

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 23

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN EDWARD PETROVIC

Appeal No. 2004-0946
Application No. 09/965,150

HEARD: June 10, 2004

Before FRANKFORT, MCQUADE, and NASE, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's refusal to allow claims 10 through 14 as amended subsequent to the final rejection in a paper filed May 1, 2003 (Paper No. 8). Claims 10 through 14 are the only claims remaining in the application. Claims 1 through 9 and 15 through 18 have been canceled.¹ In

¹ Although we note that the examiner has approved entry of the above-noted amendment filed May 1, 2003 (see advisory action, Paper No. 9), we observe that such amendment has not as of yet been clerically entered. This oversight should be corrected during any further prosecution of the application before the examiner.

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addition, at the oral hearing held June 10, 2004, appellant's counsel requested that claim 14 be withdrawn from the appeal. Accordingly, the appeal as to claim 14 is dismissed, and only the examiner's rejection of claims 10 through 13 remains for consideration in this appeal.

Appellant's invention is directed to a multiple head shower system for retrofit installation on an existing shower plumbing system in a shower enclosure. Independent claim 10 is representative of the subject matter on appeal and a copy of that claim can be found in the Appendix to appellant's brief.

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

Gellmann	3,375,532	Apr. 2, 1968
Holbrook	6,233,756	May 22, 2001

Claims 10 through 13 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Gellmann in view of Holbrook.

Rather than attempt to reiterate the examiner's full commentary with regard to the above-noted § 103 rejection and the conflicting viewpoints advanced by the examiner and appellant

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regarding that rejection, we make reference to the examiner's answer (Paper No. 15, mailed November 7, 2003) for the reasoning in support of the rejection, and to appellant's brief (Paper No. 14, filed September 22, 2003) and reply brief (Paper No. 17, filed January 23, 2004) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by appellant and the examiner. As a consequence of our review, we have made the determination that the examiner's rejection will not be sustained. Our reasons follow.

The examiner's rejection of claims 10 through 13 under 35 U.S.C. § 103(a) based on the combined teachings of Gellmann and Holbrook recognizes that the flexible shower line unit of Gellmann teaches a multiple shower head system (col. 4, lines 66-71) for retrofit installation on existing shower plumbing, wherein the multiple shower head system includes a flexible conduit (28) extending from a valved connector fitting (30)

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attached to shower line (12), a primary shower head (70) attached to the connector fitting, and secondary shower head units (e.g., 92) provided on and along the flexible conduit if desired. What the examiner finds lacking in the system of Gellmann is any teaching or suggestion of a second elongate water conduit, as required in claim 10 on appeal. To account for this difference, the examiner looks to Holbrook, urging that this patent teaches a retrofit arrangement in a shower that allows for two auxiliary water lines extending from a header member (2-5) associated with the main water line (1). In the examiner's view, it would have been obvious to one of ordinary skill in the art at the time of appellant's invention to have provided the system of Gellmann with such multiple auxiliary water lines so as to provide more options for the user. The examiner has additionally expressed the view that the position of the respective auxiliary lines with respect to each other as specified in claim 10 on appeal "would have constituted an obvious use expedient" (answer, page 4).

Appellant argues, and we strongly agree, that neither Gellmann nor Holbrook teaches or suggests first and second elongate water conduits extending a substantial distance vertically downwardly towards a tub or shower base from a header

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member carrying a primary shower head, and wherein the first and second water conduits extend downwardly in different amounts and each carries a water spray valve mechanism and a separate on-off lever member at the end thereof, as specifically set forth in claim 10 on appeal. As for the examiner's proposed combination of Gellmann and Holbrook, and the further modification thereof to arrive at the claimed subject matter, we are of the view that the examiner's position represents a clear case of impermissible hindsight reconstruction of the claimed invention based on appellant's own teachings. In that regard, we note, as our court of review indicated in In re Fritch, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992), that it is impermissible for the examiner to use the claimed invention as an instruction manual or "template" in attempting to piece together isolated disclosures and teachings of the prior art so that the claimed invention is rendered obvious.

Since we have determined that the teachings and suggestions found in Gellmann and Holbrook would not have made the subject matter as a whole of independent claim 10 on appeal obvious to one of ordinary skill in the art at the time of appellant's invention, we must refuse to sustain the examiner's rejection of

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that claim under 35 U.S.C. § 103(a). It follows that the examiner's rejection of dependent claims 11 through 13 under 35 U.S.C. § 103(a) on the basis of Gellmann and Holbrook will likewise not be sustained.

Accordingly, the decision of the examiner to reject claims 10 through 13 of the present application under 35 U.S.C. § 103(a) is reversed.

REVERSED

CHARLES E. FRANKFORT)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
JOHN P. MCQUADE)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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JEFFREY V. NASE)	
Administrative Patent Judge)	

CEF/lbg

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JOHN A. ARTZ
ARTZ & ARTZ, P.C.
28333 TELEGRAPH ROAD, SUITE 250
SOUTHFIELD, MI 48034