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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
15/062,566	03/07/2016	Ronald M. Helton	3240-00104	2689
62763	7590	06/29/2020	EXAMINER	
TOD T. TUMEY TUMEY LLP P.O. BOX 22188 HOUSTON, TX 77227-2188			WALRAED-SULLIVAN, KYLE	
			ART UNIT	PAPER NUMBER
			3635	
			MAIL DATE	DELIVERY MODE
			06/29/2020	PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RONALD M. HELTON

Appeal 2019-006708
Application 15/062,566
Technology Center 3600

Before MICHAEL L. HOELTER, WILLIAM A. CAPP, and
LEE L. STEPINA, *Administrative Patent Judges*.

Opinion for the Board filed by STEPINA, *Administrative Patent Judge*

Opinion Concurring filed by CAPP, *Administrative Patent Judge*

STEPINA, *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 1–4, 6, and 7. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM and enter a NEW GROUND OF REJECTION pursuant to 37 C.F.R. § 41.50(b).

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 Ronald M. Helton. Appeal Br. 3.

CLAIMED SUBJECT MATTER

The claims are directed to flood proof doors having a flange and hinges.

Claims 1 and 4, reproduced below, are the sole independent claims on appeal.

1. A flood proof door comprising:
 - a door having a front portion, lying in a plane, a rear portion, a top and bottom portion and a pair of side portions;
 - each of said pair of side portions having an outwardly extending flange lying in the plane of the front portion, the outwardly extending flange extending from the bottom portion of the door to a height above the bottom portion;
 - the bottom portion of the door including a downwardly extending flange portion;
 - a plurality of hinges having a first element of the each of said plurality of hinges attached to a first side of one of said outwardly extending flange of the door, and front face of the outwardly extending flange being coplanar with a front surface of the door, each outwardly extending flanges-consisting of a flat plate extension of the front portion of the door.

4. A flood proof door comprising:
 - a door having a front portion, lying in a plane, a rear portion, a top and bottom portion and a pair of side portions;
 - each side portions of said pair of said portions having an outwardly extending flange lying in the plane of the front portion, the outwardly extending flange extending from the bottom portion of the door to a height above the bottom portion;
 - the bottom portion of the door including a downwardly extending flange portion;
 - a plurality of hinges having a first element of the hinge attached to the outwardly extending flange of the door;
 - a second element of hinge secured to a first leg of an L-shaped member which is adapted to be secured to a door jamb frame,

Appeal 2019-006708
Application 15/062,566

each outwardly extending flanges consisting of a flat plate extension of the front portion of the door.

Appeal Br. 9–10 (Claims App.).

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Wirfs	US 1,695,073	Dec. 11, 1928
Mehaffy	US 3,044,130	July 17, 1962
Lingle	US 3,768,206	Oct. 20, 1973
Heikkinen	US 4,807,396	Feb. 28, 1989
Helton '975	US 8,782,975 B2	July 22, 2014
Helton '018	US 9,341,018 B2	May 17, 2016

REJECTIONS²

I. Claims 1–3 and 6 are rejected under 35 U.S.C. § 103(a) as unpatentable over Heikkinen, Wirfs, and Lingle.

II. Claims 4 and 7 are rejected under 35 U.S.C. § 103(a) as unpatentable over Heikkinen, Mehaffy, and Wirfs.

² The Final Office Action included rejections of claims 1–4 and 6 on the ground of nonstatutory double patenting over (i) claims 1, 2, and 4 of US 9,341,018 B2 (filed June 20, 2014) and Wirfs (Final Act. 3–5) and (ii) claims 1 and 2 of US 8,782,975 B2 (filed Apr. 25, 2012) and Wirfs (Final Act. 5–7). The Final Office Action also include a rejection of claims 1–4, 6, and 7 under 35 U.S.C. § 112, second paragraph, as indefinite. Final Act. 7–8. These rejections were all withdrawn by the Examiner. Ans. 3–4.

