

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

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

Ex parte INGO MULLER

Appeal No. 2003-1575
Application No. 09/420,306

ON BRIEF

Before McQUADE, NASE, and BAHR, Administrative Patent Judges.
NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 2 to 4, which are all of the claims pending in this application.

We REVERSE.

BACKGROUND

The appellant's invention relates to a massaging apparatus for massaging body areas of a person (specification, p. 1). A copy of the dependent claims under appeal is set forth in the appendix to the appellant's brief. Claim 4, the only independent claim on appeal, reads as follows:

A massaging apparatus, movable over the skin of a person in a given operating direction, said apparatus comprising;

a suction chamber enclosing a suction space, said chamber comprising a first and a second chamber wall, spaced from each other, and extending substantially transverse to the operating direction and a third and a fourth chamber wall, spaced from each other, extending substantially parallel to the operating direction, and connected to the first and second chamber wall, said suction chamber being open in an area for facing the skin,

a pump, for generating a partial vacuum inside the suction chamber for forming a skin fold and drawing said skin fold into the suction chamber when the massaging apparatus is disposed on the skin of a person, said pump communicating with the suction chamber via an air-transfer duct,

two rollers, each having a circumferential surface for contacting the skin of a person, each rotatable about a pair of roller axes extending transversely to the operating direction,

a motor and drive transmission for driving the rollers in a same direction of rotation, speed vectors of circumferential areas of the circumferential surfaces which face said skin oriented opposite to the operating direction, one of the rollers, disposed in the front of said apparatus, as viewed in the operating direction, arranged inside the suction chamber, and the other of the rollers, disposed in the rear of the apparatus, as viewed in the operating direction, arranged outside of the suction chamber wherein;

the circumferential surface of the roller, disposed in the front of the apparatus, as viewed in the operating direction, consists of a material having a friction value higher than that of the material of the circumferential surface of the roller, disposed in the rear of the apparatus, when viewed in the operating direction.

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

Bleeker et al. (Bleeker)	6,017,320	Jan. 25, 2000
Bergmann	GB 2558	June 28, 1890

Claims 2 to 4 stand rejected under 35 U.S.C. § 103 as being unpatentable over Bleeker in view of Bergmann.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejection, we make reference to the final rejection (Paper No. 10, mailed June 19, 2001) and the answer (Paper No. 17, mailed September 17, 2002) for the examiner's complete reasoning in support of the rejection, and to the brief (Paper No. 16, filed June 18, 2002) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. Upon evaluation of all the evidence before us, it is our conclusion that the evidence adduced by the

examiner is insufficient to establish a prima facie case of obviousness with respect to the claims under appeal. Accordingly, we will not sustain the examiner's rejection of claims 2 to 4 under 35 U.S.C. § 103. Our reasoning for this determination follows.

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that would have led one of ordinary skill in the art 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 (Fed. Cir. 1988) and In re Lintner, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

With this as background, we analyze the prior art applied by the examiner in the rejection of the claims on appeal.

Bleeker's invention relates to a massaging apparatus comprising two rollers which are each rotatable about one of two mutually parallel spaced-apart roller spindles, these rollers are to be placed onto the skin of a person with their circumferential surfaces and are rotationally drivable in a given direction of rotation when the massaging apparatus with its two rollers is moved over the skin of a person in

a given operating direction which extends transversely to the roller spindles. The massaging apparatus further comprises a suction chamber in the area of the two rollers, this suction chamber enclosing a suction space and comprising two transverse walls, which extend substantially perpendicularly to the roller spindles, and two longitudinal walls, which extend parallel to the roller spindles, are connected to the two transverse walls, and each has a free end adjacent the circumferential surface of a roller, this suction chamber being open in its area which faces a person's skin when the rollers are applied to the skin of a person and is connected to a pump for the transfer of air via an air-transfer connection, the pump--with the rollers applied to the skin of a person--being capable of generating a partial vacuum in the suction chamber in order to form a skin fold which is drawn into the suction chamber.

