

REJECTIONS

- I. The Examiner rejects claims 1–5 under 35 U.S.C. § 103 as being unpatentable over Isao² and Nihon.³
- II. The Examiner rejects claim 4 under 35 U.S.C. § 103 as being unpatentable over Isao, Nihon, and Fischer.⁴

ANALYSIS

Rejection I

Appellant does not present arguments for the patentability of claims 2–5 apart from claim 1. *See* Appeal Br. 11 (“Claims 2-5 depend on claim 1 and should be patentable at least for the reasons given above in the discussion of claim 1 above.”). Therefore, in accordance with 37 C.F.R. § 41.37(c)(1)(iv), we select claim 1 as the representative claim to decide the appeal of the rejection of these claims, with claims 2–5 standing or falling with claim 1.

The Examiner finds that Isao discloses most of the limitations of independent claim 1 including, *inter alia*, front-blow opening 21a, adjacent a vehicle windshield and a rear-blow opening 22a, adjacent front-blow

² Isao et al., JP 2000-233721 A, published Aug. 29, 2000. We derive our understanding of this reference from the translation contained in the image file wrapper of this application. All references to the text of this document are to portions of the translation.

³ Nihon, JP 61-177907, published Nov. 6, 1986.

⁴ Fischer, US 5,934,988, issued Aug. 10, 1999.

opening 21a and located further inside the vehicle, wherein front-blow opening 21a is configured to blow air onto a trapezoidal central area “a” of the windshield and rear-blow opening 22a is configured to blow air onto right and left portions “b” of the windshield. Final Act. 3–4 (citing Isao, Figs. 1, 7). The Examiner further finds that “Isao does not teach that the front blow-opening sends air to the left and right and the rear-blowing opening sends [air] to the central portion of the windshield.” *Id.* at 4. Nonetheless, the Examiner finds that Nihon teaches front-blow openings 21–23 configured to blow air onto right and left portions of a windshield and rear-blow opening 24 configured to blow air onto a central portion of the windshield. *Id.* (citing Nihon, Fig. 1).

Thus, the Examiner determines that “it would have been obvious for one of ordinary skill in the art to have modified the teachings of Isao by switching the front and rear blow-openings, as taught by Nihon” in order to “hav[e] the rear-blow opening further away from the windshield so that it has a more direct path to the top of the windshield, thereby defrosting the top more quickly.” *Id.*

Appellant argues that because the volume of air blown from Isao’s front blow-opening 21a and Nihon’s front-blow openings 21–23 is larger than a volume of air blown from rear blow-opening 22a and 24, respectively, the combined teachings of Isao and Nihon fail to disclose “that a volume of air blown from the rear blow-opening is larger than a volume of air blown from the front blow-opening.” Appeal Br. 6.

We are not persuaded by Appellant’s argument because it is not commensurate with the Examiner’s rejection, where, in view of Nihon, “the front and rear blow openings [21a, 22a] of Isao are reversed (the front becomes the rear and the rear becomes the front, i.e. they switch places).”

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Advisory Act. 2.⁵ Hence, as the cross-sectional area of Isao's blow-opening 21a is larger than that of blow-opening 22a (*see id.*), in the device of Isao, as modified by Nihon, a volume of air blown from blow-opening 21a, which constitutes a rear blow-opening, is larger than a volume of air blown from blow-opening 22a, which constitutes a front blow-opening.

Appellant further argues that "it is not logical to move the central openings 21a [of Isao] rearward to send more air to the top of the windshield because that would deprive the bottom of the windshield of air flow."

Appeal Br. 7. According to Appellant, "[i]f the front nozzle were shifted rearward . . . the flow of air from the central nozzles 21a would be directed to a higher location of the window glass 1, and the lower edge of the windshield 1 of Isao would not receive air," and, thus, "the [E]xaminer's proposed modification would leave the lower central part of the windshield 1 undefrosted." *Id.* at 8.

Appellant's arguments are not persuasive as such arguments amount to attorney argument that cannot take the place of evidence in the record. *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."). We appreciate Appellant's position that moving blow-opening 21a rearward of blow-opening 22a would direct airflow to a somewhat higher location on windshield 1. However, we are not persuaded that such a location would not *overlap* a portion of Isao's central part 1a of windshield 1, and, thus, the lower edge of the windshield 1 of Isao, as modified by Nihon, would still receive air, albeit at a lower level. *See Isao*,

⁵ Examiner's Advisory Action, dated Sept. 25, 2018.