OPINION

Rejection I–Heikkinen, Wirfs, and Lingle (claims 1–3 and 6)

The Examiner finds that Heikkinen discloses many of the elements recited in claim 1, including an outwardly extending flange (bottom of door plate 40) lying in a plane of a front portion of the door and extending from a bottom portion of the door to a height above the bottom portion. Final Act. 8–9 (citing Heikkinen, 4:35–40, 6:19–23, Figs. 1, 2). In this regard, the Examiner notes that although Heikkinen’s Figures depict sealing assembly 10 only on the bottom of the door, Heikkinen’s detailed description discloses that sealing assembly 10 is also used on the sides and top of the door. *Id.* at 9 (citing Heikkinen, 6:19–23). The Examiner also finds Heikkinen’s door includes hinges 22. *Id.*

Although the Examiner finds Heikkinen discloses a door including a flange on the bottom, sides, and top, as well as a plurality of hinges, the Examiner finds Heikkinen does not explicitly disclose (i) that “a first element of the each of said plurality of hinges [is] attached to a first side of one of said outwardly extending flange[s] of the door” and (ii) that “said outwardly extending flanges consist[] of a flat plate extension of the front portion of the door.” Final Act. 8–9.

To address the first of these deficiencies in Heikkinen, the Examiner finds Lingle “discloses a first element (92) of the each of said plurality of hinges (96) attached to a first side (of 18) of one of said outwardly extending flange (18) of the door (10).” Final Act. 10. The Examiner determines that a person of ordinary skill in the art would have found it obvious to add hinges in the claimed location on the flange “in order to provide secure attachment of the door at an outermost point to the jamb, frame, or wall, as

hinging doors on flanges is extremely well known and common in the art, and does not appear critical to the invention.” *Id.*

To address the second deficiency in Heikkinen, the Examiner finds Wirfs discloses outwardly extending flanges consisting of a *flat plate* extension (the top of door B in Figure 1). Final Act. 10. The Examiner determines that a person of ordinary skill in the art would have been motivated to use a flat plate structure as the flange in Heikkinen because doing so would minimize the amount of material and machining required. *Id.*

Appellant argues that because Heikkinen’s flanges include “at least two plate steps 44,” Heikkinen fails to disclose an outwardly extending flange consisting of a flat plate extension. Appeal Br. 6. We agree with the Examiner’s response (Ans. 6) noting that the rejection of claim 1 relies on Wirfs, not Heikkinen, to teach a flange consisting of a flat plate extension. *See* Wirfs, Fig. 1. Thus, Appellant’s argument does not address the rejection of claim 1 and does not apprise us of Examiner error.

Appellant next argues “Heikkinen also fails to explain how the sealing assembly can be combined with the hinges which is a critical component of the claimed invention.” Appeal Br. 6.

The Examiner responds that Lingle is relied upon to teach the recited relationship between the flange and hinges, and, therefore, it is not necessary for Heikkinen to explain how the combination of these components is possible. Ans. 6–7. Nonetheless, the Examiner notes, “Heikkinen clearly discloses use of hinges 22. Col 4 lines 35–40 discloses 40 is part of the sealing assembly 10, and Col 6 lines 19–23 discloses that seal assembly 10 may be placed around the entirety of the door. As such, hinges 22 must be combined with the sealing assembly 10.” *Id.* at 7. In other words, according

Appeal 2019-006708
Application 15/062,566

to the Examiner, Heikkinen teaches the use of hinges in combination with a proximate flange, even if Heikkinen does not specifically teach that the flange and hinges are connected as recited in claim 1.

We agree with the Examiner on this point. It is not necessary that Heikkinen explain how the deficiency regarding the attachment of the hinge and flange, which is acknowledged by the Examiner in the rejection of claim 1, would be remedied. Appellant's argument on this point amounts to an unpersuasive attack on the cited references individually rather than an argument against the proposed combination of the references.

