

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 JACK O. CARTNER

Appeal No. 2006-0063
Application No. 09/587,197

HEARD: February 22, 2006

Before FRANKFORT, CRAWFORD and BAHR, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 10, 11, 13, 17, 19, 39, 40 and 65 through 73, all of the claims remaining in the application. Claims 1 through 9, 12, 14 through 16, 18, 20 through 38 and 41 through 64 have been canceled.

Appellant's invention relates to a mower head with a movable guard. As noted on page 1 of the specification, the invention finds particular application in conjunction with rotary brush and grass mowing and cutting apparatus for trimming highway medians and shoulders. Figures 3A and 3B show one embodiment of the mower head (c) wherein the movable guard (84) of the guard assembly (80) is in a closed position.

Figure 6 shows the movable guard (84) in an open position wherein the blade (70) of the mower extends beyond the side walls of the deck of the mower head and is thus able to better cut small trees, shrubs, and the like. A further understanding of the invention can be derived from a reading of independent claims 65, 68, 72 and 73 on appeal, a copy of those claims appears in the "Appendix of Claims" attached to appellant's brief.

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

Kobey	3,496,707	Feb. 24, 1970
Fassauer	5,048,275	Sep. 17, 1991
Thagard et al. (Thagard)	5,657,620	Aug. 19, 1997

MoTrim, Inc.® Brochure, "Boom Mower" (MoTrim) November 1996

Claims 68 through 71 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 11, 13, 17, 65, 66 and 73 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Kobey.

Claims 10, 39, 40 and 67 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Kobey in view of Thagard.

Claim 72 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Kobey in view of MoTrim.

Claims 68 and 69 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Kobey in view of Fassauer.

Claims 19, 40, 70 and 71 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Kobey in view of Fassauer and Thagard.

Rather than attempt to reiterate the examiner's commentary with regard to the above-noted rejections and the conflicting viewpoints advanced by appellant and the examiner regarding those rejections, we make reference to the answer (mailed January 14, 2005) for the examiner's reasoning in support of the rejections, and to appellant's brief (filed October 14, 2004) and reply brief (filed March 11, 2005) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by appellant and the examiner. As a consequence of our review, we have made the determinations which follow.

In considering the rejection of claims 68 through 71 under 35 U.S.C. § 112, second paragraph¹, we note that the examiner is of the view that recitations in claim 68 make it

¹ It is not apparent why the examiner has not also included claims 19 and 40 in this rejection, since they likewise ultimately depend from independent claim 68, via claims 69 and 70, respectively.

“unclear whether the deck and guard are separate parts of the mower head attached to each other or the deck comprises the guard” (answer, page 3). The source of this confusion for the examiner comes from the recitation in the last two lines of the claim that the guard which is said to be pivotally attached to the deck of the mower head includes “a plurality of discretely angled sections which angled sections together form a single corner of the deck,” which the examiner sees as being inconsistent with the initial claim recitations regarding the deck and guard assembly.

In attempting to provide clarification regarding the structure to be encompassed by claim 68, appellant points to the top plan view of the mower head seen in Figure 3A and side elevation view Figure 3B of the application drawings. In the language of claim 68, Figure 3A shows a mower head (c) comprising a deck (50) comprising at least four sides (52, 54, 56, 58 and 60) and four corners, and three side walls (62, 64, 66, 68), one depending from each of three of said at least four sides, wherein two of said three side walls are rigid; at least one cutting blade (70) rotatably mounted to the deck on an axis extending through the deck, said deck being disposed above and generally parallel to the blade; and a guard assembly (80) comprising: a hinge (110) mounted to and extending at an angle in relation to two adjacent ones (52, 56) of the at least four sides of said deck, a guard (84) pivotally attached to said deck via the hinge (110), and said guard including a plurality of discretely angled sections (124, 126, 128, 130, 132, 133, 134, 136) which angled sections together form a single corner of the deck. Thus,

appellant urges that it is clear that the deck and guard are separate parts attached to each other and that, when so attached, the guard comprises a single corner of the deck as well as the mower head.

