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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/556,479	12/01/2014	Thomas Jasiulek	ROH 0077 NA/ P30984-US-pd	6133
67491	7590	03/23/2020	EXAMINER	
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			ART UNIT	PAPER NUMBER
			3731	
			NOTIFICATION DATE	DELIVERY MODE
			03/23/2020	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte THOMAS JASIULEK and
ANDREAS TRAPP

Appeal 2019-004969
Application 14/556,479
Technology Center 3700

Before CHARLES N. GREENHUT, MICHAEL L. HOELTER, and
ANNETTE R. REIMERS, *Administrative Patent Judges*.

GREENHUT, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner’s decision to reject claims 1, 3, and 5–11. *See* Final Act. 1. Claims 2 and 4 have been canceled and claims 12–20 have been withdrawn from consideration. *See* App. Br. 4; Final Act. 1–2. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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 Roche Diagnostics Operations, Inc. App. Br. 2.

STATEMENT OF THE CASE

The claims are directed to a carrier element for use in a packaging device that transmits wirelessly pressure information from a pressure sensor.

Claim 1, reproduced below, is the sole independent claim before us:

1. A carrier element for use in a packaging device, wherein
 - the carrier element is connectable with at least one transport device of the packaging device,
 - the carrier element comprises at least one receiving surface for receiving at least one package,
 - the receiving surface comprises at least one suction opening for fixing the package by suction,
 - the carrier element further comprises at least one pressure reservoir connected to the suction opening, and
 - the carrier element further comprises at least one pressure sensor configured to measure a pressure inside the pressure reservoir, wherein the carrier element is configured to transmit wirelessly at least one pressure information that indicates the pressure inside the pressure reservoir to at least one receiver, wherein the carrier element is configured to vary a measurement rate, and wherein the measurement rate is selected from the group consisting of a rate at which the pressure information is acquired by the pressure sensor and a rate of wireless transmission of the pressure information.

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Graff	US 3,852,938	Dec. 10, 1974
Kaushal	US 8,026,113 B2	Sept. 27, 2011
Meyer	US 2010/0263986 A1	Oct. 21, 2010

REJECTION

Claims 1, 3, and 5–11² are rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Meyer, Graff, and Kaushal. Final Act. 3.

OPINION

In order to arrive at the claimed subject matter, the Examiner proposes modifying Meyer’s carrier element (box carrier 14) by replacing its feeler pin 38 with Graff’s pressure sensors 79a, 79b that are used with suction cups 61. Final Act. 3–4 (citing Meyer Figs. 1, 6; Graff 3:44–50, 4:22–30; Figs. 1–2); *see also* Graff Fig. 5. The Examiner reasons that “[t]he motivation for such a replacement would be to avoid any risk of failure of the mechanical feeler pins thereby ensuring a more reliable controlled method for applying the suction for gripping.” Final Act. 4; *see also* Ans. 4.

Appellant argues that the Examiner’s proposed modification is based on improper hindsight reconstruction. *See* App. Br. 14 (citing Final Act. 7).³ Appellant also challenges the Examiner’s stated reasoning for replacing Meyer’s feeler pin 38 with Graff’s pressure sensors 79a, 79b (Ans. 4 (“[r]ecognizing that mechanical switches contacting boxes would be prone to failure over time, a person having ordinary skill in the art would recognize

² In the statement of the rejection, the Examiner listed claims 1–11 as being rejected. Final Act. 3. We regard this as a typographical error because claims 1, 3, and 5–11 are discussed in the body of the rejection (*see id.* at 3–7) and claim 2 and 4 have been canceled (*see id.* at 2).

³ Appellant also contends that in the Interview Summary dated August 23, 2018, the Examiner improperly takes the position that the claim language “configured to” can be interpreted as “capable of being configured to.” App. Br. 6. However, the Examiner has withdrawn this position. *See* Ans. 5.

that Meyer’s carrier element could be improved by using pressure sensors rather than mechanical feeler switches, in view of Graff’s teachings,”)) as not being supported by the cited prior art, conclusory, and thus, as based on hindsight. Reply Br. 1–2 (quoting Ans. 4).

