

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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 CLAUDE R. ALLEN,
THOMAS S. CUSHMAN,
JIMMY A. HICKOK
and PURNAL L. MCWHORTER

Appeal No. 2005-2197
Application No. 10/751,432

ON BRIEF

Before KIMLIN, OWENS and JEFFREY T. SMITH, Administrative Patent Judges.
JEFFREY T. SMITH, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 23 to 29, all of the pending claims. We have jurisdiction under 35 U.S.C. § 134.

BACKGROUND

The present invention relates to a hauler vehicle for mining operations. The hauler vehicle comprises a vehicle frame and a conveyer centrally disposed and coupled with the frame. Representative claim 23 appears below:

23. A hauler vehicle for mining operation comprising:
a vehicle frame coupleable with a source of motive power; and
a conveyer centrally disposed and coupled with the vehicle frame,
wherein the vehicle frame and conveyer define a receiving end and a
discharge end, and wherein the discharge end has a substantially fixed
height.

The Examiner relies on the following references in rejecting the appealed claims:

| | | |
|--------------------------|-----------|---------------|
| Beck | 2,405,636 | Aug. 13, 1946 |
| Brasher et al. (Brasher) | 4,576,107 | Mar. 18, 1986 |
| Butler et al. (Butler) | 5,873,431 | Feb. 23, 1999 |

Claims 23, 26, 27 and 29 stand rejected under 35 U.S.C. § 102(b) as anticipated by Beck. Claims 23, 24, 27 and 28 stand rejected under 35 U.S.C. § 102(b) as anticipated by Brasher. Claim 25 stands rejected under 35 U.S.C. § 103(a) as obvious over Brasher in view of Butler. (Answer, pp. 3-5). We affirm the rejections.

Rather than reiterate the conflicting viewpoints advanced by the Examiner and the Appellants regarding the above-noted rejections, we make reference to the

Answer (mailed April 14, 2005) for the Examiner's reasoning in support of the rejections, and to the Brief (filed April 1, 2005) and the Reply Brief (filed June 9, 2005) for the Appellants' arguments there against.

OPINION

We start with the claim language. *Gechter v. Davidson*, 116 F.3d 1454, 1457, 1460 n.3, 43 USPQ2d 1030, 1032, 1035 n.3 (Fed. Cir. 1997); *In re Paulsen*, 30 F.3d 1475, 1479, 31 USPQ2d 1671, 1674 (Fed. Cir. 1994). In proceedings before the U.S. Patent and Trademark Office (PTO), claims must be interpreted by giving words their broadest reasonable meanings in their ordinary usage, taking into account the written description found in the specification. *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997)("[T]he PTO applies to the verbiage of the proposed claims the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant's specification."); *In re Zletz*, 893 F.2d 319, 321-22, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989)("During patent examination the pending claims must be interpreted as broadly as their terms reasonably allow.").

Here, the preamble of appealed claim 23 recites: "A hauler vehicle for mining operation comprising..." It is by now axiomatic that the term "comprising" in a claim not only alerts potential infringers that the recited components are essential, but that

other unrecited components may be present and still form a construct within the scope of the claim. See, e.g., *In re Baxter*, 656 F.2d 679, 686, 210 USPQ 795, 802 (CCPA 1981). Consistent with this interpretation of "comprising," we determine that appealed claim 23 requires as the recited components a vehicle frame coupleable with a source of motive power and a conveyer centrally disposed and coupled with the frame. Claim 23 also specifies that the vehicle frame and conveyer define the receiving end and the discharge end. The claim further specifies that the discharge end, i.e., the frame and conveyer, has a substantially fixed height. However, the claimed hauler vehicle may also include any other unrecited components.

Claims 23, 26, 27 and 29 stand rejected under 35 U.S.C. § 102(b) as anticipated by Beck.¹ We affirm.

According to the Examiner, Beck discloses a hauler vehicle that comprises a frame, a source of motive power and a conveyer centrally disposed and coupled with the frame. The Examiner also found that the hauler vehicle comprises a discharge boom integrated into the vehicle frame. (Answer, pp. 3-4). As to claim 26, Beck discloses a hopper 33 at the rear end of the hauler vehicle. This hopper is created from the side walls which are flared outwardly. (Col. 1, ll. 41-44). Appellants have not disputed the Examiner's factual determinations. (See Briefs generally).

¹ For this rejection, Appellants assert that the subject matter of claim 27 is patentable for the same reasons as have been presented for claim 23 and the subject matter of claim 29 is patentable for the same reasons as have been presented for claim 26. (Brief, pp. 12-13). Thus we will limit our discussion to claims 23 and 26.