While we agree with the examiner that the language of claim 68 is not the model of clarity, we are of the view that it would nonetheless reasonably convey to one of ordinary skill in the art exactly what the invention therein encompasses, i.e., a mower head having a polygonal deck (50) and a guard assembly (80) attached thereto along an angled forward side (54) of the deck, with the guard assembly including a guard (84) including a plurality of discretely angled sections (124, 126, 128, 130, 132, 133, 134, 136), which angled sections (when viewed in a top plan view like Figure 3A) together form or establish one corner of the deck and of the mower head as a whole. Thus, claim 68 is reasonably definite and the rejection of claim 68 and claims 69 through 71 which depend from claim 68 under 35 U.S.C. § 112, second paragraph, will not be sustained.

As for the rejection of claims 11, 13, 17, 65, 66 and 73 under 35 U.S.C. § 102(b) as being anticipated by Kobey, it is the examiner's position that this patent shows a mower including a deck (20) having at least three sides with rigid side walls (40), at least one cutting blade (24) rotatably mounted to the deck, and a guard assembly comprising a guard (34) pivotally attached to the deck via a hinge (42) and extending between two adjacent sides of the deck at an angle with respect to the two sides. In addressing the language of claim 65 that "a horizontal plane of said guard is parallel to, and spaced from, a horizontal plane of said deck in one orientation of the guard," the examiner

points to Figure 3 of Kobey as reproduced and annotated on page 9 of the answer, urging that the guard and deck each have top and bottom surfaces wherein the top surface is spaced from the bottom surface by the thickness of the rigid material forming the respective members. Thus, the examiner finds that the guard (34) has a horizontal plane (coincident with the bottom surface of the guard) that is parallel to, and spaced from, a horizontal plane of the deck (i.e., a plane coincident with the top surface of the deck) in one orientation of the guard as seen in Figure 3 of Kobey.

Appellant's only argument in the brief addressing the examiner's rejection of claim 65 under 35 U.S.C. § 102(b) centers on the examiner's use of Figure 3 of Kobey to account for the limitation in claim 65 regarding the spaced horizontal planes of the deck and guard. Note particularly pages 6 and 7 of the brief. However, after reviewing Figure 3 of Kobey in light of the broad language of claim 65 concerning the spaced horizontal planes of the deck and guard, we agree with the examiner's reasoning set forth on pages 8 and 9 of the answer. On the basis of that reasoning, we will sustain the rejection of claim 65 under 35 U.S.C. § 102(b) as being anticipated by Kobey. Since appellant has not otherwise argued for the separate patentability of dependent claims 11, 13 and 66, it follows that those claims will fall with independent claim 65. Thus, the examiner's rejection of claims 11, 13 and 66 under 35 U.S.C. § 102(b) as being anticipated by Kobey is likewise sustained.

Regarding the rejection of claim 17 under 35 U.S.C. § 102(b), appellant asserts that Kobey does not teach an arrangement wherein one of the three sides of the deck

includes an extension which protrudes under the guard, as can be seen in Figure 4A of the application at (154). The examiner's position regarding claim 17 again exemplifies the breadth of the language used by appellant to define the structure claimed. In this instance, the examiner points to the annotated version of Figure 1 of Kobey found on page 12 of the answer and contends that at least some portion of the two sides of the mower deck therein on either side of the guard protrude under the guard (34) when the guard is in the raised position. We agree with the examiner. While it is true that Kobey does not teach or show an extension (154) like that in Figure 4A of the application which protrudes under the guard when the guard is in its closed position, we note that the open-ended language of claim 17 is so broad as to be readable in the manner urged by the examiner when the guard is in its open position. Thus, we will sustain the rejection of claim 17 under 35 U.S.C. § 102(b).

