

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 17

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte WILLIAM THOMAS SUMMERS

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Appeal No. 2004-1635  
Application No. 10/083,915

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ON BRIEF

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Before OWENS, KRATZ and TIMM, Administrative Patent Judges.  
KRATZ, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-3, which are all of the claims pending in this application.

BACKGROUND

Appellant's invention relates to a step for climbing. An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below.



At the outset, we note that the examiner (answer, Page 2) has correctly noted that appellant brings this appeal on the basis that all of the claims stand or fall together as indicated at page 2 of the brief. Appellant has not disagreed with this assessment of the examiner or with the examiner's selection of claim 1 as representative of the appealed claims in their reply brief. Consequently, we limit our discussion to appealed claim 1.

A prior art reference anticipates the subject matter of a claim when the reference discloses every feature of the claimed invention, either explicitly or inherently (see Hazani v. Int'l Trade Comm'n, 126 F.3d 1473, 1477, 44 USPQ2d 1358, 1361 (Fed. Cir. 1997) and RCA Corp. v. Applied Digital Data Sys., Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984)); however, the law of anticipation does not require that the reference teach what the appellants are claiming, but only that the claims on appeal "read on" something disclosed in the reference (see Kalman v. Kimberly-Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983).

Anticipation is a factual determination. See In re Baxter Travenol Labs., 952 F.2d 388, 390, 21 USPQ2d 1281, 1283 (Fed. Cir. 1991) (citing In re Bond, 910 F.2d 831, 833, 15 USPQ2d 1566,

1567 (Fed. Cir. 1990). In the case before us, we agree with the examiner that Wright discloses, either expressly or inherently, every limitation of representative claim 1. Concerning this matter, we observe that Wright discloses a device including a screw, such as screw (5, figures 1 and 2), a substantially straight lever (4, figures 1 and 2) with first and second substantially right angle bends and a loop connected to the second bend as shown in the drawing figures of Wright.

Appellant does not dispute the examiner's determination that Wright discloses a device corresponding to the claim 1 device but for the alleged functional requirement that the claimed device is a "step for climbing" that is "sufficient to perform as a tree step, handhold, or lanyard clip" (Claim 1).

Appellant argues (brief, page 9) that the claim 1 step for climbing limitation requires a structural limitation, "such as resistance to structural collapse under weight" (reply brief, page 3) that is not found in the prior art. Appellant further maintains that the "sufficient to perform limitation" of claim 1 further specifies the functional limitation and restricts the claimed step structure in a way to differentiate over the applied prior art. This is so, according to appellant, because the device of Wright is disclosed for use as a hat hanger and is made

of materials (shapable wire) that would not be capable of performing as the claimed climbing step. Consequently, appellant maintains that the Wright device must be structurally different from the here claimed subject matter.

In determining the patentability of claims, the PTO gives claim language its "broadest reasonable interpretation" consistent with the specification and claims. In re Morris, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997) (citations omitted). Even after a patent issues, a claim term takes on its ordinary and accustomed meaning unless the patentee demonstrates an intent to deviate from that meaning by redefining the term in the intrinsic record using words of "manifest exclusion or restriction." Teleflex Inc. v. Ficosa North America Corp., 299 F.3d 1313, 1325, 63 USPQ2d 1374, 1380 (Fed. Cir. 2002).

Having reviewed the specification and claims, we determine that appellant furnished no special definition for the recited term "step for climbing" or "step" that would limit those terms to requiring that the claimed device must be constructed in a special way to support a particular size person as a climber in a position well above ground level. In this regard, we note that appellant has not furnished a special definition for the term step in their specification that would suggest a structure that

differs from the structure taught by Wright. Absent such a special definition, we interpret the claimed step for climbing as requiring structure as recited in claim 1 which is useful as a rest for a "foot in ascending or descending"<sup>1</sup>.

Consequently, even though we agree with appellant that the claim preamble and "sufficient to perform . . ." functional language must be given some weight in determining the scope of the claims, we do not find in that claim language a requirement that the step is constructed to support the full weight of a particularly sized person, such as the person schematically depicted in drawing figure 7, while the step is located a significant distance off the ground as illustrated in drawing figure 7. In this regard, appellant has not established that the hanger of Wright would not be capable of serving as a step for resting the foot of a creature such as a bird or squirrel that is in the process of climbing. Nor do the appealed claims exclude such. Moreover, the loop portion of the representative claim 1 step is open to being in a position resting on the ground or some other surface for a person to step onto. Thus appellant's arguments and the declaration of Mr. Schlais with respect to 50

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<sup>1</sup> See Webster's II New Riverside University Dictionary (1984), page 1136. Also, see page 8 of the reply brief.

pounds being the minimum safe weight for a person being trained to use climbing equipment is not persuasive. See In re Self, 671 F.2d 1344, 1350-1351, 213 USPQ 1, 7 (CCPA 1982) (when the claim does not recite allegedly distinguishable features, "appellant[s] cannot rely on them to establish patentability.").

Moreover, the testing of a device made from a wire coat hanger as reported in the declaration of Mr. Schlais has not been shown to be germane to the device disclosed by Wright because Wright teaches using braced wire, very stiff wire, or multi-stranded wire and the coat hanger employed by Mr. Schlais has not been established as being comparable let alone equivalent to the device taught by Wright.

In sum, appellant has not furnished a special definition in their specification for the functional claim terms at issue that would require a structure that differs from the device taught by Wright. Nor has appellant otherwise established via the declaration evidence submitted with the brief how the parts differ structurally. Consequently, we are not persuaded of reversible error in the examiner's rejection on this record.

CONCLUSION

The decision of the examiner to reject claims 1-3 under 35 U.S.C. § 102(b) as being anticipated by Wright is affirmed.

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

AFFIRMED

TERRY J. OWENS	)	
Administrative Patent Judge	)	
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	)	
	)	BOARD OF PATENT
PETER F. KRATZ	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
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CATHERINE TIMM	)	
Administrative Patent Judge	)	

PFK/sld

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