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for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

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

Ex parte FRANK VENEGAS JR.

Appeal No. 2005-0775
Application No. 09/815,628

ON BRIEF

Before FRANKFORT, MCQUADE and BAHR, Administrative Patent Judges.

BAHR, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 5-8, 15, 17 and 25. Claims 4, 16 and 18-21, the only other claims pending in this application, stand withdrawn from consideration as not being directed to elected species.

BACKGROUND

The appellant’s invention relates to a hand rail assembly with an infill panel. A copy of the claims under appeal is set forth in the appendix to the appellant’s brief.

The Prior Art

The examiner relied upon the following prior art references in rejecting the appealed claims:

Bobrowski	3,342,457	Sep. 19, 1967
Venegas, Jr., et al. (Venegas II)	5,364,077	Nov. 15, 1994
Venegas, Jr. (Venegas I)	5,396,739	Mar. 14, 1995
Parisien	5,474,279	Dec. 12, 1995

The Rejections

Claims 5, 6, 8, 17 and 25 stand rejected under 35 U.S.C. § 103 as being unpatentable over Venegas I in view of Venegas II.

Claim 7 stands rejected under 35 U.S.C. § 103 as being unpatentable over Venegas I in view of Venegas II and further in view of Parisien.

Claims 15 and 17 stand rejected under 35 U.S.C. § 103 as being unpatentable over Venegas I in view of Bobrowski.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the final rejection (mailed January 28, 2004) and answer (mailed August 13, 2004) for the examiner's complete reasoning in support of the rejections and to the brief (filed June 30, 2004) 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. As a consequence of our review, we make the determinations which follow.

We turn our attention first to the rejection of claims 15 and 17 as being unpatentable over Venegas I in view of Bobrowski. The examiner concedes that the rails (first and second horizontal stanchions 22, 26) of Venegas I are not “releasably engaged” to the vertical posts (first and second vertical stanchions 12, 16), as called for in claim 17. To overcome this deficiency, the examiner has taken the position that it would have been obvious to one of ordinary skill in the art at the time of appellant’s invention to modify the guard rail assembly of Venegas I to include releasable engagement between the rail and post members, for the purpose of facilitating adjustability and flexibility of the assembly as taught by Bobrowski, presumably by providing fittings at the junctions of the vertical stanchions and horizontal stanchions as taught by Bobrowski.

Bobrowski discloses a guard rail assembly comprising balusters 20, 20', a top handrail 24 and bottom rails 26 which “are preferably elongated, extruded aluminum structures having the same generally rectangular cross section which prevents rotation thereof within the junctioning units or fittings 30, 32 and 34” (column 1, lines 68-71).

The fittings “are all hollow members having a plurality of angularly oriented, unidirectional, intersecting cavities having a generally rectangular cross-sectional configuration of sufficient size to provide a smooth slip fit between the fittings and the rail and baluster members” (column 2, lines 1-6). In light of this teaching, one of ordinary skill in the art viewing the disclosures of Venegas I and Bobrowski would not have been led to modify the guard rail assembly of Venegas I by segmenting the hollow circular stanchions and fastening them together using fittings having circular cavities to accommodate the circular stanchions, as proposed by the examiner, as such an arrangement would not prevent rotation of the stanchions within the cavities as taught by Bobrowski. We thus cannot sustain the examiner’s rejection of claims 15 and 17 as being unpatentable over Venegas in view of Bobrowski

We also cannot sustain the examiner’s rejection of claims 5, 6, 8, 17 and 25 as being unpatentable over Venegas I in view of Venegas II. Again recognizing that Venegas I lacks rails which are “releasably engaged” to the vertical posts as required by claim 17, the examiner has taken the position that it would have been obvious to include releasable engagement between the rail and post members of Venegas I “for the purpose of facilitating removal and installation of said assembly in distinct locations as taught by Venegas II” (final rejection, page 3). Quite simply, Venegas I and Venegas II disclose two distinct ways of constructing a guard rail or hand rail using metal stanchions or posts and rails covered by plastic sheathing. From our perspective, one

of ordinary skill in the art familiar with the teachings of both Venegas I and Venegas II would have selected one or the other of these techniques for constructing the guard rail or hand rail assembly and would have found no suggestion in Venegas II to modify the guard rail assembly of Venegas I.

The examiner's application of Parisien does not make up for the above-noted deficiency of the combination of Venegas I and Venegas II. It follows that we shall also not sustain the rejection of claim 7 as being unpatentable over Venegas I in view of Venegas II and Parisien.

REMAND TO THE EXAMINER

We remand this application to the examiner to consider whether the subject matter of claim 17, and any of the dependent claims, would have been unpatentable over Venegas II in view of Venegas I or Bobrowski. As evidenced by Venegas I and Bobrowski, the use of partitions or panels within guard rail frameworks was well known at the time of appellant's invention. Thus, to have provided such a partition or panel within the handrail assembly of Venegas II to prevent dangerous falls, for example, in a stadium setting would appear to have been obvious to one of ordinary skill in the art. With particular regard to claim 7, Parisien (abstract) evidences that panels and mesh were recognized alternatives as infill material in guardrails at the time of appellant's invention and, as such, would have provided ample motivation to use a mesh infill panel in the framework of Venegas II.

CONCLUSION

To summarize, the decision of the examiner is reversed and the application is remanded to the examiner for the reason set forth above.

REVERSED and REMANDED

CHARLES E. FRANKFORT Administrative Patent Judge	)
JOHN P. MCQUADE Administrative Patent Judge	) BOARD OF PATENT) APPEALS) AND) INTERFERENCES
JENNIFER D. BAHR Administrative Patent Judge	)

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