As for the examiner's rejection of independent claim 73 under 35 U.S.C. § 102(b) based on Kobey, we agree with appellant's position as set forth on page 11 of the brief and understand the claim to be limited in the manner argued therein. In our view, the examiner's attempt on pages 15-16 of the answer to account for the structure recited in claim 73 is flawed because the examiner improperly reads the separate first and second corners of the mower deck required in claim 73 on the same area or corner of the deck in Kobey. Thus, we will not sustain the rejection of claim 73 under 35 U.S.C. § 102(b) based on Kobey.

The next rejection for our review is that of claim 10 under 35 U.S.C. § 103(a) as being unpatentable over Kobey in view of Thagard. Claim 10 depends from claim 66 which, in turn, depends from independent claim 65. Claim 66 sets forth the requirement that the mower head of claim 65 also includes “an actuating member mounted on said deck.” Claim 10 further limits the actuating member of claim 66 by requiring that it be in the form of “a hydraulic cylinder and a piston, said cylinder including a chamber surrounding said piston.” In rejecting claim 66, the examiner points to the manually operated handle (54) and cable (52) of Kobey used to open and close the guard (34). As we noted above, appellant did not challenge the examiner’s position concerning claim 66.

In addressing claim 10, the examiner notes that Kobey has no actuating member in the form of a hydraulic cylinder and piston. To supply this deficiency, the examiner looks to the patent to Thagard and the hydraulic piston cylinders (182) used to open and close the folding shroud sections (165) of the tractor-towed mowing, cutting and mulching device therein. From the examiner’s perspective, it would have been obvious to one of ordinary skill in the art at the time of appellant’s invention to replace the cable control (52, 54) on the push mower of Kobey with a hydraulic piston and cylinder actuator like that of Thagard in order to facilitate operator ease in lifting the guard. For the reasons adequately set forth on pages 7-9 of the brief, we agree with appellant that it would not have been obvious to one of ordinary skill in the art at the time of appellant’s invention to replace the simple manually-operable cable control (52, 54) on the push mower of

Kobey with a hydraulic piston and cylinder arrangement like that in the much more complicated tractor-towed mowing, cutting and mulching device of Thagard. There is clearly no indication in the applied references that an operator of the push mower in Kobey would need assistance in lifting the weight of the guard (34), which is the only reason the examiner gives for making the proposed modification. Thus, we conclude that the examiner's rejection of claim 10 under 35 U.S.C. § 103(a) will not be sustained.

The examiner has also rejected claims 39, 40 and 67 under 35 U.S.C. § 103(a) as being unpatentable over Kobey in view of Thagard. Those claims set forth a flap which depends from the guard (claim 67) and further specify that the flap is "a resilient, one-piece flap" (claims 39 and 40). The first problem we see is that claim 40 is dependent from claim 70, which has not been rejected by the examiner on the basis of the combined teachings of Kobey and Thagard. Claim 70 depends from independent claim 68, which likewise has not been rejected by the examiner on the basis of the combined teachings of Kobey and Thagard. Nonetheless, finding that the collective subject matter set forth in claim 40/70/68 would not have been obvious based on the teachings of Kobey and Thagard, we will not sustain the rejection of that claim under 35 U.S.C. § 103(a).

As for dependent claims 39 and 67, we note that appellant has not presented separate arguments for the patentability of those claims apart from claims 66 and 65 from which they depend. Given our determination above that the examiner's rejection of both claims 65 and 66 is sustained, we conclude that dependent claims 39 and 67 will

fall with those claims. Thus, the examiner's rejection of claims 39 and 67 under 35 U.S.C. § 103(a) as being unpatentable over Kobey in view of Thagard is sustained.