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paras. 19, 27, Fig. 1. The Examiner is correct that moving blow-opening 21a rearward of blow-opening 22a would still direct air to a central part of windshield 1, i.e., central part 1a. Ans. 3–4.⁶ Appellant has not proffered evidence or a line of reasoning tending to show that moving blow-opening 21a rearward of blow-opening 22a would have discouraged a skilled artisan from making the combination to attain the potential advantage of providing a “more direct path [of air] to the top of the windshield, thereby defrosting the top more quickly.” See Final Act. 4. “The fact that the motivating benefit comes at the expense of another benefit, however, should not nullify its use as a basis to modify the disclosure of one reference with the teachings of another. Instead, the benefits, both lost and gained, should be weighed against one another.” *Winner Int’l Royalty Corp. v. Wang*, 202 F.3d 1340, 1349 n.8 (Fed. Cir. 2000).

Appellant also argues that “[i]f the rear nozzles 22a were shifted forward, as proposed by the [E]xaminer,” such movement “would undermine Isao’s purpose of using the outer nozzles 22a to clear frost from the part of the side window 5 that is near the rear-view mirror 6.” Appeal Br. 8–9 (citing Isao, Fig. 1).

We are not persuaded by Appellant’s argument because it is not commensurate with the Examiner’s combination of Isao and Nihon, where, in view of Nihon, Isao’s blow-opening 21a is moved *rearward* of blow-opening 22a. See Final Act. 3–4. In other words, Isao’s blow-opening 22a is not shifted forward, as Appellant asserts, but rather remains in the same location, and, thus, air blown through blow-opening 22a continues to be directed to side portions 1b of windshield 1, which clears frost from side

⁶ Examiner’s Answer, dated Apr. 10, 2019.

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window 5. *See* Isao, Fig. 1. Such an interpretation of the Examiner’s rejection is consistent with the Examiner’s reasoning to modify Isao, according to Nihon, namely, to provide a “more direct path [of air] to the top of the windshield [1], thereby defrosting the top more quickly,” which is provided by air blown through blow-opening 21a and not blow-opening 22a. *See* Final Act. 4.

We are also not persuaded by Appellant’s assertion that in the modification of Isao, according to Nihon, “the air will not be uniformly distributed” because the airflows from nozzles 21a, 22a “will interfere with one another” due to shifting of rear nozzles 22a forward *and* forward nozzles 21a rearward. *See* Appeal Br. 9.

Appellant’s argument does not address the Examiner’s modification of Isao, according to Nihon. As discussed *supra*, in the Examiner’s rejection, Isao’s blow-opening 21a is shifted rearward, whereas blow-opening 22a is not shifted forward, as Appellant asserts, but rather remains in the same location. As such, because blow-opening 22a is not shifted forward in the combination of Isao and Nihon, we do not agree with Appellant’s contention that part 1b of windshield 1 where air from blow-opening 22a strikes the glass would be narrower. *See* Appeal Br. 9. Accordingly, Appellant’s contention that in the modification of Isao, according to Nihon, “the air will not be uniformly distributed” (*see id.*) constitutes unsupported attorney argument. *See In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984) (Arguments and conclusions unsupported by factual evidence carry no evidentiary weight.).

Lastly, Appellant argues that “one of ordinary skill in the art would not modify the ducts of Isao with those of . . . [Nihon] because . . . [Nihon] shows the type of ducts that extend across the entire instrument panel, which

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is the type of duct that is described as problematic in the background section of Isao.” Appeal Br. 10.

We are not persuaded by Appellant’s argument, because obviousness does not require that all of the features of the secondary reference be bodily incorporated into the primary reference. *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). The artisan is not compelled to blindly follow the teaching of one prior art reference over the other without the exercise of independent judgment. *Lear Siegler, Inc. v. Aeroquip Corp.*, 733 F.2d 881, 889 (Fed. Cir. 1984). Here, the Examiner is not proposing to use the particular size of Nihon’s front-blow openings 21–23 and rear-blow opening 24. *See* Ans. 5 (“The sizing of the respective ducts in Nihon is not brought into Isao.”). Rather, the Examiner is employing “the relative forward and rearward positioning” of nozzles aimed centrally and sideways at a windshield. *See id.*

In conclusion, for the foregoing reasons, we sustain the rejection under 35 U.S.C. § 103 of independent claim 1 as unpatentable over Isao and Nihon. Claims 2–5 fall with claim 1.

