

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 10

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROBERT SACKETT

Appeal No. 1997-3449
Application No. 08/424,806

ON BRIEF

Before MARTIN, FLEMING, and BARRY, Administrative Patent Judges.
BARRY, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on the appeal under 35 U.S.C. § 134 from the final rejection of claims 1, 3, 5-7, 9, 10, and 12-14. The appellant filed an amendment after final rejection on March 10, 1997, which was denied entry. We affirm-in-part.

BACKGROUND

Dump trucks are commonly used to haul materials (e.g., sand, gravel, asphalt, trash) in a bin. Materials in the bin are dumped by elevating the front of the bin and allowing the materials to slide- out through a back door or gate. Elevating the front, however, creates a moment arm. If the truck is tilted to the side, it is likely to roll over, severely damaging the truck and possibly injuring its operator.

The invention at issue in this appeal measures the side-to-side tilt of a dump truck and displays the tilt to an operator in or near the truck. If a safe tilt is exceeded, the invention stops elevation of the front of the truck's bin.

More specifically, a curved, transparent tube filled with liquid and a gas bubble is mounted on the truck. A series of light emitters is arranged along one side of the tube; a corresponding series of light detectors, along the other side. The detectors detect light passing through the liquid

(but not through the bubble). Resulting signals are transmitted to a display having a series of light emitting diodes (LEDs). An

electronic circuit processes the signals and illuminates the LEDs in a pattern corresponding to the tilt. Additional circuitry stops the elevation.

Claim 10, which is representative for our purposes, follows:

10. An apparatus for measuring side-to-side tilt of a vehicle having a bin and means for elevating one end of said bin to dump out contents of said bin and displaying indicia showing the amount of tilt present which comprises:

a curved transparent tube having two closed ends and a center;

a liquid within said tube filling the tube except for a single gas bubble;

means for mounting said tube on an axle of said vehicle with said tube lying in a vertical plane with said ends lowest so that said bubble will be at about said tube center when said supporting means is level, the distance along said tube between a bubble location and said tube center indicating tilt in said supporting means;

a series of light emitting means along a first side of said tube;

a series of light detecting means along a second side of said tube, each light detecting means directly opposite a light emitting means;

electronic means for receiving signals from each of said light detecting means indicative of whether

liquid or said bubble is adjacent to each light detecting means;

display means comprising at least one light bar having a series of light emitters operatively connected to said electronic means for producing a visible display pattern indicative of the degree of tilt of said supporting means; and

said electronic means including means for predetermining the degree of tilt to be indicated by said light pattern and for stopping lifting of said bin end when vehicle tilt reaches a predetermined angle.

The reference relied on in rejecting the claims follows:

Kramer	4,154,000	May 15,
1979.		

Claims 5 and 12 stand rejected under 35 U.S.C. § 112, ¶ 2, as indefinite. Claims 1, 3, 5-7, 9, 10, and 12-14 stand rejected under 35 U.S.C. § 103 as obvious over Kramer. Rather than repeat the arguments of the appellant or examiner in toto, we refer the reader to the briefs and answer for the respective details thereof.

OPINION

In reaching our decision in this appeal, we considered the subject matter on appeal and the rejections advanced by the examiner. Furthermore, we duly considered the arguments and evidence of the appellant and examiner. After considering the totality of the record, we are not persuaded that the examiner erred in rejecting claims 5 and 12 as indefinite. We are persuaded, however, that he erred in rejecting claims 1, 3, 5-7, 9, 10, and 12-14 as obvious. Accordingly, we affirm-in-part. Our opinion addresses the indefiniteness and obviousness of claims 5 and 12 and the obviousness of the claims 1, 3, 6, 7, 9, 10, 13, and 14.

Indefiniteness and Obviousness of Claims 5 and 12

The second paragraph of 35 U.S.C. § 112 requires that a specification conclude "with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." We address the rejections of claims 5 and 12 seriatim.

