

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 17

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte ROBERT V. VICKERS

Appeal No. 2002-0602
Application No. 09/596,749

ON BRIEF

Before ABRAMS, STAAB, and NASE, Administrative Patent Judges.
NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 44 to 55, 74, 86 to 91, 94 and 97 to 105. Claims 56 to 73, 75 to 85, 92, 93, 95 and 96 have been allowed. Claims 1 to 43 have been canceled.

We REVERSE.

BACKGROUND

The appellant's invention relates to a vehicular plow of the type used to clear snow and like debris from roadways and similar surfaces. A copy of the claims under appeal is set forth in the appendix to the appellant's brief.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

| | | |
|-----------|-----------|---------------|
| Middleton | 3,994,081 | Nov. 30, 1976 |
| Ciula | 4,803,790 | Feb. 14, 1989 |

Claims 44 to 55, 74, 86 to 91, 94 and 97 to 105 stand rejected under 35 U.S.C. § 103 as being unpatentable over Ciula in view of Middleton.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejection, we make reference to the answer (Paper No. 11, mailed September 11, 2001) for the examiner's complete reasoning in support of the rejection, and to the brief (Paper No. 10, filed July 19, 2001) and reply brief (Paper No. 12, filed October 19, 2001) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. Upon evaluation of all the evidence before us, it is our conclusion that the evidence adduced by the examiner is insufficient to establish a prima facie case of obviousness with respect to the claims under appeal. Accordingly, we will not sustain the examiner's rejection of claims 44 to 55, 74, 86 to 91, 94 and 97 to 105 under 35 U.S.C. § 103. Our reasoning for this determination follows.

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that would have led one of ordinary skill in the art to combine the relevant teachings of the references to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) and In re Lintner, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

Claim 44, the only independent claim on appeal, reads as follows:

A vehicular plow of the type used to clear snow and like debris from roadways and similar surfaces comprising:

a plow blade,
a rigid frame adapted to be secured to a vehicle on one side thereof and to which said plow blade is assembled on the opposite side thereof,
a resilient material at least partially positioned between said plow blade and said rigid frame,
said rigid frame including at least one vertically extending brace member which forms a gap between the brace member and said plow blade,
said resilient material at least partially positioned in said gap.

Ciula discloses a snow plow having a blade which includes an inwardly curved, polyethylene moldboard secured in a prestressed and arcuate relationship to a structural frame. The frame includes inwardly curved, vertically extending, transversely spaced brace members and a defined space of predetermined shape exists between the moldboard and the braces for improved snow removal by the blade.

Middleton discloses a push-type snowplow having a forwardly mounted angled blade reciprocated in a fore-and-aft direction by an oscillating motor drive for thrusting snow aside, the oscillatory impulses of the blade easing the manual effort required for snow removal. As shown in Figures 1-3, the blade 26 is comprised of a constrained blade portion 26b and a pivotal blade portion 26a that can be swung back to form a substantially symmetrical V-shape when desired for particular snowplow operations.

Middleton teaches (column 2, lines 52-65) that

FIG. 3 shows additional details of the structure including a blade-adjustment silencing provision in the form of a resilient strip of material 70, preferably plastic, of which polypropylene is a suitable example. Because the

blade half portions are adjustable (phantom lines and arrow) the strip of material is cemented or clamped to the back of the pivotable portion 26a of the blade and extends through and seals the opening between it and the constrained portion 26b. By this means the blade halves are prevented from vibrating against each other, even though they closely overlap in the straight configuration, held on the pivot structure top and bottom, as shown, to provide smooth continuous shunting of snow to the side.

After the scope and content of the prior art are determined, the differences between the prior art and the claims at issue are to be ascertained. Graham v. John Deere Co., 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966).

Based on the examiner's analysis and review of Ciula and claim 44, the examiner ascertained (answer, p. 3) that "Ciula fails to disclose a resilient material in the gap between the plow blade and the brace."

With regard to this difference, the examiner determined (answer, p. 4) that "[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to provide a resilient material in the gap of Ciula as taught by Middleton, in order to seal the space."

The appellant argues throughout both briefs that the applied prior art does not suggest the claimed subject matter. We agree.

All the claims under appeal require a resilient material to be at least partially positioned in the gap between the plow blade and the brace member. However, this limitation is not suggested by the applied prior art (i.e., Ciula and Middleton). In that regard, while Middleton does teach a resilient strip of material cemented or clamped to the back of the pivotable blade portion 26a which extends through and seals the opening between it and the constrained blade portion 26b, Middleton does not teach or suggest modifying Ciula's plow to have a resilient material at least partially positioned in the gap between the plow blade and the brace member. In our view, the only suggestion for modifying Ciula in the manner proposed by the examiner to meet the above-noted limitation stems from hindsight knowledge derived from the appellant's own disclosure. The use of such hindsight knowledge to support an obviousness rejection under 35 U.S.C. § 103 is, of course, impermissible. See, for example, W. L. Gore and Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984).

With regard to the examiner's reference (answer, pp. 5-6) as to what is commonly known in this art we note that such evidence is not before us in this appeal. Furthermore, a broad conclusory statement regarding the obviousness of modifying a reference, standing alone, is not "evidence." Thus, when an examiner relies on general knowledge to negate patentability, that knowledge must be articulated and placed on

the record. See In re Lee, 277 F.3d 1338, 1342-45, 61 USPQ2d 1430, 1433-35 (Fed. Cir. 2002). See also In re Dembiczak, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999).

For the reasons set forth above, the decision of the examiner to reject claim 44, and claims 45 to 55, 74, 86 to 91, 94 and 97 to 105 dependent thereon, under 35 U.S.C. § 103 is reversed.

CONCLUSION

To summarize, the decision of the examiner to reject claims 44 to 55, 74, 86 to 91, 94 and 97 to 105 under 35 U.S.C. § 103 is reversed.

REVERSED

NEAL E. ABRAMS
Administrative Patent Judge

LAWRENCE J. STAAB
Administrative Patent Judge

JEFFREY V. NASE
Administrative Patent Judge

)
)
)
)
)
) BOARD OF PATENT
) APPEALS
) AND
) INTERFERENCES
)
)
)
)

Appeal No. 2002-0602
Application No. 09/596,749

Page 9

FAT, SHARPE, FAGAN, MINNICH & MCKEE, LLP
1100 SUPERIOR AVENUE
SEVENTH FLOOR
CLEVELAND, OH 44114-2518

JVN/jg