Independent claim 72 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Kobey in view of MoTrim. In this instance, the examiner contends that although Kobey shows a simple push mower, it would have been obvious based on the teachings of MoTrim to alternatively attach the mower deck and guard assembly of Kobey to a boom as in MoTrim, "as one commonly know [sic] equivalent alternative means of moving a mower" (answer, page 6). Like appellant, we find that the simple push mower of Kobey and the tractor-carried boom mower of MoTrim are so different from one another that there would have been no motivation or suggestion to combine those references in the manner urged by the examiner. Contrary to the examiner's assertions, we do not view the push mower of Kobey and the tractor-carried boom mower of MoTrim as evidencing "commonly know [sic] equivalent alternative means of moving a mower." Thus, we will not sustain this rejection.

The next rejection for our consideration is that of claims 68 and 69 under 35 U.S.C. § 103(a) as being unpatentable over Kobey in view of Fassauer. This was a new ground of rejection entered for the first time in the examiner's answer. In this instance, the examiner asserts that the rounded mower deck (20) of Kobey has at least four sides and three corners, a cutting blade (24) and a guard (34) attached to the deck via a hinge (42), with the guard (34) being formed of a plurality of discretely angled sections,

which angled sections form a single corner of the mower deck. The only limitation the examiner finds lacking in Kobey is that the deck therein “only has three corner [sic] and not four corners since part of the deck of Kobey is circular” (answer, page 6). To account for this difference the examiner looks to Fassauer, urging that it teaches that a mower deck can be circular or rectangular (col. 6, lines 53-55). The examiner then concludes that “one of ordinary skill in the art at the time the invention was made would make the circular part of the deck in Kobey rectangular as taught in Fassauer as being equivalent.”

Like appellant (reply brief, pages 5-6), we find no reasonable suggestion or motivation for combining Kobey and Fassauer in the manner urged by the examiner. Moreover, even if combined, it appears that the resulting structure would not be that required in claim 68 on appeal, since a movable guard like that of Kobey on a rectangular mower deck would encompass the two front corners of the mower deck, and not form a single corner as set forth in claim 68, and as shown in Figures 3A, 4A, 5A of the application drawings. Therefore, the rejection of claims 68 and 69 under 35 U.S.C. § 103(a) as being unpatentable over Kobey in view of Fassauer will not be sustained.

Concerning the rejection under 35 U.S.C. § 103(a) of claims 19, 40, 70 and 71 based on Kobey in view of Fassauer and Thagard, we have considered the prior art as applied to these dependent claims, but find nothing in Thagard to make up for or otherwise overcome the fundamental flaws in the combination of Kobey and Fassauer pointed out

above. Thus, the examiner's rejection of dependent claims 19, 40, 70 and 71 under 35 U.S.C. § 103 will likewise not be sustained.

In light of the foregoing, the decision of the examiner rejecting claims 10, 11, 13, 17, 19, 39, 40 and 65 through 73 of the present application is affirmed-in-part. More specifically, we have sustained the examiner's rejection of claims 11, 13, 17, 65 and 66 under 35 U.S.C. § 102(b) based on Kobey, but not that of claim 73. In addition, we have sustained the rejection of claims 39 and 67 under 35 U.S.C. § 103(a) based on Kobey in view of Thagard, but not that of claims 10 and 40. We have likewise not sustained the examiner's rejection of claim 72 under 35 U.S.C. § 103(a) based on Kobey in view of MoTrim, that of claims 68 and 69 under 35 U.S.C. § 103(a) based on Kobey and Fassauer, or that of claims 19, 40, 70 and 71 under 35 U.S.C. § 103(a) based on Kobey, Fassauer and Thagard. We also have not sustained the rejection of claims 68 through 71 under 35 U.S.C. § 112, second paragraph.

No time period for taking any subsequent action in connection with this appeal
may be extended under 37 C.F.R.
§ 1.136(a)(1)(iv).

AFFIRMED-IN-PART

CHARLES E. FRANKFORT
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MURRIEL E. CRAWFORD
Administrative Patent Judge

JENNIFER D. BAHR
Administrative Patent Judge

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