The examiner rejects claim 5 as being "dependent on claim 4 which has been canceled." (Examiner's Answer, ¶ 11.) The

appellant does not contest the rejection. To the contrary, he admits "the incorrect dependency of claim 5." (Paper No. 7 at 1.) For these reasons, we are not persuaded that claims particularly points out and distinctly claims the subject matter regarded as the invention. Therefore, we affirm the rejection of claim 5 under 35 U.S.C. § 112, ¶ 2.

The examiner rejects claim 12 because "there is no antecedent basis for 'said lamps'." (Examiner's Answer, ¶ 12.) The appellant does not contest the rejection.

A claim is indefinite "where the language 'said lever' appears in a dependent claim where no such 'lever' has been previously recited in a parent claim to that dependent claim . . ." Ex parte Moelands, 3 USPQ2d 1474, 1476 (Bd. Pat. App. & Int. 1987). Here, dependent claim 12 uses the language "said lamps." No such lamps have been previously recited in independent claim 10, which is the parent claim to claim 12. For these reasons, we are not persuaded that claim 12 particularly points out and distinctly claims the subject matter that the appellant regards as his invention.

Therefore, we affirm the rejection of claim 12 under 35 U.S.C. § 112, ¶ 2.

A rejection under 35 U.S.C. 103 should not be based on "speculations and assumptions." In re Steele, 305 F.2d 859, 862, 134 USPQ 292, 295 (CCPA 1962). "All words in a claim must be considered in judging the patentability of that claim against the prior art. If no reasonably definite meaning can be ascribed to certain terms in the claim, the subject matter does not become obvious-the claim becomes indefinite." In re Wilson, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970).

For the reasons explained in addressing the indefiniteness of claims 5 and 12, our analysis of the claims leaves us in a quandary about what they specify. Speculations and assumptions would be required to decide the meaning of the terms employed in the claims and the scope of the claims. Therefore, we reverse pro forma the rejection of claims 5 and 12 under 35 U.S.C. § 103. We emphasize that our reversal is based on procedure rather than on the merits of the obviousness rejections. The reversal is not to be construed

as meaning that we consider the claims to be patentable as presently drawn. Next, we address the obviousness of claims 1, 3, 6, 7, 9, 10, 13, and 14.

Obviousness of Claims 1, 3, 6, 7, 9, 10, 13, and 14

We begin by noting the following principles from In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993).

In rejecting claims under 35 U.S.C. Section 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). Only if that burden is met, does the burden of coming forward with evidence or argument shift to the applicant. Id. "A prima facie case of obviousness is established when the teachings from the prior art itself would appear to have suggested the claimed subject matter to a person of ordinary skill in the art." In re Bell, 991 F.2d 781, 782, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993) (quoting In re Rinehart, 531 F.2d 1048, 1051, 189 USPQ 143, 147 (CCPA 1976)). If the examiner fails to establish a prima facie case, the rejection is improper and will be overturned. In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988).

With these in mind, we analyze the appellant's argument.

The appellant argues, "Kramer neither teaches nor suggests measuring of level and coordinating the degree of

tilt with other factors, such as elevation of a dump bin, to .
. . stop the elevation or the bin before the combination of
tilt and elevation reaches a tip over point." (Appeal Br. at

6.) The examiner's reply follows:

Kramer teaches that the sensor signals can also be used as inputs to appropriate control units, see column 8, lines 55+. It would have been obvious to one of ordinary skill in the art at the time the invention was made that in the case of dump bins an 'appropriate control unit' would control the dumping thus terminating the dump in case of an over range signal. (Examiner's Answer, ¶ 11.)