Figures 1-6 show a massaging apparatus in accordance with a first embodiment of Bleeker's invention wherein both the forward roller 30 and the rearward roller 31 are outside of the suction chamber 56. Figure 9 is a highly diagrammatic sectional view of a massaging apparatus in accordance with another embodiment of Bleeker's invention wherein the forward roller 30 is within the suction chamber 56 and the rearward roller 31 is outside the suction chamber 56. Figure 10 shows a highly diagrammatic sectional view of a massaging apparatus in accordance with a further embodiment of Bleeker's

invention wherein the forward roller 30 is outside the suction chamber 56 and the rearward roller 31 is within the suction chamber 56.

Bleeker teaches (column 7, lines 52-65) that

the forward roller 30, viewed in the given operating direction 29, is wholly made of a comparatively hard material, the circumferential surface 37 of the roller 30 advantageously having a surface roughness ranging between 0 μm and 2 μm . The interior of the rearward roller 31, viewed in the operating direction 29, is also made of a comparatively hard material but is surrounded by a shell of a comparatively soft material, the circumferential surface 38 of the rearward roller 31 having a higher surface roughness than the circumferential surface 37 of the forward roller 30. The surface roughness of the circumferential surface 38 of the rearward roller 31 may range approximately between 3 μm and 6 μm .

Bergmann discloses an apparatus for shampooing, which may be used for this purpose alone, or for simultaneously shampooing, beating and rubbing the body. The apparatus as shown in Figure 9 includes a knobbed roll *a*, a smooth roll *c* and a handle *g*. Bergmann teaches (page 2, lines 41-44) that (1) the knobbed roll *a* consists of a metal core provided with a knobbed covering of india rubber or other suitable material; and (2) the smooth roll *c* is made of metal covered with wash leather or other similar soft material.

In the rejection of claim 4 in the answer (pp. 3-4), the examiner (1) ascertained that Bleeker differs from the present invention in that Bleeker's rearward roller 31 has a

higher roughness than the forward roller 30 rather than the forward roller having a higher roughness than the rearward roller as recited in claim 4; and (2) concluded that reversal of Bleeker's rollers such that having the forward roller 30 with higher roughness than the rearward roller would not have modified the operation of Bleeker's device and that if one of ordinary skill in the art desired to change the massaging effect, one would have looked to Bleeker's device and seen that reversing the location of Bleeker's rollers, would be able to provide different massaging effects.¹

The appellant argues that the applied prior art does not suggest the claimed subject matter. We agree. In that regard, the teachings of Bleeker do not in any way teach or suggest that Bleeker's forward roller 30 in the embodiment of Figure 9 wherein the forward roller 30 is within the suction chamber 56 have a higher roughness than the rearward roller 31. In fact, Bleeker teaches the exact opposite. To supply this omission in the teachings of Bleeker, the examiner made the above-noted determination that this difference would have been obvious to an artisan. However, this determination has not been supported by any evidence that would have led an artisan to arrive at the claimed invention. Thus, the examiner has not presented a prima facie case of obviousness.²

¹ Thus, in the rejection of independent claim 4, the examiner does not rely on the teachings of Bergmann.

² We have also reviewed the reference to Bergmann but find nothing therein which makes up for the deficiency of Bleeker discussed above.

In our view, the only suggestion for modifying Bleeker in the manner proposed by the examiner to arrive at the claimed invention stems from hindsight knowledge derived from the appellant's own disclosure. The use of such hindsight knowledge to support an obviousness rejection under 35 U.S.C. § 103 is, of course, impermissible. See, for example, W. L. Gore and Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984).

For the reasons set forth above, the decision of the examiner to reject independent claim 4, and claims 2 and 3 dependent thereon, under 35 U.S.C. § 103 is reversed.

CONCLUSION

To summarize, the decision of the examiner to reject claims 2 to 4 under 35 U.S.C. § 103 is reversed.

REVERSED

JOHN P. McQUADE
Administrative Patent Judge

JEFFREY V. NASE
Administrative Patent Judge

JENNIFER D. BAHR
Administrative Patent Judge

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