

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. 14

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* ROD A. GARCIA

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Appeal No. 2003-0362  
Application 09/439,973

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ON BRIEF

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Before GARRIS, WARREN and WALTZ, *Administrative Patent Judges*.

WARREN, *Administrative Patent Judge*.

*Decision on Appeal and Opinion*

We have carefully considered the record in this appeal under 35 U.S.C. § 134, including the opposing views of the examiner, in the answer, and appellant, in the brief, and based on our review, find that we cannot sustain the rejection of appealed claims 1 through 15,<sup>1</sup> all of the claims in the application, under 35 U.S.C. § 103(a) as being unpatentable over Takado et al. (Takado) in view of von Bonin.<sup>2</sup>

In order to establish a *prima facie* case of obviousness, the examiner must show that

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<sup>1</sup> See specification, pages 11-13. Appellant states in the brief that “[c]laim 1 is representative of the invention” (page 4). Thus, we decide the appeal based on claim 1. 37 CFR § 1.192(c)(7) (2002).

<sup>2</sup> The statement of the ground of rejection is set forth in the Office action of July 17, 2001 (Paper No. 4; pages 2-4) (answer, page 3).

some objective teaching, suggestion or motivation in the applied prior art taken as a whole and/or knowledge generally available to one of ordinary skill in this art would have led that person to the claimed invention as a whole, including each and every limitation of the claims, without recourse to the teachings in appellant's disclosure. *See generally, In re Rouffet*, 149 F.3d 1350, 1358, 47 USPQ2d 1453, 1458 (Fed. Cir. 1998); *Pro-Mold and Tool Co. v. Great Lakes Plastics Inc.*, 75 F.3d 1568, 1573, 37 USPQ2d 1626, 1629-30 (Fed. Cir. 1996); *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992); *In re Fine*, 837 F.2d 1071, 1074-76, 5 USPQ2d 1596, 1598-1600 (Fed. Cir. 1988); *In re Dow Chem. Co.*, 837 F.2d 469, 473, 5 USPQ2d 1529, 1531-32 (Fed. Cir. 1988).

As an initial matter, we find that, when considered in light of the written description in the specification as interpreted by one of ordinary skill in this art, *see, e.g., In re Morris*, 127 F.3d 1048, 1054-55, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997), the plain language of appealed claim 1 specifies a tank comprising at least a multi-layer structure with its outer layer of a polyolefin containing a non-halogen intumescent additive package in an amount sufficient to prevent flammability. Thus, in giving these terms of the claim their broadest reasonable interpretation consistent with the specification, we determine that the outer layer must be capable of being characterized as a layer of polyolefin that contains as an additive a non-halogen intumescent additive package which is a combination of compounds found in non-halogen intumescent additives (specification, pages 4-6).

We find that the sole material which can be included in the high-density polyethylene outer layer of the multi-layer molded tank taught by Takado is reground scrap of the *same* multi-layered material used to mold the tank, which material is blended with virgin high-density polyethylene, with the reference teaching that such material does not result in "the deterioration of properties such as impact resistance" (col. 11, lines 27-33; *see also* col. 15, lines 1-4). Thus, we agree with appellant that "[i]n fact, [Takado] fails to disclose any additive or additive package in the outer layer and has no disclosure of any flame retardant" (brief, page 2; original emphasis omitted).

We further find that, as pointed out by appellant (*id.*, pages 3-8), von Bonin is drawn to a porous or non-porous intumescent mass "containing carbonization auxiliaries, fillers, and

optionally other auxiliary agents, obtainable by the reaction of polyisocyanates with isocyanate reactive compounds, optionally containing phosphorous or boron in the presence of polyepoxides” wherein the isocyanate provides the *cross-linking to solidify the mass*, which is used for structural elements for fire resistant purposes either alone or in combination with other ingredients (col. 1, line 56, to col. 2, line 8; and col. 7, lines 29-35). The applications taught in von Bonin indeed use this material as a “mass,” *inter alia*, in the manufacture of molded articles as well as forming coatings on plastic products such as fuel tanks, with the mass formed into granulates which can be foamed to prepare molded bodies (e.g., col. 8, lines 14-45; and col. 9, lines 6-38). We find no teaching or inference in the disclosure of von Bonin which would have suggested to one of ordinary skill in this art that the intumescent masses can be used as additives in the formation of a layer of polyolefin to form a molded product.<sup>3</sup>

Based on this evidence, we cannot agree with the examiner (answer, pages 3-9; Paper No. 4, page 4) that the mere disclosure in von Bonin that the porous and non-porous intumescent masses can be used to coat plastics, including fuel tanks, or molded foamed articles for fire resistance purposes would have motivated a person of ordinary skill in this art to include such material in the high-density polyethylene outer layer of the molded fuel taken of Takado, and particularly since Takado does not teach that additives, other than from reground scrap of the same material, can be used in preparing that layer. Thus, the applied references, separately and as combined, fail to provide the necessary motivation and reasonable expectation of success necessary to support the examiner’s position that the claimed tank encompassed by appealed claim 1 would have been *prima facie* obvious over the combined teachings of the references. *See, e.g., Dow Chem.*, 837 F.2d at 473, 5 USPQ2d at 1531 (“The consistent criterion for determination of obviousness is whether the prior art would have suggested to one of ordinary skill in the art that [the claimed process] should be carried out and would have a reasonable

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<sup>3</sup> It is well settled that a reference stands for all of the specific teachings thereof as well as the inferences one of ordinary skill in this art would have reasonably been expected to draw therefrom, see *Fritch*, 972 F.2d at 1264-65, 23 USPQ2d at 1782-83; *In re Preda*, 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968), presuming skill on the part of this person. *In re Sovish*, 769 F.2d 738, 743, 226 USPQ 771, 774 (Fed. Cir. 1985).

likelihood of success, viewed in light of the prior art. [Citations omitted] Both the suggestion and the expectation of success must be founded in the prior art, not in the applicant's disclosure.”).

Indeed, at best, the combination of Takado and von Bonin would have reasonably suggested to one of ordinary skill in this art to coat the plastic tank of Takado with the intumescent mass of von Bonin, which, of course, does not result in appellant's claimed invention. *See Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1050-54, 5 USPQ2d 1434, 1438-41 (Fed. Cir.).

The examiner's decision is reversed.

*Reversed*

BRADLEY R. GARRIS	)	
Administrative Patent Judge	)	
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	)	
	)	
CHARLES F. WARREN	)	BOARD OF PATENT
Administrative Patent Judge	)	APPEALS AND
	)	INTERFERENCES
	)	
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THOMAS A. WALTZ	)	
Administrative Patent Judge	)	

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