Appellant argues that "rectangular elements 18 of Lingle are not a flange[,] but rather are part of the door frame." Appeal Br. 6 (citing Lingle, Fig. 2).

In response, the Examiner states, regarding Lingle, "Col 1 lines 56-61 discloses that relied upon outwardly extending flange 18 is a side rail which is secured to the cover by nails. As such, 18 is not a part of the door frame as argued by the Appellant, but is part of the door itself." Ans. 7. The Examiner contends element 18 of Lingle is an outwardly extending flange because it extends outwardly from center rail 44 and insulation 80. *Id.*

In reply, Appellant asserts element 18 of Lingle is part of the door frame itself and cannot reasonably be considered to be a flange that extends outwardly from side portions of the door. Reply Br. 2.

Lingle describes element 18 as a "rectangular side rail" that is "nested *within* the sockets formed along the sides of the cover 10." Lingle, 1:57-59 (emphasis added). As shown in Figure 4 of Lingle, rectangular side rail 18 is surrounded by front cover 10 (including integral flanges 12 and flange extensions 14), with this front cover 10 being directly attached to hinge plate 92. Lingle's door is widest at the point identified by reference number 12

(the integral flange), which extends beyond rectangular side rail 18. The portion of this assembly farthest to the right in Figure 4 supports gasket 74 for compression against outside wall 88. *See id.* at 3:24–39. We reproduce Figure 4 of Lingle below with an annotation identifying this portion of Lingle’s assembly.

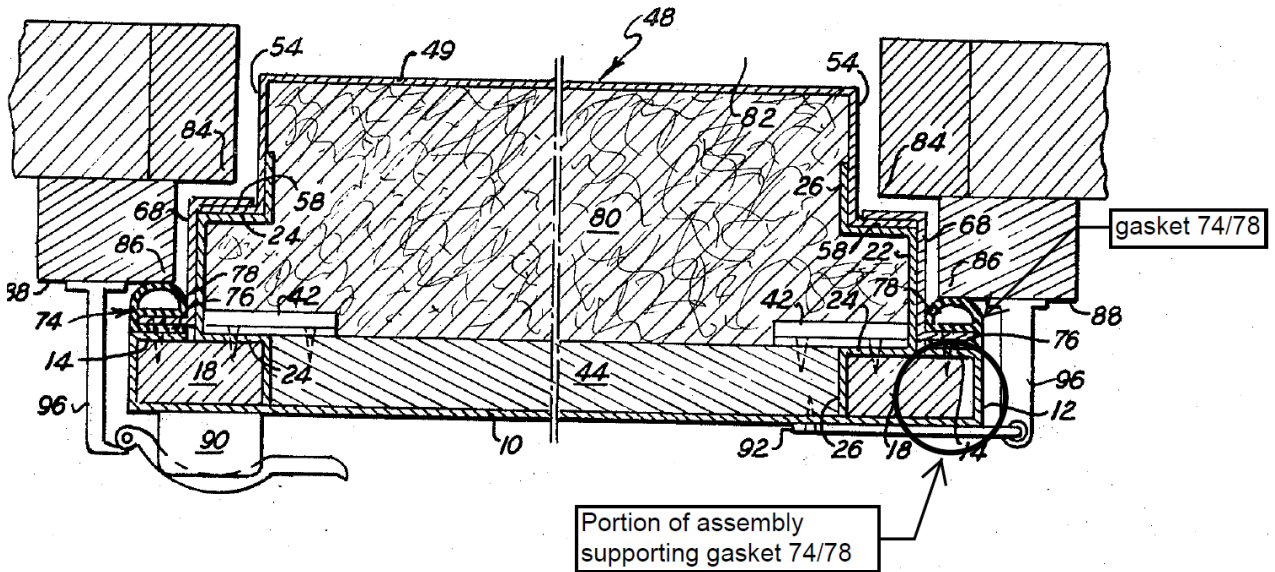


FIG. 4

Annotated Figure 4 is a top view of a cross-section of Lingle’s door mounted in a door opening and includes a circle identifying the lower right-hand corner of the door.