Claims 1, 3, 6, 7, 9, 10, 13, and 14 each specify "an apparatus for measuring side-to-side tilt of a vehicle." Each of the claims adds that the vehicle has "a dump bin" and "means for elevating one end of said dump bin." Claims 1, 3, 6, 7, and 9 each further specify in pertinent part "means for automatically stopping elevating of said bin when a predetermined vehicle tilt limit is reached." Similarly, claims 10, 13, and 14 each further specify in pertinent part "means . . . for stopping lifting of said bin end when vehicle tilt reaches a predetermined angle." In summary, claims 1, 3, 6, 7, 9, 10, 13, and 14 each recite measuring the side-to-side

tilt of a vehicle having an elevating dump bin and automatically stopping elevation of the bin when a predetermined tilt is reached.

The examiner fails to show a teaching or suggestion of the claimed limitations. "Obviousness may not be established using hindsight or in view of the teachings or suggestions of the inventor." Para-Ordnance Mfg. v. SGS Importers Int'l, 73 F.3d 1085, 1087, 37 USPQ2d 1237, 1239 (Fed. Cir. 1995), cert. denied, 519 U.S. 822 (1996) (citing W.L. Gore & Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1551, 1553, 220 USPQ 303, 311, 312-13 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984)). "The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification." In re Fritch, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992) (citing In re Gordon, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984)).

Here, the examiner admits, "[n]ot specifically taught is the use of the level [of Kramer] on a dump bin trailer."

(Examiner's Answer, ¶ 11.) This is an understatement.

Kramer, the sole reference, teaches a "remote level sensor enclosure 10" Col. 5, ll. 15-16. The examiner, however, has not shown a teaching or suggestion of using the level sensor on a structure likely to increase in tilt, much less on a vehicle having an elevating dump bin. In contrast to the claimed invention, the reference uses the level sensor on a structure being leveled. Specifically, Kramer mentions, "level 10 might be placed on the chassis of a trailer which requires leveling or on an overhead beam which is to be leveled via jacks or the like." Col. 7, ll. 41-44.

The examiner also has not shown a teaching or suggestion of stopping any action upon identification of any condition much less stopping bin elevation upon identification of a predetermined tilt. Kramer does teach "that the output of sensors 94, signal conditioning amplifiers 95 or code conversion circuitry 96 can be used as the input for other

digital data processing systems such as the input to . . .
[an] appropriate control unit" Col. 8, ll. 56-61.
The reference, however, stops no action upon identification of
any condition. No other reference was applied by the examiner
to show any case where an over-tilt condition resulted in
stopping an action.

For the foregoing reasons, we are not persuaded that
teachings from the prior art would appear to have suggested
the claimed limitations of measuring the side-to-side tilt of
a vehicle having an elevating dump bin and automatically
stopping elevating of the bin when a predetermined vehicle
tilt is reached. The examiner impermissibly relies on the
appellant's teachings or suggestions; he has not established a
prima facie case of obviousness. Therefore, we reverse the
rejection of claims 1, 3, 6, 7, 9, 10, 13, and 14 under 35
U.S.C. § 103.

CONCLUSION

To summarize, the rejection of claims 5 and 12 under 35 U.S.C. § 112, ¶ 2, is affirmed. The rejection of claims 1, 3, 5-7, 9, 10, and 12-14 under 35 U.S.C. § 103 is reversed.

No period for taking subsequent action concerning this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED-IN-PART

JOHN C. MARTIN)	
Administrative Patent Judge)	
)	
)	
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)	BOARD OF PATENT
MICHAEL R. FLEMING)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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)	
LANCE LEONARD BARRY)	
Administrative Patent Judge)	

LLB/sld

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APPEAL NO. [Appeal No.] - JUDGE BARRY

APPLICATION NO. [Application No.]

APJ BARRY

APJ [APJ # 2]

APJ [APJ # 3]

DECISION:

Prepared by:

DRAFT TYPED: 07 Dec 00

FINAL TYPED:

Team 3, please note the following instructions:

Do NOT change style of citations.

Do insert full names of all inventors

Do insert reference(s).

Do add a mailing address

Do check quotations and citations.

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Thank you.