UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte SAM M. JYAWOOK and SHAWN J. JYAWOOK

Appeal No. 2005-0127
Application No. 10/077,427

ON BRIEF

Before GARRIS, TIMM, and JEFFREY T. SMITH, *Administrative Patent Judges*.

TIMM, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal involves claims 1-7 and 15-20 which are all the claims pending in the application. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 134.

INTRODUCTION

The claims are rejected under 35 U.S.C. § 103(a). As evidence of obviousness, the Examiner relies upon the following prior art references:

Hendrix	6,458,301	Oct. 1, 2002 (filed Aug. 27, 2001)
Chen et al. (Chen)	6,602,064	Aug. 5, 2003 (filed Aug. 9, 2000)

The specific rejection is as follows: Claims 1-7 and 15-20 rejected under 35 U.S.C. § 103(a) as being unpatentable over Hendrix in view of Chen.

Appellants state that "[c]laims 1-7 and 15-20 stand or fall together for purposes of this appeal." (Brief, p. 4). We, therefore, select one claim to represent the issues on appeal. We select claim 1 which reads as follows:

1. A weather stripping for use in sealing an interface between selected portions of a vehicle, comprising:

a body portion that is adapted to be supported on a selected one of the vehicle portions; and

a sealing portion extending at least partially away from the body portion, the sealing portion and the body portion comprising the same thermoplastic material having a microcellular structure.

We affirm and, in so doing, we adopt the reasoning presented in the Answer and add the following for emphasis.

OPINION

Hendrix describes a weather stripping having a body portion (gripping portion 20) and a sealing portion (sealing portion 30) as required by claim 1. Hendrix suggests a foamed construction (Hendrix, col. 4, ll. 22-24 and ll. 41-43). However, Hendrix does not further describe the cell size or density of the foam. Chen, on the other hand, indicates that microcellular foams are a class of foams that have small cell sizes and high cell densities (Chen, col. 1, ll. 22-24) and that "[t]he unique cell structure of microcellular foams lead to several advantages over conventional foams including improved properties and appearance." (Chen, col. 2, ll. 53-56). Chen describes a method for forming microcellular foams.

Appellants argue that the combination of the teachings of Hendrix and Chen does not provide a workable result (Brief, p. 7). According to Appellants, Hendrix and Chen require opposite approaches and the Hendrix approach is not compatible with forming a microcellular product (Brief, p. 8). This is because, according to Appellants, Hendrix requires heating the primary extrudate (which forms the gripping portion 20 of the weather stripping) after it exits the die in order to secure the secondary extrudate (which forms the sealing portion 30) to the primary extrudate (Brief, p. 7; see also Brief, pp. 4-5). According to Appellants, such heating is not compatible with the formation of a microcellular structure because cooling upon exiting the die is required to control the formation of cells in a microcellular material (Brief, pp. 7-8; see also Brief, pp. 5-7).

We are not persuaded by Appellants' argument because Hendrix suggests forming the product using foamed material. As made clear by Chen microcellular foams are a type of foam. If the weather stripping of Hendrix can be formed from foam, it follows that it can be formed from microcellular foam.

Moreover, Appellants' argument is based on an erroneous reading of Hendrix. Hendrix does not describe heating the primary extrudate after it exits from the die. In the process of Hendrix, the primary extrudate and the first appendage extrudate "are joined *in the die assembly* to form a unitary weatherseal **10** (Fig. 6)." (Hendrix, col. 4, ll. 44-49; emphasis added). "Heat bonding" as described by Hendrix at column 9, lines 1-2 is not a process of heating extruded materials after they exit the die, but is a process of urging two molten extrudates against each other within the extrusion die to bond the molten materials together within the die (Hendrix, col. 8, ll. 63-67).

Upon a correct reading of the references, it is clear that one of ordinary skill in the art would have understood how to obtain a workable result when combining the teachings of the references. Hendrix describes a particular extrusion die arrangement for obtaining a weather stripping having a body portion and sealing portion. Hendrix suggests forming a foamed weather stripping (Hendrix, col. 4, ll. 22-24 and ll. 41-43). Chen describes a particular extruder screw and blowing agent introduction system that can be configured to produce microcellular material. As Chen is directed to the upstream extruder screw system and Hendrix the

downstream die arrangement, one of ordinary skill in the art would have recognized how to combine the teachings to produce a microcellular weather stripping.

We conclude that the Examiner has established a *prima facie* case of obviousness with respect to the subject matter of claims 1-7 and 15-20.

Appellants rely upon evidence of secondary considerations, namely commercial success, in an attempt to show non-obviousness. "Evidence of secondary considerations are but a part of the 'totality of the evidence' that is used to reach the ultimate conclusion of obviousness." *Richardson-Vicks Inc. v. Upjohn Co.*, 122 F.3d 1476, 1483, 44 USPQ2d 1181, 1187 (Fed. Cir. 1997). The usefulness of this type of evidence lies in the fact that it "serves as a guard against slipping into hindsight" during the determination of obviousness, *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966), in that it may demonstrate that the invention, while it appears to be obvious upon looking back in time with hindsight, really was not. *Stratoflex Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538-39, 218 USPQ 871, 879 (Fed. Cir. 1983). To properly consider secondary considerations, we must consider all of the evidence under the *Graham* factors together. *Id*.

Appellants' evidence of commercial success is embodied in the Jyawook Declaration. The Jyawook Declaration provides evidence that the weather stripping seals were the subject of a purchase order from DaimlerChrysler (Exhibit A). But the bare numbers provided in the purchase order provide insufficient information with regard to success in the marketplace. For instance, it is unknown what proportion of the market the sales represent. Moreover, there is no

evidence that the sales were due to the unique characteristics of the product as claimed. Both significant success and a nexus between the unique characteristics of the weather stripping and the sales are required for the evidence to be sufficiently probative as an indicia of non-obviousness. *See In re Huang*, 100 F.3d 135, 140, 40 USPQ2d 1685, 1689-90 (Fed. Cir. 1996). "When a patentee offers objective evidence of nonobviousness, there must be a sufficient relationship between that evidence and the patented invention." *In re Paulsen*, 30 F.3d 1475, 1482, 31 USPQ2d 1671, 1676 (Fed. Cir. 1994). "The term 'nexus' is used, in this context, to designate a legally and factually sufficient connection between the proven success and the patented invention, such that the objective evidence should be considered in the determination of nonobviousness. The burden of proof as to this connection or nexus resides with the patentee." *Id*.(quoting *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1392, 7 USPQ2d 1222, 1226 (Fed.Cir.), *cert. denied*, 488 U.S. 956, 109 S.Ct. 395, 102 L.Ed.2d 383 (1988)).

Having considered all the evidence of record, we determine that the evidence of obviousness, on balance, outweighs the evidence of non-obviousness. Hence, we conclude that the claimed subject matter as a whole would have been obvious to one of ordinary skill in the art.

CONCLUSION

To summarize, the decision of the Examiner to reject claims 1-7 and 15-20 under 35 U.S.C. § 103(a) 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

BRADLEY R. GARRIS Administrative Patent Judge	)))
CATHERINE TIMM Administrative Patent Judge	) BOARD OF PATENT) APPEALS) AND) INTERFERENCES
JEFFREY T. SMITH Administrative Patent Judge	))

CT/tdl

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