The portion of the assembly identified in annotated Figure 4 of Lingle above is comparable to Appellant’s outwardly extending flange 121, which is shown in Appellant’s Figure 13 as supporting seals 122. Appellant’s Specification indicates “[f]langes 114, 121, 141, 152 and 162 all extend from the *exterior* surface of door 100.” Spec. ¶ 59 (emphasis added). As rectangular side rail 18 is merely an *internal* subcomponent of a larger assembly that more closely matches Appellant’s structure identified as an outwardly extending flange, we agree with Appellant that a person of ordinary skill in the art would not consider rectangular side rail 18, by itself,

to be a flange under the broadest reasonable interpretation of this term in light of Appellant's Specification. Nonetheless, we agree with the Examiner's conclusion that Lingle discloses that first element (hinge plate 92) of a plurality of hinges (hinges 96) is attached to a first side of an outwardly extending flange. *See* Final Act. 8. Our findings differ from the Examiner's only in that we determine that the portion of the assembly identified in annotated Figure 4 of Lingle above, rather than rectangular side rail 18 by itself, satisfies the requirement for an outwardly extending flange of the door.

Appellant next argues that rectangular side rail 18 does not lie in the plane of the front portion of the door as recited in claim 1. Appeal Br. 6.

This argument is unpersuasive. The Examiner did not rely on Lingle to teach that the flange lies in the plane of the front portion of the door, and, instead, relied on Heikkinen to teach this feature. *See* Final Act. 9. Appellant does not contest that Heikkinen discloses that its flange lies in the plane of the front of the door. Thus, Appellant's argument does not address the Examiner's proposed combination of references. In any event, Appellant's argument does not appear to apply to the portion of the assembly identified in annotated Figure 4 of Lingle.

Finally, Appellant argues "it is unclear how the teachings of Lingle and Werfs [sic] would be incorporated into Herkkinen [sic] to arrive at the claimed invention. It appears that the examiner is selecting isolated elements from the prior art in an attempt to render the invention obvious based upon Appellant's disclosure." Appeal Br. 6.

Appellant's general allegation of impermissible hindsight is unavailing because Appellant does not address the Examiner's stated rationales for modifying the door and flange disclosed by Heikkinen based

Appeal 2019-006708
Application 15/062,566

on the teachings of Wirfs and Lingle. These rationales are set forth on page 10 of the Final Office Action.

We sustain the rejection of claim 1, and claims 2, 3, and 6 depending therefrom, as unpatentable over Heikkinen, Wirfs, and Lingle. However as our findings of fact regarding the flange disclosed by Lingle differ from those made in the Final Office Action (*see* Final Act. 10), we designate our affirmance a NEW GROUND OF REJECTION to afford Appellants a full and fair opportunity to react to the thrust of the rejection. *See In re Kronig*, 539 F.2d 1300, 1302 (CCPA 1976) (“the ultimate criterion of whether a rejection is considered ‘new’ in a decision by the board is whether appellants have had [a] fair opportunity to react to the thrust of the rejection.”).

Rejection II—Heikkinen, Wirfs, and Lingle (claims 4 and 7)

Independent claim 4 differs from claim 1 by reciting, *inter alia*, “a second element of hinge secured to a first leg of an L-shaped member which is adapted to be secured to a door jamb frame.” Appeal Br. 9 (Claims App.). The Examiner relies on Mehaffy to teach this element. Final Act. 12 (citing Mehaffy, 2:55–56, Fig. 1). The Examiner relies on Wirfs to teach outwardly extending flanges consisting of a flat plate extension of the front portion of the door. *Id.* at 13 (citing Wirfs, Fig. 2).