“[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006), cited with approval in *KSR Int’l. v. Teleflex*, 550 U.S. 398, 418 (2007). Further, our reviewing court has frequently cautioned that it is not proper to base a conclusion of obviousness upon facts gleaned only through hindsight. To draw on hindsight knowledge of the patented invention, when the prior art does not contain or suggest that knowledge, is to use the invention as a template for its own reconstruction—an illogical and inappropriate process by which to determine patentability. *Sensonic Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1570 (Fed. Cir. 1996) (citing *W.L. Gore & Assoc. v. Garlock, Inc.*, 721 F.2d 1540, 1553 (Fed. Cir. 1983)). The invention must be viewed not after the blueprint has been drawn by the inventor, but as it would have been perceived in the state of the art that existed at the time the invention was made. *Id.* (citing *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1138 (Fed. Cir. 1985)). Here, the Examiner did not provide sufficient evidence to demonstrate, nor technical reasoning to explain, why Meyer’s mechanical pin has a higher risk of failure or lower reliability as compared to Graff’s pressure sensors. If anything, it can be argued that Graff’s pressure sensors, which seem more complex, would be more prone to failure and thus less reliable than an apparently simpler mechanical pin of Meyer.

As such, because the Examiner's statement is conclusory and the Examiner has not articulated a persuasive reason supported by rational underpinnings for combining the reference teachings in the manner proposed, we conclude that it is more likely than not that the Examiner improperly resorted to hindsight in reaching a conclusion of obviousness. *See* Reply Br. 2.

The rejection is also deficient for two additional reasons. First, in the Final Office Action, the Examiner acknowledges that the combination of Meyer, Graff, and Kaushal does not disclose varying a measurement rate of acquiring pressure information or varying a measurement rate of wireless transmission of pressure information, as required for claim 1. Final Act. 5. The Examiner, however, finds that Kaushal discloses "sampling the various sensor data at different rates." *Id.* (citing Kaushal 12:36–39, 16:43–45; Fig. 11). The Examiner concludes that it would have been obvious to modify the combination of Meyer, Graff, and Kaushal to have the required feature of claim 1 because

[a] person having ordinary skill in the art would recognize that a higher sampling rate would be needed to measure the precise moment a package is gripped, compared to when the partial vacuum is applied (no package is gripped), and thus two sampling rates may be used. A person having ordinary skill in the art would recognize this would reduce the amount of superfluous data required to be computed by the receiver, resulting in less computational expense of the device.

Id. This reasoning is also conclusory. First, from the cited passages and Figure 11, Kaushal, at best, discloses different sampling rates;⁴ Kaushal does

⁴ To the extent that the Examiner found that Kaushal discloses a single sensor operating at different sampling rates, we do not agree as discussed below.

not disclose the different sampling rates for the reasons discussed by the Examiner. Further, the Examiner did not provide sufficient evidence to demonstrate, nor technical reasoning to explain, why a higher sampling rate for precise measurement *and* a lower sampling rate for reducing superfluous data and computational expense are desirable in a single system. In other words, if a higher sampling rate produces precise measurement, then it would make sense to have the system operate only at that higher sampling rate. As such, this statement is also conclusory and because the Examiner has not articulated a persuasive reason supported by rational underpinnings for combining the reference teachings in the manner proposed, we conclude that again, it is more likely than not that the Examiner improperly resorted to hindsight. *See App. Br.* 13–14.

Further, claim 1 recites “the carrier element is configured to vary a measurement rate, and wherein the measurement rate is selected from the group consisting of a rate at which the pressure information is acquired by the pressure sensor and a rate of wireless transmission of the pressure information.” In other words, this limitation is different from a carrier element that uses one measurement rate and *another* carrier element that uses a different measurement rate. Appellant argues that Kaushal does not disclose the same sensor, i.e., the same carrier element, that varies the measurement rate as claimed. *App. Br.* 13. The Examiner appears to take the position that Kaushal does. *See Ans.* 7–8 (citing Kaushal 16:43–45).

Appellant’s contention is more persuasive. Kaushal discloses “the data may be obtained from a cluster of similar or dissimilar sensors being sampled at the same or different rates.” Kaushal 16:43–45. This passage does not clearly suggest a single sensor that is configured to vary its

measurement rate. At best, this passage discloses similar sensors that can sample at the same rates and different sensors that can sample different rates. We note that in the Answer, the Examiner pivots away from this position taken in the Final Office Action by asserting that the Specification discloses variable sampling rate pressure sensors are known. *See* Ans. 8–10 (citing Spec. 9:30–10:17⁵). However, even if variable sampling rate pressure sensors are known, the Specification does not admit that it would have been obvious to an ordinary artisan to use those sensors to vary data acquisition or data transmission *in a carrier element*. Thus, this altered position taken by the Examiner fails to remedy the lack of rational underpinnings discussed above.

For the foregoing reasons, we do not sustain the Examiner’s rejection.

CONCLUSION

The Examiner’s rejection is reversed.

DECISION SUMMARY

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 3, 5–11	103(a)	Meyer, Graff, Kaushal		1, 3, 5–11

REVERSED

⁵ Rather than citing to the Specification as filed, the Examiner cites to paragraphs 44 and 45 of the published application (US 2015/0082754 A1).