Rejection II

Appellant relies on the same arguments discussed *supra* with respect to the rejection of independent claim 1. *See* Appeal Br. 11.

Therefore, for the same reasons discussed above, we likewise sustain the rejection under 35 U.S.C. § 103 of claim 4 as unpatentable over Isao, Nihon, and Fischer.

CONCLUSION

Claim(s) rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1-5	103	Isao, Nihon	1-5	
4	103	Isao, Nihon, Fischer	4	
Overall outcome			1-5	

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

FITZPATRICK, *Administrative Patent Judge*, concurring.

I concur in the majority’s Decision to affirm the rejections of claims 1–5. I join most of the Decision with the exception of its treatment of Appellant’s argument that “[i]f the rear nozzles 22a were shifted forward, as proposed by the [E]xaminer,” such movement “would undermine Isao’s purpose of using the outer nozzles 22a to clear frost from the part of the side window 5 that is near the rear-view mirror 6.” Appeal Br. 8–9 (citing Isao, Fig. 1).

The Decision characterizes the above-quoted argument as “not commensurate with the Examiner’s combination of Isao and Nihon, where, in view of Nihon, Isao’s blow-opening 21a is moved *rearward* of blow-opening 22a [but] blow-opening 22a is not shifted forward.” *Supra* 6 (citing Final Act. 3–4). I disagree with the Decision’s characterization of Appellant’s argument and thus its conclusion that is not commensurate with the Examiner’s rejection.

The Examiner concluded that, “[a]t the time the invention was effectively filed, it would have been obvious for one of ordinary skill in the art to have modified the teachings of Isao *by switching the front and rear blow-openings*.” Final Act. 4 (emphasis added). The Examiner further stated that “Nihon is used to show that the front and rear blow openings of Isao are reversed (the front becomes the rear and the rear becomes the front, *i.e. they switch places*).” Advisory Act. 2 (emphasis added). Thus, Appellant’s argument is commensurate with the Examiner’s rejection. Accordingly, we must resolve it on the merits.

The Examiner provides two responses to Appellant’s argument.

First, the Examiner states that “[m]oving 22a forward would not stop the airflow from being deflected to the side window in the bottom corner as shown with Item 6. Therefore, the same area of the windshield would be defrosted.” Ans. 4. I am not persuaded by this argument, as it appears to be based purely on Examiner speculation and not evidence.

Second, the Examiner states that, one of ordinary skill in the art would understand how to aim the modified outlets 22a at the same portion of the windshield as they were aimed prior to the modification. *Id.* I find this argument persuasive in light of the prior art of record as well as common sense. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007) (“A person of ordinary skill is also a person of ordinary creativity, not an automaton.”).

Appellant replies that this second point by the Examiner cannot be relied upon by the Examiner without forfeiting the reasoning underlying the proposed modification of Isao. Appellant explains as follows:

It is inconsistent to say the motivation to modify Isao is to direct more airflow to the top of the windshield while also saying it would be obvious, after the modification, to aim the outlet to cover the lower area of the windshield as it was before the modification. If the outlet must be re-aimed to cover the lower part of the windshield after the modification, then the motivation to modify Isao cannot be to direct airflow to the top of the windshield. The inconsistency of these arguments highlights the non-obviousness of the combination and the lack of a teaching, suggestion, or motivation in the prior art that would have led one of ordinary skill to modify the prior art reference or to combine prior art reference teachings to arrive at the claimed invention.

Reply Br. 3. Appellant is mistaken. The motivation cited by the Examiner to direct airflow more directly at the top of the windshield (see Final Act. 4)

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is not mutually exclusive with a desire to maintain Isao's airflow (from separate outlets) at other portions of the windshield.

For the forgoing reasons, I concur in the Decision to affirm the rejections of claims 1–5.