The Examiner reasons it would have been obvious to modify the flood proof door of Heikkinen with the plurality of hinges having a first element of the hinge attached to a first side flange of the door and second element of the hinge secured to a first leg of an L-shaped member secured to a door jamb frame (as disclosed by Mehaffy) “to provide secure attachment of the door at an outermost point to the jamb, frame, or wall, or to carry the door.” Final Act. 12–13 (citing Mehaffy, 1:54–55).

Appellant argues, “claim 4 recites that the outwardly extending flange lies in the plane of the front portion of the door. Mehaffy fails to disclose such arrangement.” Appeal Br. 7.

The Examiner responds, and we agree, that the rejection of claim 4 relies on Heikkinen to disclose an outwardly extending flange that lies in a plane of a front portion of the door. Ans. 10; *see also* Final Act. 11. Thus, Appellant’s argument fails to address the rejection of claim 4 by attacking Mehaffy for not disclosing an element the Examiner finds is already disclosed in Heikkinen.

Appellant next asserts the Examiner’s implementation of the teachings of Wirfs in combination with those of Heikkinen is unclear, and “[i]n Mehaffy, one portion of hinge 22 is attached to the side of door 4 by screws 25. Thus the examiner is saying that it is obvious to modify Heikkinen by utilizing a single flange that is coplanar with the front surface of the door (Wirfs) and then to attach a portion of a hinge to the flange (Mehaffy).” Appeal Br. 7. Appellant contends such a modification to the arrangement in Heikkinen amounts to the use of Appellant’s disclosure as a roadmap. *Id.*

We disagree with Appellant’s argument because the Examiner provides specific statements of motivation for making the proposed modifications to the arrangement in Heikkinen on pages 12–13 of the Final Office Action. Appellant does not contest the Examiner’s findings regarding these reasons for combining the teachings of Heikkinen, Wirfs, and Mehaffy. *See* Appeal Br. 6. Appellant’s description of the Examiner’s proposed combination of teachings, followed by a statement that the Examiner is merely taking individual elements from the prior art based solely on Appellant’s disclosure (*see id.*) does not identify error in the Examiner’s reasoning set forth on pages 12–13 of the Final Office Action.

Finally, although Mehaffy discloses hinge 22 attached via screws 25 and 26 to door 4 and in direct contact with the portion of door 4 identified by the Examiner as an outwardly extending flange (*see* Mehaffy, Fig. 1), Appellant asserts, “Mehaffy also does not show a first element of a hinge connected to a single flange extending from side portions of a door.” Reply Br. 2. This argument was first raised in the Reply Brief. Appellant’s argument is untimely, and Appellant does not present any persuasive evidence or explanation to show good cause why it should be considered by the Board at this time. *See* 37 C.F.R. § 41.41(b)(2) (“Any argument raised in the reply brief which was not raised in the appeal brief, or is not responsive to an argument raised in the examiner’s answer . . . will not be considered by the Board for purposes of the present appeal, unless good cause is shown.”); *Ex parte Borden*, 93 USPQ2d 1473, 1474 (BPAI 2010) (informative) (“[T]he reply brief [is not] an opportunity to make arguments that could have been made in the principal brief on appeal to rebut the Examiner’s rejections, but were not.”).

We have considered all of Appellant’s timely arguments in support of the patentability of claim 4, but find them unavailing. Accordingly, we sustain the rejection of claim 4 as unpatentable over Heikkinen, Wirfs, and Mehaffy. Appellant does not make separate arguments for the patentability of dependent claim 7, and this claim falls with claim 4.

CONCLUSION

The Examiner’s rejections are affirmed.

DECISION SUMMARY

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed	New Ground
1-3, 6	103(a)	Heikkinen, Wirfs, Lingle			1-3, 6
4, 7	103(a)	Heikkinen, Wirfs, Mehaffy	4, 7		
Overall Outcome			4, 7		1-3, 6

TIME PERIOD FOR RESPONSE

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 proceeding 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.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

Appeal 2019-006708
Application 15/062,566

AFFIRMED; 37 C.F.R. § 41.50(B).

