

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

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

Ex parte PETER GALLAGHER,
TIPAWAN KREU-NOPAKUN, and
ANDREW MALCOLM MURRAY

Appeal No. 2002-0608
Application No. 09/294,173

ON BRIEF

Before SCHEINER, MILLS, and GREEN, Administrative Patent Judges.

GREEN, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 1-16.¹ Claim 1 is representative of the subject matter on appeal, and reads as follows:

1. An aqueous shampoo composition comprising, in addition to water:
 - i) at least one cleansing surfactant;
 - ii) a cationic deposition polymer; and

iii) a silicone component consisting of a blend of:

- (a) emulsified particles of an insoluble silicone, in which the emulsified particles of insoluble silicone are incorporated into the shampoo composition as a preformed aqueous emulsion having an average silicone particle size in the emulsion and in the shampoo composition of from 0.15 to 30 microns, and
- (b) microemulsified particles of an insoluble silicone, in which the microemulsified particles of insoluble silicone are incorporated into the shampoo composition as a preformed aqueous microemulsion having an average silicone particle size in the microemulsion and in the shampoo composition of less than 0.10 microns.

The examiner relies upon the following references:

Reid et al. (Reid)	5,085,857	Feb. 4, 1992
Baravetto et al. (Baravetto)	5,980,877	Nov. 9, 1999

Claims 1-16 stand rejected under 35 U.S.C. § 103(a) as being obvious over Reid and/or Baravetto. After careful review of the record and consideration of the issue before us, we reverse.

DISCUSSION

According to the rejection, Reid teaches an aqueous shampoo composition having a cleansing surfactant, a cationic deposition polymer and emulsified insoluble silicone particles having an average particle range of less than 2 microns. See Examiner's Answer, page 3. Baravetto, according to the rejection, teaches an aqueous shampoo composition containing a cleansing

¹ Claims 1-17 are pending, and were rejected finally in Paper No. 11. In the Examiner's Answer, however, the examiner indicates that claim 17 now stands as allowed, and thus claim 17 is not subject to this appeal.

surfactant and a cationic deposition polymer, and teaches the use of a blend of emulsified particles, wherein the particles have an average particle size of less than about 2 microns and an average particle size of greater than about 5 microns.

The rejection concludes:

Neither Reid nor Baravetto teach a blend (two components) of silicone particles with the claimed average particles of 0.15 to 30 microns and less than 0.10 microns. However, the prior art recognizes the combination of cationic deposition polymers, cleansing surfactants, and emulsified silicone particles in aqueous shampoo formulations. The prior art recognizes that the combination improves hair conditioning effects in shampoo compositions. As to the emulsified silicone particles, such preformed silicone microemulsions are commercially available as conditioning additives in shampoo compositions, and one of ordinary skill in the art would have expected similar conditioning results with one or more of these silicone microemulsions. Further, the selection of an optimal species to obtain the art recognized effect (i.e. improving the conditioning of the hair during a shampoo treatment) is within the ambit of ordinary skill in the art.

Examiner's Answer, pages 3-4.

Appellants argue that Reid taken by itself does not teach or suggest a dual particle size composition. See Appeal Brief, page 12. Appellants argue that Baravetto does not remedy the deficiency because Baravetto

makes no disclosure or teaching of the use of a microemulsion of 0.10 micron particle size or less in conjunction of another emulsion of particles of 0.15 to 30 microns. In fact, Baravetto, which recites a number of varying particle size ranges at column 11, lines 35-58, never captures the presently recited ranges of particle sizes.

Appeal Brief, page 13. We agree.

The burden is on the examiner to make a prima facie case of obviousness, and the examiner may meet this burden by demonstrating that the

prior art would lead the ordinary artisan 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, 1598-99 (Fed. Cir. 1988). The findings of fact underlying the obviousness rejection, as well as the conclusions of law, must be made in accordance with the Administrative Procedure Act, 5 U.S.C. 706 (A), (E) (1994). See Zurko v. Dickinson, 527 U.S. 150, 158, 119 S.Ct. 1816, 1821, 50 USPQ2d 1930, 1934 (1999). Findings of fact underlying the obviousness rejection, upon review by the Court of Appeals for the Federal Circuit, must be supported by substantial evidence within the record. See In re Gartside, 203 F.3d 1305, 1315, 53 USPQ2d 1769, 1775 (Fed. Cir. 2000). In addition, in order for meaningful appellate review to occur, the examiner must present a full and reasoned explanation of the rejection. See, e.g., In re Lee, 277 F.3d 1338, 1342, 61 USPQ2d 1430, 1432 (Fed. Cir. 2002).

Baravetto teaches that the shampoo compositions contain an insoluble hair component, wherein the component comprises a first conditioning agent having a mean particle size less than 2 microns, and a second conditioning agent having a mean particle size greater than about 5 microns. Id. at col. 11, lines 26-34. With respect to the particle sizes, Baravetto specifically teaches:

The first non-volatile conditioning agent in the present invention (the smaller particles) have a mean particle size below about 2 microns, preferably below about 1 micron, more preferably below about 0.5 microns, even more preferably below about 0.3 microns, even more preferably below about 0.15 microns, and most preferably below about 0.05 microns, and preferably greater than about 0.01 microns. The second non-volatile conditioning agent in the present invention (the larger particles) have a mean particle size range greater than about 5 microns, preferably from about 5

microns to about 500 microns, more preferably from about 10 microns to about 200 microns more preferably from about 15 microns to about 100 microns and most preferably from about 20 microns to about 75 microns.

Col. 11, lines 41-54.

Thus, admittedly Baravetto teaches a particle size less than 0.10 microns, which meets the requirements of the microemulsified particles of claim 1, as Baravetto teaches that the first non-volatile conditioning agent be most preferably below about 0.05 microns, but greater than about 0.01 microns. Baravetto does not, however, teach or suggest the required particle size of the emulsified particles.

One of the requirements of claim 1 is that the aqueous shampoo composition comprise a silicone component consisting of emulsified particles having an average size range of from 0.15 to 30 microns. Because of the use of the “consisting of” language, the emulsified particle component cannot contain particles that have an average size range that falls outside of that size range. Baravetto teaches that the second insoluble conditioning component most preferably has a mean particle range from about 20 microns to about 75 microns, but there is no teaching or suggestion in the reference that the range be further limited to particles that would fall within the size range required by claim 1. Thus, Baravetto does not teach or such emulsified particles of an insoluble silicone (i.e., an insoluble conditioning agent), wherein the particles have an average size range of from 0.15 to 30 microns.

The rejection asserted that the selection of an optimal species to obtain the art recognized effect (i.e., improving the conditioning of the hair during a shampoo treatment) is within the ambit of ordinary skill in the art. The examiner, however, provided no evidence to support that statement, and such conclusory statements are not sufficient to support a prima facie case of obviousness. See In re Lee, 277 F.3d 1338, 1343-44, 61 USPQ2d 1430, 1433-34 (Fed. Cir. 2002) (in reviewing an obviousness rejection, the court noted that “conclusory statements” as to teaching, suggestion or motivation to arrive at the claimed invention “do not adequately address the issue.”).

CONCLUSION

Because the rejection fails to set forth a prima facie case of obviousness, we reverse.

REVERSED

Toni R. Scheiner)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
Donald E. Adams)	
Administrative Patent Judge)	APPEALS AND
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)	INTERFERENCES
)	
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Appeal No. 2002-0608
Application No. 09/294,173

Page 7

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