Paper No. 26

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHARLES H. TUCKEY

Appeal No. 98-2141
Application No. 08/427,653[1]

ON BRIEF

Before CALVERT, COHEN, and ABRAMS, Administrative Patent Judges.

CALVERT, Administrative Patent Judge.

DECISION ON APPEAL

[1] Application for patent filed April 21, 1995. According to appellant, this application is a continuation of Application No. 08/245,375, filed May 18, 1994; which is a continuation-in-part of Application No. 08/243,856, filed May 17, 1994, now U.S. Patent No. 5,427,074, issued June 27, 1995.

This is an appeal from the final rejection of claim 1. The other claims remaining in the application, claims 2 to 7 and 9 to 16, have been allowed.

Claim 1 reads:

> A fuel delivery system for an automotive vehicle which comprises:
>
> (a) a main fuel tank in said vehicle,
> (b) a closed reservoir in said main fuel tank, an electric pump drive in said reservoir,
> (c) a first rotary pump in said reservoir having a plurality of first vanes, a first inlet communicating with said first vanes for drawing fuel from said main tank and a first outlet communicating with said first vanes for delivering fuel into said reservoir through said first outlet,
> (d) a second rotary pump in said reservoir having a plurality of second vanes, a second inlet independent of said first inlet, open to the interior of said reservoir, and communicating with said second vanes for drawing fuel from said reservoir, and a second outlet communicating with said second vanes to deliver fuel to an engine,
> (e) both said first and second rotary pumps being simultaneously driven by said electric pump drive, and
> (f) a vent carried by the reservoir for venting air and fuel vapor from adjacent the top of the reservoir as fuel rises in said reservoir, said vent also being responsive to a fuel level adjacent the top of said reservoir to effectively close said vent to allow pressure to build up in said reservoir when said pumps are running.

The references applied in the final rejection are:

Kato et al. (Kato)	5,110,265	May 5, 1992
Jones	5,146,901	Sep. 15, 1992

Claim 1 stands finally rejected under 35 U.S.C. § 103 as unpatentable over Jones in view of Kato.

Before addressing the merits of the rejection, we note that on page 7 of the brief appellant contends that, because the final rejection was premature, claim 1 should be considered in the form in which appellant proposed to amend it in the Response to Final Office Action filed on May 27, 1997. However, the examiner refused entry of this amendment in the Advisory Action mailed on June 25, 1997 (Paper No. 20), and these issues are not within our jurisdiction to consider. See MPEP § 706.07(c) and Ex parte Jackson, 1926 C.D. 102, 104 (Comr. 1924) (premature final rejection) and In re Mindick, 371 F.2d 892, 894, 152 USPQ 566, 568 (CCPA 1967) (refusal to enter amendment after final rejection).

Turning to the question of obviousness under § 103, we have fully considered the record in light of the arguments presented in appellant's brief and reply brief, and in the examiner's answer. As a result, we conclude that claim 1 in unpatentable over the combination of references applied.

With regard to Jones, appellant submitted a declaration by him to the effect that at the time of the filing date of

the Jones patent, "skilled persons" would have understood that Jones' second stage fuel pump (42), which the patent describes as "conventional" (col. 5, line 19), would be "a positive displacement pump, such as a gear-rotor pump." The examiner

disagrees with this assertion (answer, page 7)[2], but in our view, whether or not Jones' pump 42 would be as stated by appellant in his declaration does not affect our conclusion of obviousness.

With regard to Jones, appellant argues that Jones does not disclose a vent as recited in part (f) of claim 1 because the reservoir 24 of Jones is continuously pressurized, even when vapor is being vented through vent 40 (brief, page 15, reply brief, pages 5 to 8), whereas in appellant's apparatus, the vent depressurizes the reservoir so that it is at the same pressure as the fuel tank. The problem with this argument is that it is not commensurate with the language of the claim. As described by Jones at col. 7, lines 9 to 22, the vent (orifice) 40 vents accumulated vapor from the reservoir 24, until fuel in the reservoir rises to a normal level and the float 36 rises in response thereto and closes the vent. Since this is all that part (f) of claim 1 requires, the claimed vent reads on the vent of Jones. While the claimed vent may

[2] Although the declaration was submitted with the proposed amendment after final rejection, supra, which was denied entry, the examiner evidently entered the declaration since he referred to it in his answer.

be intended to operate in a somewhat different manner than that of Jones, no limitations are recited in part (f) which are not found in the apparatus described by Jones.

The apparatus recited in claim 1 which is not disclosed by Jones is element (d), a second rotary pump having a plurality of vanes. As discussed above, we assume that Jones' disclosure that pump 42 is "conventional" means that it is a positive displacement pump. Nevertheless, we agree with the examiner that it would have been obvious to utilize a rotary vane pump as Jones' second stage pump 42 along with the turbine (rotary vane) first stage pump 52 disclosed by Jones. The use of two rotary vane pumps, one for the first stage and one for the second, would have been suggested to one of ordinary skill in view of Kato's disclosure thereof in a fuel pump positioned in a reservoir 6. Moreover, we note that appellant acknowledges in the first paragraph on page 2 of his specification that a two-stage pump utilizing two axially spaced rotors is illustrated in a prior publication. Thus, one of ordinary skill would have found it obvious to use two pumps of the same type on the same shaft, rather than using two pumps of different types.

Appellant argues that the references do not disclose or suggest the problem facing him, nor do Jones or Kato, "whether considered alone or in combination, disclose or suggest any construction having the significant practical advantages of Applicant’s specific construction" (brief, page 15). These

arguments are not persuasive because, first, even if Jones, as modified in view of Kato, would not solve appellant's problem,

> [a]s long as some motivation or suggestion to combine the references is provided by the prior art taken as a whole, the law does not require that the references be combined for the reasons contemplated by the invention.

In re Beattie, 974 F.2d 1309, 1312, 24 USPQ2d 1040, 1042 (Fed. Cir. 1992). See also In re Kemps, 97 F.3d 1427, 1430, 40 USPQ2d 1309, 1311 (Fed. Cir. 1996). Also, limitations appearing in the specification will not be read into the claims. Sjoland v. Musland, 847 F.2d 1573, 1582, 6 USPQ2d 2020, 2027 (Fed. Cir. 1988); In re Prater, 415 F.2d 1393, 1405, 162 USPQ 541, 551 (CCPA 1969). While the combination of Jones and Kato may not contain all the specific construction which appellant discloses, it does suggest the construction claimed in claim 1.[3]

Accordingly, the rejection of claim 1 will be sustained.

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[3] For example, on pages 14 to 15 of the brief, appellant argues that "the outlet of [Jones'] first stage pump has a check valve therein preventing the pressure in the reservoir from acting on the outlet of the first stage pump," but there is nothing recited in claim 1 which would exclude the presence of such a check valve.

Conclusion

The examiner's decision to reject claim 1 is affirmed.

No period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

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