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RONALD M. HELTON

Appeal 2019-006708
Application 15/062,566
Technology Center 3600

OPINION CONCURRING

CAPP, *Administrative Patent Judge*

I agree with the majority that the Examiner's rejection should be affirmed. However, I write separately to comment on whether there is a need, under the facts of this case, to designate the affirmance as a new ground of rejection.

As shown in the annotated version of Lingle Figure 4 in the majority decision hereinabove, Lingle exhibits structure comprised of side rail 18, flange 12, and flange extension 14. Elements 12 and 14 are depicted in Figure 4 as surrounding element 18. Collectively, elements 12, 14, and 18 extend laterally beyond the remainder of the door structure. Such elements collectively provide a base for mounting gasket 74.

In the rejection under review, the Examiner cites to only element 18 as satisfying the flange limitation of the claim. Final Act. 10. However, given the juxtaposition of elements 12, 14, and 18, I do not consider the Examiner to have erred in citing to only element 18 as the flange. Although, the Examiner could have cited collectively to elements 12, 14, and 18 as the flange, I do not think that such is necessary under the facts of this case.

Appeal 2019-006708
Application 15/062,566

In the Appeal Brief, Appellant argues that element 18 is not a flange because it is a part of a door frame. Appeal Br. 6. Even if we were to accept this argument (we should not), Appellant does not persuasively explain why a door frame may not be formed with a flange. Appellant never argues that element 18 is not a flange because it is covered by elements 12 and 14, which are integral to door cover 10 instead of other door features. *See generally* Appeal Br. Here, the majority disagrees with the Examiner's finding that element 18 is not a flange *sua sponte*, for a reason that is never raised by Appellant. This is contrary to the Board's long-standing practice of requiring an Appellant to identify the alleged error in an Examiner's rejection. *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011); *see also* 37 C.F.R. § 41.37(c)(1)(iv) (the Appeal Brief "shall explain why the examiner erred").

In my opinion, the Appellant has already been given a full and fair opportunity to respond to the thrust of the rejection. Merely noting that element 18 is surrounded by elements 12 and 12 does not change the "thrust" of the Examiner's rejection under prevailing law. *See In re Biedermann*, 733 F.3d 329, 337 (Fed. Cir. 2013) (explaining that a new ground of rejection, in an appropriate case, may be necessary to provide an applicant with a fair opportunity to react to the thrust of a rejection). In my opinion, the following principle applies here.

This court's predecessor long acknowledged the right of the Board to make additional findings of fact based upon the Board's own knowledge and experience to fill in the gaps that might exist in the examiner's evidentiary showing.

In re Leithem, 661 F.3d 1316, 1319 (Fed. Cir. 2011) (citing *In re Ahlert*, 424 F.2d 1088, 1091–92 (CCPA 1970); *In re Moore*, 444 F.2d 572, 574–75 (CCPA 1971)). Consistent with the foregoing principle, we should be able

Appeal 2019-006708
Application 15/062,566

to find that, even if element 18 is surrounded by elements 12 and 14, such finding amounts to no more than filling in gaps in the Examiner's evidentiary showing. To me, such a finding does not change the thrust of the rejection. Elements 12 and 14 are integral to the exterior metal cover of the door. Lingle, col. 1, ll. 49–55. In that regard, a person of ordinary skill in the art would understand that elements 12 and 14 merely provide an exterior cover for element 18, which is made of different material. In my opinion, that does not negative the fact that element 18 is a flange that is merely covered by a relatively thin layer of metal.

In summary, I concur in the result that has been reached by the majority, which is an affirmance of the Examiner's rejection. I am simply of the opinion that designating the affirmance as a new ground of rejection, under the facts of this case, is unnecessary.