

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 24

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARK V. HEMBLING, ROBERT R. CASSANELLI,
and STEVEN J. LEUSNER

Appeal No. 2000-1087
Application No. 08/976,102

ON BRIEF

Before PAK, OWENS, and JEFFREY SMITH, Administrative Patent Judges.
PAK, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 2 through 7, 11 through 14, and 21 through 23, which are all of the claims pending in the above-identified application.

Claim 21 is representative of the subject matter on appeal and reads as follows:

21. A readily-dispersible, dry mix for producing a quick-setting, aqueous gel having a pH of between 3.5 and 5.5 comprising; sweetener, potassium and/or sodium alginate, acid, buffering agent and a crystalline sugar product comprised aggregates of sucrose

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crystals and particles of a slowly-soluble calcium salt, salt sucrose crystals having a particle size of about 3-50 microns and wherein said crystalline sugar product is prepared by concentrating a sugar syrup containing at least 80% sucrose to a solids content of about 90 to 98%, admixing the concentrated sugar syrup with the calcium salt, subjecting the admixture to vigorous mechanical agitation within a crystallization zone until a crystallized sugar product is formed and recovering said product from the crystallization zone.

The prior art reference of record relied upon by the examiner is:

Hembling et al. (Hembling) 5,389,393 Feb. 14, 1995

The prior art reference of record relied upon by the Board is:

Chen et al. (Chen) 4,338,350 Jul. 6, 1982¹

Claims 21 through 23, 2 through 7 and 11 through 14 stand rejected under 35 U.S.C. § 103 as unpatentable over the disclosure of Hembling.

We reverse.

Under 35 U.S.C. § 103, "the examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability." *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). In other words, the examiner must provide a sufficient factual basis to support his

¹ A copy of this prior art reference is attached to this decision.

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Section 103 rejection. *In re Warner*, 379 F.2d 1011, 1017, 154 USPQ 173, 177-78 (CCPA 1967).

To carry his burden of proof, the examiner relies on Hembling. The examiner finds, and appellants do not dispute, that Hembling describes a readily-dispersible dry mix for producing a quick-setting, aqueous gel, comprising "sodium or potassium alginate, [a] calcium salt, sugars, [a] buffering agent, sweetening agents, food acids, flavors and colors." Compare, Answer, pages 3 and 4, with Brief in its entirety. The examiner finds, and appellants do not dispute, that the calcium salt can be agglomerated either per se or with up to 90% of a water-soluble filler such as sugars (sucrose). Compare Answer, page 4, with Brief in its entirety.

The examiner appears to recognize that Hembling is deficient in that it does not mention that its sugars are crystalline sucrose aggregates having particular particle sizes produced from the claimed sugar crystallization process. See Answer, page 4.

The examiner, however, concludes (*id.*) that:

It would have been obvious to one skilled in the art at the time of the invention to select the sugar product and calcium salt of any size as long as they can properly be mixed with other ingredients to make the dry mix. The selection of any particular size would have been an obvious matter of choice. As to the way the crystalline sugar product is obtained, it is not seen how the way the sugar is obtained affects the final product. Applicant

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has not shown that the way the sugar is obtained results in a different product from the Hembling et al product.

The examiner's conclusions are fatally flawed in that they are not supported by any factual evidence. The examiner has provided no factual evidence that the claimed sugar crystals having particular sizes are known. Nor has the examiner explained why "[t]he selection of any particular size would have been an obvious matter of choice." Accordingly, we are constrained to reverse the examiner's decision rejecting the claims on appeal under 35 U.S.C. § 103.

REMAND

As acknowledged by appellants at page 4 of their Brief, Chen teaches readily water-dispersible dry crystallized sugar (sucrose) aggregates having the claimed particle sizes (3-50 microns) which are produced from the same or substantially the same crystallization process as that claimed. See column 1, line 45 to column 2, line 3 and column 3, line 8 to column 4, lines 20. The sugar aggregates can be produced by adding food additives at any step during the crystallization process, e.g., concentrating and crystallization, thus incorporating into a sugar matrix the additives. See column 2, lines 4-24 and column 3, lines 16-26. These sugar aggregates are useful for powder or granular form food

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and can be used for the gelling (gelatin), coloring and flavoring purposes. See column 1, lines 9-20. These sugar aggregates improve the dispersibility of powdered food ingredients and prevent them from caking and clumping together. See column 1, lines 18-36 and column 2, lines 14-24.

Given the above-mentioned advantages of using the sugar product described in Chen in dry powder food ingredients useful for producing gelatin, we determine that one of ordinary skill in the art would have been led to employ the method described in Chen to produce the sugar-calcium particles described in Hembling, motivated by a desire to improve the dispersibility of Hembling's powder mix for producing a quick-setting gel (gelatin). In other words, the combined disclosures of Hembling and Chen would have rendered at least the subject matter recited in claim 21 *prima facie* obvious to one of ordinary skill in the art.

Upon return of this application, the examiner is to determine

- 1) whether the combined teachings of Hembling and Chen would have rendered the subject matter recited in each and every claim *prima facie* obvious to one of ordinary skill in the art; and
- 2) whether such *prima facie* case is rebutted by the declaration of record relied upon by appellants.

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If the declaration is not sufficient to rebut the *prima facie* case, the examiner is to enter a new ground of rejection at least against claim 21, if not against all the appealed claims. In setting forth the above-mentioned new ground of rejection, the examiner is reminded to explain why the declaration of record is not sufficient to rebut the *prima facie* case established by the combined teachings of Hembling and Chen. Should the examiner enter any new ground of rejection against any or all the claims on appeal, the examiner must reopen the prosecution of this application.

In view of the foregoing, we reverse the examiner's decision rejecting all the appealed claims under 35 U.S.C. § 103 and remand the application to the examiner's jurisdiction to address the issues raised by the combined disclosures of Hembling and Chen consistent with the instruction provided *supra*.

This application, by virtue of its "special", status, requires immediate action, see MPEP & 708.01 (8th ed., Aug. 2001), item (D). It is important that the Board of Patent Appeals and Interferences be promptly informed of any action affecting the appeal in this case.

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REVERSED/REMANDED

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| CHUNG PAK |) | |
| Administrative Patent Judge |) | |
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| |) | BOARD OF PATENT |
| TERRY J. OWENS |) | APPEALS |
| Administrative Patent Judge |) | AND |
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| JEFFREY SMITH |) | |
| Administrative Patent Judge |) | |

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APPEAL NO. 2000-1087

APPLICATION NO. 08/976,102

APJ PAK

APJ SMITH, JEFFREY

APJ OWENS

DECISION: **REVERSED/REMAND**

PREPARED: Sep 29, 2003

OB/HD

PALM

ACTS 2

DISK (FOIA)

REPORT

BOOK