

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte BRUCE K. REDDING JR.  
and  
JEROME HARDEN

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Appeal No. 2004-1451  
Application No. 09/360,262

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ON BRIEF

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Before KIMLIN, KRATZ and PAWLIKOWSKI, Administrative Patent Judges.

KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1, 3-13 and 15-18. Claim 1 is illustrative:

1. A process for modifying the water and oil holding capacities of a particulate dietary fiber material consisting essentially of indigestible fiber derived from natural grains and wood products, comprising dispersing said particulate material in a liquid media, applying an abrupt pressure change by mechanical means to said particulate material in said liquid media, and recovering said modified fiber material.

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In the rejection of the appealed claims, the examiner relies upon the following references:

Redding, Jr. 5,455,342 Oct. 3, 1995

Owen R. Fennema ed. (Fennema), 3 Food Chemistry 205-207 & 218-220 (Marchel Dekker, Inc. 1996)

J. Brandrup and E. H. Immergut eds., 3 Power Handbook 128-129 & 399-402

Appellants' claimed invention is directed to a process for modifying the water and oil holding capacities of a dietary fiber material derived from natural grains and wood products. The process entails the application of an abrupt pressure change by mechanical means to the material dispersed in a liquid media.

Appealed claims 1, 3, 4, 6, 7, 9, 15 and 18 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Redding. The appealed claims also stand rejected under 35 U.S.C. § 103(a) as follows:

(a) claims 5, 8, 12 and 13 over Redding;

(b) claims 10 and 16 over Redding in view of The Polymer Handbook;

(c) claims 11 and 17 over Redding in view of Fennema.

Appellants submit at page 3 of the Brief that "[a]ll of the pending claims are to be considered as a single group, and the patentability of all of the pending claims stand or fall

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together" (last paragraph). Accordingly, all the appealed claims stand or fall together with claim 1 and, since appellants do not present separate substantive arguments for the separately rejected claims under 35 U.S.C. § 103, we will limit our consideration to the examiner's rejection of claim 1 under 35 U.S.C. § 102.

We have thoroughly reviewed each of appellants' arguments for patentability. However, we are in complete agreement with the examiner that the subject matter of claim 1 on appeal is described in the applied prior art. Accordingly, we will sustain the examiner's rejections for the reasons set forth in the Answer, which we incorporate herein, and we add the following for emphasis only.

Redding, one of the present inventors, describes, like appellants, a process of modifying the physical characteristics of dietary fiber material by applying an abrupt pressure change with a piston device to the dietary fiber material dispersed in a liquid media. As pointed out by the examiner, Redding expressly teaches that the abrupt pressure treatment modifies a variety of properties of the fiber material, e.g., disintegration and solubility, thermal profile, turbidity profile and viscosity (see column 7, lines 1-12). While appellants contend that "the

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materials which are processed in accordance with the presently claimed method are defined as 'particulate dietary fiber' as opposed to 'starches' and 'other polymers' as characterized in the Redding patent" (sentence bridging pages 5 and 6 of Brief), the examiner has accurately drawn a specific correspondence between the materials acted upon by the Redding process and those disclosed and claimed as dietary fiber in the present application. In particular, the natural grain and wood products of appealed claim 1 include high protein, powdered cellulose, corn fiber, sodium carboxymethylcellulose and microcrystalline cellulose, which materials directly correspond to the corn zein, bark and carboxymethylcellulose disclosed by Redding.

Consequently, although Redding does not expressly disclose that the application of an abrupt pressure change modifies the water and oil holding capacities of the fiber material, we find that the examiner has drawn the reasonable conclusion that the process of Redding inherently brings about the claimed modifications. It only stands to reason that since Redding subjects the same materials to the same abrupt changes in pressure, the same materials would undergo the same modifications. Furthermore, it would seem that the change in solubility discussed by Redding would indicate a change in water

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and oil holding capacities. We note that appellants have not proffered any convincing line of reasoning, let alone the requisite objective evidence, which refutes the examiner's reasonable conclusion that the fiber materials of Redding inherently undergo a modification in their water and oil holding capacities upon subjection to the abrupt pressure changes employed by Redding. It is well settled that when a claimed process reasonably appears to be substantially the same as a process disclosed by the prior art, it is eminently fair to place on appellant the burden of proving that the prior art process does not necessarily or inherently possess characteristics attributed to the claimed process. In re Spada, 911 F.2d 705, 708, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990); In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). It has long been recognized that the PTO does not have the facilities or wherewithal to conduct experimental tests on prior art processes and products, and it is noteworthy that in the present case one of the applicants, Bruce K. Redding Jr., is the patentee of the applied reference. It would seem that it would not be an undue burden on appellants to present evidence regarding the patented process of Redding, one of the present inventors.

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As for the examiner's § 103 rejections, appellants simply advance that "[t]he deficiencies in the Redding patent cannot be overcome through combination with either *The Polymer Handbook* or the Fennema reference" (page 7 of Brief, second paragraph).

In conclusion, based on the foregoing and the reasons well-stated by the examiner, the examiner's decision rejecting the appealed claims is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv) (effective Sep. 13, 2004; 69 Fed. Reg. 49960 (Aug. 12, 2004); 1286 Off. Gaz. Pat. Office 21 (Sep. 7, 2004)).

AFFIRMED

EDWARD C. KIMLIN	)	
Administrative Patent Judge	)	
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	)	
PETER F. KRATZ	)	BOARD OF PATENT
Administrative Patent Judge	)	APPEALS AND
	)	INTERFERENCES
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	)	
BEVERLY PAWLIKOWSKI	)	
Administrative Patent Judge	)	

ECK:clm

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