Appellants argue that Beck does not anticipate the claimed invention because the Examiner has only inferred that Beck discloses the discharge end has a substantially fixed height. (Brief, p. 12). Appellants also argue “[s]ince no other prior art reference of record describes a vehicle including a discharge end with a substantially fixed height, and height adjustable constructions were prevalent during the time of the Beck patent, it is reasonable to assume that those of ordinary skill in the art would interpret the ‘usual manner’ as a conveyer including a height adjustable discharge end.” (Brief, p. 13). We do not agree.

As correctly stated by the Examiner, Answer page 6, Beck does not describe the structure necessary for adjusting the discharge end. The Examiner has never alleged that the discharge end of the hauler vehicle of Beck is adjustable. When making arguments that certain features are included in a reference the person making those arguments, i.e., Attorney or Examiner, should cite to the specific portions of the reference to support their argument. In the present case, Appellants have not cited specific portions of the Beck reference that would support their argument that the discharge end is necessarily adjustable. Further, Appellants have not directed us to evidence on this record that establish that during the time of Beck hauler vehicles comprising an adjustable discharge end were prevalent.²

² In fact, the contrary appears to be the case. See U.S. 2,192,650 and U.S. 2,558,341 cited in the present specification.

Claims 23, 24, 27 and 28 stand rejected under 35 U.S.C. § 102(b) as anticipated by Brasher.³ We affirm.

According to the Examiner, Brasher discloses a hauler vehicle that comprises a frame, a source of motive power and a conveyer centrally disposed and coupled with the frame. (Answer, p. 4). Brasher discloses the conveyer (50) transports the solid particles along the length of the hauler vehicle toward the second end (16), i.e., discharge end. (Col. 2, ll. 40-49). Brasher discloses the second end (16) further comprises a hinged section (18) positioned near the second end. (Col. 2, ll. 21-26).

Claim 23 requires the frame and conveyer (discharge end) to have a substantially fixed height. Appellants have not argued that the frame and conveyer located at the second end of Brasher does not have a substantially fixed height. Rather, Appellants argue that “[t]he claimed ‘substantially fixed height’ of the discharge end precludes any adjustment of the discharge end, and consequently, the Brasher patent is irrelevant to the present invention.” (Brief, p. 14). It appears that Appellants are arguing that the claimed invention excludes the hinged portion of Brasher. We do not agree. As stated above, claim 23 does not exclude the presence of other unnamed components. The hinged section is positioned near the discharge area. There is no disclosure that the adjustment of the hinged section,

³ For this rejection, Appellants assert that the subject matter of claims 24, 27 and 28 are patentable for the same reasons as have been presented for claim 23. (Brief, pp. 14-15). Thus, we will limit our discussion to claim 23.

positioned near the discharge area, causes an adjustment in the fixed height of the frame and conveyer located at the second end.

Appellants' arguments regarding the phrase "substantially fixed height" in the Briefs have been considered. (Brief, p. 15 and Reply Brief, pp. 2-3). It appears that Appellants' arguments are directed to the hinged portion of Brasher. These arguments are not persuasive for the reasons stated above. Specifically, claim 23 does not exclude the presence of a hinged section that is positioned near the discharge area of the hauler vehicle. We note that Appellants have not argued that the frame and conveyer located at the second end Brasher do not maintain a substantially fixed height as required by the claimed invention. There is no disclosure that the adjustment of the hinged section, positioned near the discharge area, causes an adjustment in the height of the vehicle frame and conveyer.

The Examiner has rejected claim 25 under 35 U.S.C. § 103(a) as obvious over Brasher in view of Butler. (Answer, p. 5). We affirm.

The Examiner cites the Butler reference for teaching that persons of ordinary skill in the art would have recognized that the source of motive power for a hauler vehicle can comprise a motor connected to a vehicle-mounted battery. (Answer, p. 5). Appellants have failed to specifically challenge the Examiner's motivation for combining the teachings of Brasher and Butler. Rather, Appellants argue that Butler does not teach modifying the construction of Brasher to include a discharge end

having a substantially fixed height. (Brief, p. 16). Since, Appellants have failed to challenge the Examiner is stated motivation we assume that they are in agreement therewith. Thus, we affirm the rejection for the reasons expressed by the Examiner.

CONCLUSION

For the foregoing reasons, giving due weight to Appellants' arguments, we determine that the preponderance of evidence weighs in favor of the Examiner's rejections. Accordingly, the Examiner's rejections under 35 U.S.C. §§ 102(b) and 103(a) are affirmed.

TIME FOR TAKING ACTION

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

TERRY J. OWENS
Administrative Patent Judge

JEFFREY T. SMITH
Administrative Patent Judge

)
)
)
)
)
) **BOARD OF PATENT**
) **APPEALS**
) **AND**
) **INTERFERENCES**
)
)
)
)

Appeal No. 2005-2197
Application No. 10/751,432

Page 10

NIXON & VANDERHYE, P.C.
901 NORTH GLEBE ROAD
11TH FLOOR
ARLINGTON, VA 22203